STATE OF MICHIGAN

COURT OF APPEALS

DEBRA N. POSPIECH, as Next Friend of SAMANTHA HUNT, a Minor

Plaintiff-Appellant,

v

JANA RING, as Personal Representative of the Estate of MARY FILIPKOWSKI, Deceased,

Defendant-Appellee.

UNPUBLISHED
March 26, 1999

No. 205371
Wayne Circuit Court
LC No. 96 607046 NO

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition and denying plaintiff's motion for reconsideration. We affirm.

The essential facts in this case are undisputed. In January 1994, Candy Hunt, her infant daughter, Samantha Hunt ("plaintiff"), and her three other children moved into the home of her aunt, Mary Filipkowski ("defendant"). At that time, defendant and her sister-in-law, Anna Hytla, were also living in the home. Hunt and defendant agreed that Hunt would care for defendant and Hytla, both of whom were unable to care for themselves, in exchange for a rent-free place to live.

Defendant and Hytla were both taking medication which made them unusually warm. To keep them comfortable, the heat in the home was maintained at a low temperature. Defendant gave Hunt a space heater to allow her to warm up the bedroom used by Hunt and her children. Hunt would generally turn the heater on prior to going to bed, and turn it off once they went to sleep. When not in use, the heater was stored unplugged under the night stand in the bedroom. Hunt used the heater without incident for more than three months.

The heater was approximately twenty years old. Plaintiff's expert found that the heater was in excellent condition with no damage to the heater casing, the power cord, or the interior of the heating element. However, plaintiff's expert opined that the heater was defective because it reached excessively high grill surface temperatures.

During the morning of April 22, 1994, Hunt decided to do laundry in the basement leaving unsupervised her four sleeping children. At that time, her children were the following ages: plaintiff was six months old; Amanda was two and a half years old; Kevin was three and a half years old; and Gary was five and a half years old. While Hunt was doing laundry, Kevin placed plaintiff on the floor so she could play. Amanda then turned the space heater on. Plaintiff's proximity to the space heater caused her to suffer third-degree burns.

Defendant's motion was brought pursuant to MCR 2.116(C)(8) and (10). Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court did not identify the rule under which it granted defendant's motion. However, because both defendant and the trial court relied on documentary evidence beyond the pleadings in support of defendant's motion for summary disposition, we must construe defendant's motion as being brought pursuant to MCR 2.116(C)(10). *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 705; 532 NW2d 186 (1995).

A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Spiek*, *supra* at 337. When reviewing a motion brought pursuant to this rule, the court considers affidavits, pleadings, depositions, admissions, and documentary evidence in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff claims the trial court erred because there existed competent evidence to support her claims that: (1) defendant failed to maintain a safe premises; (2) defendant negligently provided the space heater to Hunt; and (3) defendant failed to supervise the Hunt children on the day plaintiff was injured. Plaintiff also claims that the trial court erroneously denied her motion for reconsideration. We find no merit in plaintiff's arguments.

I

Defendant conceded, for purposes of her motion, that plaintiff was an invitee. "[T]he invitee status of a plaintiff, alone, does not create a duty under premises liability law unless the invitor has possession and control of the premises on which the plaintiff was injured." *Orel v Uni-Rak Sales Company, Inc,* 454 Mich 564, 565; 363 NW2d 241 (1997). The rationale for this rule is that "the [person] in possession is in a position of control, and normally best able to prevent any harm to others." *Orel*, *supra* at 568.

We find that defendant relinquished to Hunt possession and control of the bedroom where plaintiff was injured. Hunt testified that she and her children occupied the bedroom in which plaintiff was injured commencing on the date the Hunt family moved into defendant's home. Hunt not only exercised control over this bedroom, she also possessed and exercised control over the space heater by which plaintiff was injured. No evidence was submitted to show that defendant exercised control over the bedroom or the space heater from the time defendant relinquished possession of both to Hunt through the date of plaintiff's injury. We therefore conclude that defendant did not owe any duty to

plaintiff to insure the safe use of the space heater. Accordingly, summary disposition was appropriate as to plaintiff's premises liability claim.[1]

II

Plaintiff also argues that summary disposition should not have been granted on her claim that defendant negligently supplied the space heater to Hunt. In *Muscat v Khalil*, 150 Mich App 114, 121; 388 NW2d 267 (1986), the Court relied upon 2 Restatement Torts, 2d, §392 to describe when one who supplies a chattel to another may be liable for injuries that arise out of the use of the chattel:

> 'One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them[.] *Moning v Alfono*, 400 Mich 425, 443-444; 254 NW2d 759 (1977).' [*Muscat*, *supra* at 121.]

Hunt was a mature adult and mother of four children. She taught her children that the space heater was hot, like a stove, and that the children were not to touch it. Hunt used the space heater for more than three months without incident. There is no evidence to suggest that Hunt's use of the space heater prior to plaintiff's injury was anything other than reasonable. Hunt turned the space heater on prior to putting the children to bed and she turned it off once the children were asleep.

We find that defendant had no reason to know that Hunt, the person to whom she entrusted the space heater, lacked the experience and judgment needed to operate this space heater in a safe manner,[2] thus we conclude that summary disposition of plaintiff's negligent supply claim was appropriate.

III

Plaintiff also argues that the trial court improvidently dismissed her claim that defendant negligently supervised Hunt's children. We disagree. Hunt admitted that it was physically impossible for defendant to take care of the children and that the children were exclusively under her control. Hunt and her children were residing at defendant's house to allow Hunt to care for defendant, not the converse. Therefore, since Hunt testified that the children were exclusively under her control and that defendant was unable to take care of the children, we hold that summary disposition on plaintiff's claim of negligent supervision was appropriate.

IV

Finally, plaintiff did not present any issues in her motion for reconsideration related to the grant of summary disposition to defendant which were not previously ruled on, either expressly or by reasonable implication. Nor did plaintiff show a palpable error by which the court and the parties were misled. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for

reconsideration. MCR 2.119(f)(3); *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[1]We are not persuaded by plaintiff's claim that the space heater was defective and that defendant owed to Hunt and her family a duty to warn or otherwise protect. At best, defendant owed Hunt and her family a duty to warn against dangers of which defendant knew or, through the exercise of reasonable care, should have known. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 92-93; 485 NW2d 676 (1992). The alleged defect in this case, that the grill surface on this twenty year old space heater reached temperatures in excess of acceptable industry standards, was hidden to the ordinary user. In fact, this alleged defect was only discovered as a result of litigation related testing by plaintiff's expert.

Therefore, assuming without deciding that the excessive heating of the grill surface constituted a defect in the space heater, we find no evidence upon which to conclude that defendant knew or should have known of this alleged defect and thus, defendant owed to Hunt or her family no duty to warn or otherwise protect them from this alleged defect.

[2] There is evidence to support the conclusion that Hunt was an unfit parent who used cocaine. However, nothing in the record supports the conclusion that defendant knew Hunt was an unfit parent at the time defendant provided Hunt with the space heater, or at any time prior to plaintiff's injury. Therefore, this Court cannot conclude that defendant should have known that Hunt's children would be endangered by supplying Hunt with a space heater.