STATE OF MICHIGAN

COURT OF APPEALS

ROBIN L. WAGNER,

Plaintiff-Appellant,

v

EDWIN MISENER and DENISE MISENER,

Defendants-Appellees.

UNPUBLISHED
March 4, 2010

No. 289144
Clinton Circuit Court
LC No. 07-010250-NO

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants in this premises liability claim. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On November 6, 2004, plaintiff was visiting her sister, defendant Denise Misener, at the Misener farm home. Plaintiff walked out to the horse barn in the back yard to see defendant Edwin Misener and the couple's daughter, Stacy Nye. Edwin and Stacy were hauling wood boards from the barn and loading them into the back of a pickup truck. As plaintiff stepped toward the truck to push a board further back into the truck bed, her left foot stepped on a steel cover, which covered a three-foot-deep well hole containing a faucet used to water horses. Plaintiff's foot entered the hole as the cover flipped. When the cover flipped up, plaintiff straddled it as she fell, and sustained injury.

At her deposition, plaintiff acknowledged that she knew the hole was present, because she and Denise had lived on the property when they were younger, but she indicated that it did not have a cover on it at that time. She also indicated that she thought that her mother's partner had previously filled the hole. Denise Misener testified that she had known that the well pit was present since she was a child, that the well pit had never been filled and that the well cover on the pit was the same cover that had always been on it.

Edwin Misener testified at his deposition that he had known about the hole since he and his wife purchased the property from his wife's parents' estate in 1990, and that he used the faucet in the hole to water horses approximately once per month, and had last used it a month before plaintiff fell. He testified further that the cover probably had leaves or grass on it at the time of plaintiff's injury, but that he could see it as he walked into the shed prior to plaintiff's accident. He indicated that the steel lid "wasn't real heavy, but it wasn't really light either" and

that it was not latched to the pit. Edwin testified that he had not driven over the hole when he moved the truck into position to load the wood. When counsel asked Edwin whether the cover had ever previously flipped up when a horse had ever stepped on the cover or a tractor or anything else had run over it, he replied that it had not. Nor had Edwin ever seen the cover flipped over inside the hole, and he maintained that he had never known of anyone previously falling in the hole or flipping up the cover in the past. Nor was he aware that there was a potential that the cover could tip. After plaintiff fell, Edwin filled the hole with dirt.

Stacy Nye testified in her deposition that she had known of the hole and the cover since at least 1996. She remembered the cover as a bit "wobbly." She did not recall mentioning this to her father, but stated that she might have mentioned it to her then-fiancée. She did not think that her fiancée ever spoke with either of her parents about the well or the cover. She had never seen the well cover tip up on its side as it did the day of the accident, and had only noticed that when she stepped on it, "it would just rattle a little bit." She did not realize that a hole existed underneath the cover.

Defendants moved for summary disposition. The trial court found that the dangerous condition, the "inadequately supported manhole cover," was not open and obvious, but then found that plaintiff had not shown that defendants had knowledge of this defective condition.

Plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Id.*; S*ingerman v Muni Service Bureau*, 455 Mich 135, 139; 565 NW2d 383 (1997). The court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Singerman*, 455 Mich at 139. "The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence." *ER Zeiler Excavating, Inc v Valenti, Trobec & Chandler, Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006). "The responding party must then present legally admissible evidence to demonstrate that a genuine issue of material fact remains for trial." *Id*. "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001).

"'To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.'" *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000), quoting *Spikes v Banks*, 231 Mich App 341, 355; 586 NW2d 106 (1998). The duty owed by a landowner to a person present on the premises depends on the visitor's status. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). In this case, it is undisputed that plaintiff was a social guest, and as such, that she was a licensee. *Id*. Thus, the following rule applies:

> A landowner owes a licensee a duty only to warn the licensee *of any hidden dangers the owner knows or has reason to know of*, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. [*Id*. (emphasis added; citation omitted).]

The duty to warn licensees extends to hidden dangers that involve an unreasonable risk of harm. *Burnett v Bruner*, 247 Mich App 365, 372; 636 NW2d 773 (2001). "'[K]nowledge' implies not only knowledge of the dangerous condition, but also that 'the chance of harm and the gravity of the threatened harm are appreciated.'" *Altairi v Alhaj*, 235 Mich App 626, 639; 599 NW2d 537 (1999), quoting Restatement Torts, 2d, § 342, p 210, comment A. "The mere occurrence of an accident is not, in and of itself, evidence of negligence." *Clark v K-Mart Corp*, 242 Mich App 137, 140; 617 NW2d 729 (2000), rev'd on other grounds 465 Mich 416 (2001).

We conclude that the trial court did not err when it found that plaintiff did not present sufficient evidence to establish a question of fact as to whether defendants knew, or had reason to know, of the dangerous condition that caused plaintiff's injury. The parties do not dispute the trial court's finding that the combination of the well pit and the cover, i.e., the "inadequately supported manhole cover," was the true danger here, rather than just the existence of the well pit itself. We agree with this finding. Nor do the parties take issue with the trial court's determination that this danger was not open and obvious, at least to the normal observer upon causal inspection. See *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Consequently, as previously noted, plaintiff was required to establish a genuine issue of material fact as to whether defendants knew, or should have known, of the danger of the well pit cover becoming dislodged and flipping upward when stepped on.

Plaintiff has not presented any evidence that defendants had actual knowledge of the dangerous condition of the well pit cover. Neither defendant testified to any actual knowledge that the cover could tip, or to ever seeing it do so, and plaintiff presented no evidence to the contrary. While Nye might have had knowledge about the potential for some danger, i.e., of tripping over its handle, she expressed no knowledge of the cover ever tilting upward, only of noticing that it "wobble[d]" or "rattle[d]a little bit" when she stepped on it. Nye also testified that she did not know that there was a hole under the cover, and that she did not speak with defendants regarding any danger she may have perceived regarding the cover. Therefore, her knowledge, if any, is not imputed to defendants.

Plaintiff claims that defendants should have known that the cover posed a danger, considering that the well pit had existed on the property for a lengthy period of time. Plaintiff relies on *Kosmalski v St. John's Lutheran Church*, 261 Mich App 56; 680 NW2d 50 (2004), to support her assertion. However, *Kosmalski* involved actual knowledge of the danger posed and, unlike the plaintiffs in that case, plaintiff here has presented no evidence that anyone had previously raised to defendants the possibility of harm arising from the presence or condition of the well pit cover, see *id*. at 65-66, or that either defendant knew, or should have known, that the

cover could pose a danger of tilting up when stepped on.[1] Rather, the undisputed evidence presented to the trial court established that, despite the fact that the cover had been over the well pit for at least 14 years before the instant incident, it had never tilted upward in the manner that it did when plaintiff stepped on it in this instance. Thus, there simply was no basis for the trial court to find any question of fact that defendants had reason to know of a danger that such might occur. And unlike the situation in which a plaintiff is an invitee, defendants did not owe licensee plaintiff a duty to periodically inspect the well cover to ensure that it was not dislodged or otherwise posed a danger.

We affirm. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood

[1] Plaintiff does not maintain on appeal that Edwin Misener's active negligence caused her injury.