STATE OF MICHIGAN

COURT OF APPEALS

DEBRA JEAN JONES,

Plaintiff-Appellant,

v

HARVEY OVERBEEK and KAREN OVERBEEK,

Defendants-Appellees.

UNPUBLISHED
July 12, 2005

No. 261885
Ottawa Circuit Court
LC No. 04-008353-NO

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm.

Plaintiff tripped over a blue, quarter-inch thick, plastic-covered wire dog tether while exiting the rear door of her sister's home after she decided to step outside for a moment to smoke a cigarette. Plaintiff, who resides in Illinois, was at her sister's home in Michigan to pick her up for a family vacation and had been there an hour or two when the incident occurred. The dog tether was stretched across the floor and over the doorway's threshold, with one end of the tether secured outside the home and the other end of the tether attached to a coat hook inside the house behind the rear door. The indoor end of the tether is typically attached to the coat hook when the dog is not on the tether as was the situation when plaintiff tripped. A "utility" room is the last area one walks through before leaving the home via the rear doorway. There is a pantry in the utility room and a laundry area. Plaintiff was walking from the utility room heading outside as her sister was ironing in the utility room; the room had a single light that was turned on. Plaintiff mentioned to her sister that she was stepping outside for a smoke a cigarette. It was dark outside when plaintiff fell and the weather was dry. During plaintiff's visit, and before the accident occurred, plaintiff had not been in the vicinity of the rear doorway and had not observed the tether. Plaintiff's feet became entangled in the tether, and she tripped, falling forward over three concrete steps and onto the concrete walkway. The door had been open at the time plaintiff attempted to exit. She was taken by ambulance to a local hospital for treatment. Plaintiff suffered an injury consisting of two tibia fractures near her left knee that required surgery, the placement of a plate and stabilizing pins in her leg, and extensive rehabilitation.

The focus of this case is on whether plaintiff knew of the potential hazard created by the dog tether considering plaintiff's previous visits to the home. There are also arguments

regarding whether the hazard was open and obvious. Of course, these matters are posed to us in the context of a motion for summary disposition. Facts additional to those referenced above must also be examined relative to the issues presented on appeal. There are four different factual sources that we shall consider, i.e., plaintiff's recorded and transcribed interview with defendants' insurer, plaintiff's deposition testimony, plaintiff's affidavit, and the deposition testimony of plaintiff's sister.

In the interview with the insurer, plaintiff indicated that she had visited her sister at the home many times in the past; however, it had been three or four years since the last visit. Prior to that last visit three or four years ago, plaintiff visited her sister's home about once a year since the death of their mother. Plaintiff was familiar with the area where she fell. She had seen the dog tether lying across the threshold on previous visits, although it was not always present. Her sister had used the dog tether in the manner described above for quite some time. Plaintiff stated that she did not notice the tether before tripping over it; she had not personally observed it on the evening of the fall. Plaintiff also informed the interviewer that, as soon as she began to trip, she realized that she "had caught that dog leash." She was unsure whether the tether was flush with the floor and threshold or whether it was somewhat elevated.

In plaintiff's affidavit, she averred that she had been to her sister's home about a dozen times over a period of eighteen years.[1] She claimed that the rear door at issue opens inward and that the tether, when attached to the hook behind the door, is not capable of being seen by a person exiting the home. Plaintiff further averred that there is a dark-colored throw rug just inside the doorway. On the dozen or so visits over the previous eighteen years, she exited the home through the rear door only about three or four times, as she typically used another door in the kitchen. Plaintiff asserted that the fall occurred around 9:30 or 10:00 p.m. Plaintiff informed her sister, who was in the utility room, that she was stepping outside to smoke a cigarette, as smoking was not allowed in the house. Her sister did not warn her to watch out for the dog tether.[2] Plaintiff conceded that she had seen the dog tether in the area on past visits, although not on this visit, and she had not been in the area around the rear door that evening until the time of the accident. Plaintiff maintained that she watched her "footing" as she walked out the door but did not see the dog tether. We note that, when asked in the insurer's interview, plaintiff stated that she was not looking down, and she further stated, "You know, you just kind of walk out the door because you know the area or you feel you know it." In the affidavit, plaintiff additionally averred that, because the threshold was illuminated by only a single light bulb, the illumination of which was obscured by a cabinet, the vestibule was too dark to see the dog tether on the

---

[1] Plaintiff's sister testified in her deposition that plaintiff probably visited twenty to thirty times over the years.

[2] Plaintiff's sister confirmed that plaintiff rarely used the rear door in the utility room when visiting, but rather typically used a backdoor in the kitchen. Plaintiff used the exit in the utility room on this occasion because her sister was ironing in the utility room, and they were going to chat while plaintiff smoked outside with the door open. The sister acknowledged that she did not warn plaintiff about the tether.

ground.[3] Plaintiff claimed that there was no outside lighting to help illuminate the doorway area. Finally, plaintiff averred that at the time of her interview with the insurer she had recently had the knee surgery performed and was taking narcotic pain medication. Plaintiff indicated to the interviewer that she was on medication and groggy and was half asleep when contacted by the interviewer. This is also reflected in the transcribed interview. Additionally, as reflected in both the affidavit and the transcribed interview, plaintiff informed the interviewer that the pain medication and the pain itself were affecting her concentration. In the affidavit, plaintiff complained that she was never given a copy of the statement and never asked to clarify it or attest to its accuracy.

With respect to her deposition testimony, plaintiff similarly indicated that she had visited her sister about twelve times in an eighteen-year period and that she had used the rear door a total of about three or four times during all of these visits. She also testified that the doorway threshold was dark and was not lit up by the indoor light. In sum, the deposition testimony mimicked most of the information provided in the interview and affidavit, along with delving deeply into the nature of the injuries, which is not relevant for purposes of our analysis.

In defendants' motion for summary disposition, it was argued that plaintiff was a licensee in her sister's home at the time of the accident and that, as such, defendants only owed a duty to warn plaintiff of unreasonably dangerous conditions known by the defendants and of which plaintiff did not know or have reason to know. Defendants argued that, on the basis of previous trips to the home, plaintiff had become aware that the dog tether was at times stretched across the threshold of the rear door. Therefore, defendants had no duty to warn plaintiff of the dog tether of which plaintiff was already aware. Defendants additionally argued that the tether was open and obvious.

The trial court, citing plaintiff's deposition testimony and mainly the insurance interview, and viewing the evidence in a light most favorable to plaintiff, concluded that plaintiff knew that the dog tether was used in the particular doorway and simply forgot to check for it. The court granted the motion for summary disposition on the basis of plaintiff's previous knowledge of the hazard.

On appeal, plaintiff argues that the trial court erred in finding that the tether was open and obvious and that, even if open and obvious, special aspects existed. She also contends that her past knowledge of the tether's existence and placement did not put her on notice that it was there at the specific time the accident took place. Defendants argue that the trial court did not err in

---

[3] Plaintiff's sister testified that the pantry blocks some of the light, causing shadowing on the ground. Her sister also stated that the dog tether was obvious "if you were looking for it." The sister further indicated that she herself had to look for the tether because she was always getting her feet or walker tangled in it. She testified that the utility room was illuminated by two sixty-watt light bulbs. Plaintiff's sister could not actually see plaintiff falling from her vantage point in the utility room. According to plaintiff's sister, plaintiff had not been in the vicinity of the rear door prior to the accident on this particular visit.

finding that plaintiff knew or had reason to know of the presence of the tether on the basis of prior visits to the residence.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven,* 460 Mich 667, 674; 597 NW2d 99 (1999). Issues of law are also reviewed de novo. *Mahaffey v Attorney General,* 222 Mich App 325, 334; 564 NW2d 104 (1997).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id*. Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Id.* Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted).

We first note, as argued by defendants, that contrary to plaintiff's argument, the trial court did not rule that the dog tether was open and obvious. Rather, the trial court concluded that plaintiff knew or was aware of the tether, which knowledge was predicated on previous visits. There was no ruling by the trial court on defendants' separate argument that the hazard was open and obvious as it was unnecessary to reach that issue. We decline to address the open and obvious danger doctrine[4] and the related "special aspects" argument because those matters were

---

[4] Landowners have no duty to safeguard licensees from open and obvious dangers. *Pippin v Atallah,* 245 Mich App 136, 143; 626 NW2d 911 (2001). Whether a particular danger is open and obvious is dependent on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Mem Christian Methodist Episcopal Church,* 210 Mich App 261, 264; 532 NW2d 882 (1995). In determining whether an alleged dangerous condition is open and obvious, such a determination focuses on the characteristics of a reasonably prudent person. *Mann v Shusteric Enterprises, Inc,* 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). Because the test is objective, courts look not to whether a particular plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his position would foresee the danger. *Joyce v Rubin,* 249 Mich App 231, 238-239; 642 NW2d 360 (2002). The general rule is that a premises possessor is not required to protect a person from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to

(continued…)

not decided by the trial court and because it is unnecessary to do so in light of our holding affirming the trial court's ruling.

Plaintiff was a social guest while in her sister's home and is properly deemed a "licensee" under the circumstances and the law. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000) (social guests are typically licensees as a licensee is one who is privileged to enter land of another by virtue of possessor's consent); *DeBoard v Fairwood Villas Condominium Ass'n*, 193 Mich App 240, 241; 483 NW2d 422 (1992)(a plaintiff who tripped in his sister's condominium was a licensee). A landowner or premises possessor only owes a licensee a duty to warn the licensee of any hidden dangers that the owner or possessor knows or has reason to know of, if the licensee does not know or has no reason to know of the dangers and risks involved. *Stitt, supra* at 596; *DeBoard, supra* at 242. There is no duty of inspection, duty of repair, or duty of affirmative care to make the premises safe for a licensee's visit. *Stitt, supra* at 596; *Burnett v Bruner*, 247 Mich App 365, 373; 636 NW2d 773 (2001). A social guest-licensee assumes the ordinary risks associated with a visit. *Stitt, supra* at 596.

While we acknowledge that the hazard caused by the dog tether, which can be moved and which was not always stretched across the doorway floor, is different from situations where a hazard is more permanent in nature, the evidence reflected that plaintiff knew or had reason to know that the tether could very well be in the area where the accident occurred. There is no evidence suggesting that plaintiff was placed on notice by observations on the day of the accident, but the indisputable fact that plaintiff was aware of past occasions on which the dog tether was present in the doorway and her personal observation of the tether so placed eliminated her sister's legal obligation to warn plaintiff of the hazard. Plaintiff was familiar with her sister's practice of tethering the dog or leaving the tether attached to a hook inside the home. Although it had been several years since plaintiff's last visit, there was no evidence indicating that she did not recall the past presence of the tether in the doorway at various times; plaintiff was simply not focusing on it while exiting the home to smoke a cigarette. Indeed, just as plaintiff began to trip, she immediately realized that she was tripping over the tether. If it can be successfully argued that knowledge of a hazard is not generally determinative where one forgot about the hazard or was not focused on the hazard, a "knowledge" defense would become nonexistent because forgetfulness or inattentiveness necessarily play a role in causing the injury where the hazard was known, otherwise the party would not have physically struck or come into contact with the hazard. Viewing the evidence in a light most favorable to plaintiff, we hold that the trial court did not err in dismissing the action.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio

(…continued)

undertake reasonable precautions to protect others from that risk. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001).