STATE OF MICHIGAN

COURT OF APPEALS

TRACI GIBSON,

Plaintiff-Appellant,

v

HARPER UNIVERSITY HOSPITAL, a/k/a HARPER-HUTZEL HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
July 29, 2008

No. 278664
Wayne Circuit Court
LC No. 06-615987-NO

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the trial court orders granting defendant's motion for summary disposition and denying plaintiff's motion for reconsideration. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff asserts that the trial court erred in granting defendant's motion for summary disposition under MCR 2.116(C)(10) and dismissing her claim. We disagree.

A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. "Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law." *Robinson v Ford Motor Co*, 277 Mich App 146, 150-151; 744 NW2d 363 (2007).

"In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Id*. However, the duty to protect does not extend to open and obvious dangers. *Id*. at 713. The test to determine if a danger is open and obvious is whether an average user of ordinary intelligence would discover the danger and the risk presented upon casual inspection. *Id*. "Because the test is objective, this Court looks not to whether a particular plaintiff should have known that the

condition was hazardous, but to whether a reasonable person in his or her position would have foreseen the danger." *Id*.

Plaintiff asserts the trial court improperly relied on her subjective knowledge that the portion of the floor on which she fell had been waxed and buffed approximately twenty minutes earlier. However, when the dangers are known to the invitee, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite the invitee's knowledge. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). This Court has specifically found that, in applying the reasonable person standard to determine whether a condition was open and obvious, it is appropriate to consider the plaintiff's actual knowledge of the condition. See *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002).

In the present case, plaintiff testified that on her way to the restaurant, she saw a man waxing and buffing one half of the hallway. When she exited the restaurant approximately fifteen or twenty minutes later, the man was gone. Plaintiff was walking back to her office on the side of the hallway that she had previously seen being buffed when she slipped and fell. A reasonable person of ordinary intelligence in plaintiff's position would have recognized that a hallway that had been waxed and buffed fifteen or twenty minutes earlier was likely to be slippery and would have foreseen the danger. See *Kennedy*, *supra* at 713; see also *Corey*, *supra* at 5; *Joyce*, *supra*.

Plaintiff's reliance on *Laier v Kitchen*, 266 Mich App 482; 702 NW2d 199 (2005), is misplaced. In contrast to the situation in *Laier*, plaintiff's awareness that the floor had recently been waxed and buffed does not constitute specialized knowledge. Accordingly, plaintiff's knowledge of the janitor's activities is relevant to the evaluation of whether a reasonably prudent person of ordinary intelligence would have been aware of the hazard.

Plaintiff contends that her knowledge that the corridor had been very recently buffed is relevant only to the issue of comparative negligence. However, the adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. *Riddle*, *supra* at 95. Under ordinary circumstances, a premises possessor does not have a duty to protect an invitee from open and obvious dangers. *Kennedy*, *supra*.

Next, plaintiff maintains that the trial court erred in rejecting her claim that the hazard was effectively unavoidable. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 523; 629 NW2d 384 (2001). Again, we disagree.

The plaintiff has the burden of proof for all elements necessary to establish the case. *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006). After carefully reviewing the record, we conclude that plaintiff has failed to provide documentary evidence setting forth specific facts showing there is a genuine issue with regard to whether the hazard was effectively unavoidable.

Plaintiff first argues the trial court erred in finding she had not established that there was only one corridor leading to the Wendy's. In her brief on appeal, plaintiff claims that the "diagram and photographs demonstrate but one corridor leading from" the restaurant. However, we are unable to locate any "diagram" of the hospital premises in the record. Moreover, the two photographs attached to the brief in support of plaintiff's motion for reconsideration are inconclusive with regard to whether the hallway constituted the sole route available to her upon leaving the restaurant. On this record, we cannot conclude that the trial court erred.

Plaintiff also claims the trial court impermissibly speculated that the janitor had waxed and buffed only one half of the corridor. However, plaintiff concedes she did not witness the janitor waxing and buffing the other half of the hallway. Moreover, plaintiff did not present the deposition testimony of the janitor or the maintenance staff regarding the cleaning procedure.

A plaintiff establishes that the defendant's conduct was a cause in fact of her injuries only if she sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004). Michigan law requires more than a mere possibility or a plausible explanation. A valid theory of causation must be based on facts in evidence. *Id*. While the evidence need not negate all other possible causes, the evidence must exclude other reasonable hypotheses with a fair amount of certainty. *Id*. at 87-88. "An explanation that is consistent with known facts but not deducible from them is impermissible conjecture." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003).

In the present case, plaintiff has failed to present any evidence that the entirety of the hallway had been waxed and buffed. Plaintiff's theory that, because the janitor had left the scene and had taken his equipment with him, he had waxed and buffed both halves of the corridor constitutes mere speculation that fails to exclude other reasonable hypotheses with a fair amount of certainty. See *Craig*, *supra*. Accordingly, the trial court did not err in concluding that, because plaintiff failed to present any evidence that the side of the hallway on which she was not walking had been waxed and buffed prior to her fall, the hazard was not effectively unavoidable.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello