STATE OF MICHIGAN

COURT OF APPEALS

HENRIETTA LESKE,

Plaintiff-Appellant,

v

WARREN DENTAL ASSOCIATES, P.C.,

Defendant-Appellee.

UNPUBLISHED
December 1, 2000

No. 214078
Macomb Circuit Court
LC No. 97-003992-NO

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

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

I. Basic Facts and Procedural History

After receiving services at defendant dental clinic on July 22, 1996, plaintiff was allegedly injured when she slipped and fell on an oily substance in defendant's parking lot. Plaintiff alleged in her complaint that defendant breached its duties to maintain its premises in a reasonably safe manner and to diminish the hazards associated with any dangerous condition it knew of or should have discovered.

In response, defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had not presented sufficient evidence that defendant had notice of and opportunity to alleviate the allegedly dangerous condition. Defendant alternatively argued that the oil spot was an open and obvious condition, and as such, defendant had no duty to protect plaintiff from any danger associated with that condition. In granting defendant's motion for summary disposition, the trial court concluded that plaintiff failed to establish a prima facie case of negligence because plaintiff presented no evidence from which one may infer that defendant or defendant's employees either created or knew of the oil substance in its parking lot.

On appeal, plaintiff argues that the trial court improperly granted defendant's motion because a genuine issue of material fact existed regarding whether defendant knew or should have known of the oil spot in its parking lot. Plaintiff alternatively argues that she was not required to prove notice. Plaintiff further argues that the condition was not open and obvious and

that the doctrine does not apply to this case because it only applies to cases alleging failure of the duty to warn, whereas, the case at hand alleges failure to reasonably maintain the premises.

II. Standard of Review

This Court reviews a trial court's decision regarding a motion for summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion brought under MCR 2.116(C)(10), this Court must review the documentary evidence to determine whether a party was entitled to a judgment as a matter of law or whether a genuine issue of material fact exists. *Id.* This Court draws all reasonable inferences in the nonmoving party's favor. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996).

III. General Principles of Premise Liability Law

A premises liability action requires a plaintiff to establish a prima facie case of negligence, i.e., a plaintiff must show "that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered." *Schultz v Consumers Power Co,* 443 Mich 445, 449; 506 NW2d 175 (1993). The parties agree that defendant owed plaintiff the duty a landowner owes a business invitee. Landowners owe business invitees a duty to maintain their premises in a reasonably safe condition, which requires landowners to actually inspect their premises and, depending on the circumstances, to make any necessary repairs or warn of any discovered hazards. *Hammack v Lutheran Social Services of Michigan,* 211 Mich App 1, 6; 535 NW2d 215 (1995).

A defendant is liable for an injury resulting from an unsafe condition on its premises if (1) that condition is caused by the active negligence of the defendant or its employees, or (2) the condition is of a nature that the defendant or one of its employees knew or should have known about it. *Berryman v K Mart Corp,* 193 Mich App 88, 92; 483 NW2d 642 (1992). Notice may be established with the use of legitimate inferences from established facts, but conjecture is not sufficient. *Id.* Notice can be inferred from evidence that the unsafe condition existed for a length of time sufficient to have allowed a reasonably careful landowner to discover it. *Id.*

IV. The Notice Element of a Premises Liability Action

Plaintiff argues that a plaintiff need not prove notice when a defendant creates, by either its action or inaction, a dangerous condition. However, this principle applies only when an employee creates a dangerous condition through an unreasonable act or omission. *Hampton v Waste Management of Michigan, Inc,* 236 Mich App 598, 604; 601 NW2d 172 (1999). This concept is inherent in the well-established principle that a landowner is not an insurer of an invitee's safety. *Id.* Plaintiff argues that by failing to maintain and inspect its premises, defendant caused the danger of the oily substance in its parking lot to exist. In support of this claim, plaintiff states that defendant presented no records or testimony that maintenance was actually performed on the parking lot. However, the fact that defendant did not offer maintenance records to dispute plaintiff's claim of negligence does not amount to evidence that defendant failed to adequately maintain its premises. See, e.g., *Guardiola v Oakwood Hospital,*

200 Mich App 524, 537; 504 NW2d 701 (1993). Nor is it sufficient to rebut the testimony of defendant's head administrator that the full-time maintenance worker regularly maintained the parking lot.

To support her claim of negligent inaction, plaintiff makes much of the head administrator's testimony that he would not have instructed the maintenance worker to address an oil spot like "you could find in any parking lot in the country, if it wasn't anything of any consequence." Plaintiff's testimony supports a conclusion that the oil spot on which she slipped was of the sort the head administrator would ignore, as she testified she was used to seeing oil spots like that all the time in parking lots. Because the evidence indicates the oil spot at issue was of the nature of a condition commonly found in ordinary parking lots, opting to allow it to naturally absorb into the asphalt is not an unreasonable response, since landowners are not required to make ordinary parking lots "foolproof" or prevent careless persons from hurting themselves. Accordingly, defendant did not, by unreasonable action or inaction, create a dangerous condition in its parking lot. Therefore, in order to withstand defendant's motion for summary disposition, plaintiff was required to establish that defendant had notice of the condition which allegedly caused her fall. *Berryman, supra* at 92.

In opposing summary disposition, plaintiff presented no direct evidence indicating how or when the oil was spilled onto the parking lot. The only evidence plaintiff provides that defendant knew or should have known of the oil spot is her testimony that the oil was black and had spread to 2½ feet in diameter. From these factors, plaintiff theorizes that the oil had partially soaked into the asphalt and was long-standing enough that, had defendant inspected its parking lot, the oil spot would have been discovered. However, mere conjecture cannot satisfy a plaintiff's burden of coming forward with evidentiary proof to establish that a genuine issue of material fact exists concerning whether a landowner knew or should have known of an unsafe condition on its premises. *Berryman, supra* at 92.

Plaintiff's theory is similar to the type rejected in *McCune v Meijer,* 156 Mich App 561, 562; 402 NW2d 6 (1986), which is also a case involving a plaintiff who slipped on an oil spill in a parking lot. In *McCune,* the plaintiff indicated that he did not see the oil spill before he fell. *Id.* The plaintiff described the actual puddle of oil that caused him to slip as rather small, but stated that an oil stain 2½ feet in diameter surrounded it. *Id.* The plaintiff's theory was that, because the oil stain was much larger than the actual puddle of oil, the stain must have resulted from the evaporation of the oil. *Id.* The plaintiff argued that, given the naturally slow rate of evaporation, the oil spill had to have existed for a period significant enough for the defendant to have discovered it. *Id.*, 562-563. This Court held that, because the plaintiff's theory was completely unsupported by expert testimony, it amounted to no more than sheer speculation and conjecture, and thus, was not sufficient to show constructive notice. *Id.*, 563. Since plaintiff, in the case at hand, presents a nearly identical theory, she has likewise failed to present sufficient evidence from which one could infer that defendant had notice of the oil spill that allegedly created an unsafe condition in defendant's parking lot. Therefore, the trial court properly granted summary disposition on the grounds that plaintiff failed to prove that defendant had notice of the condition.

V. The Applicability of the Open and Obvious Doctrine

Since the trial court properly granted defendant's motion for summary disposition on the basis of lack of notice, it is unnecessary for this Court to address defendant's alternative argument that it did not owe plaintiff a duty to protect her from any danger associated with the oil spot because it was an open and obvious condition.

VI. Conclusion

The trial court properly granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Gary R. McDonald