STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY WALLIS,

Plaintiff-Appellant,

v

CHARLES WARDEN,

Defendant-Appellee.

UNPUBLISHED
June 29, 2001

No. 221741
Genesee Circuit Court
LC No. 98-063741-NO

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff was injured on April 17, 1998, while retrieving some of her personal belongings from defendant's garage. A review of the record reveals that plaintiff and defendant lived together as a couple in defendant's home for approximately ten months before plaintiff moved out in March 1998.[1] On April 17, 1998, while bending over to pick up a piece of exercise equipment stored in defendant's garage, plaintiff tripped on a piece of metal that became stuck in her shoelace, injuring her knee.

Plaintiff's two-count complaint alleged negligence and nuisance. After discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10).[2] During a hearing on defendant's motion for summary disposition, the trial court reasoned that plaintiff was a business invitee on defendant's land. The trial court further concluded that summary disposition of plaintiff's claim was appropriate because the condition on defendant's land was open and obvious, and did not entail an unreasonable risk of harm.

[1] It also appears from the record that plaintiff and defendant attempted to enter into a business venture together, but these plans were not successful.

[2] Because the trial court's consideration of defendant's motion extended beyond the parties' pleadings, we will review the order of summary disposition as having been granted pursuant to MCR 2.116(C)(10). *Pippin v Atallah*, 245 Mich App 136, 141; ___ NW2d ___ (2001).

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (citations omitted).]

On appeal, plaintiff challenges the trial court's conclusion that the dangerous condition in defendant's garage was open and obvious. Further, plaintiff argues that even if the dangerous condition in defendant's garage can be characterized as open and obvious, the risk of harm to plaintiff remained unreasonable to the extent that defendant is liable for the injuries plaintiff sustained.

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (citation and footnote omitted). With regard to the first element, the duty of care owed by a possessor of land to a visitor is contingent on the visitor's status while on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A visitor may be classified as either an invitee, a licensee, or a trespasser. *Id.* Ordinarily, the duty of care owed by a possessor of land to a visitor is a question of law to be decided by the Court. See *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 297; 618 NW2d 98 (2000). In the instant case, the trial court concluded that plaintiff was a business invitee while on defendant's land because she alleged that she was on defendant's premises "to wind up the business affairs of a failed business venture involving plaintiff . . . and defendant . . . ." However, in our view, a close examination of our Supreme Court's decision in *Stitt, supra*, requires a contrary conclusion.[3]

In *Stitt, supra*, our Supreme Court had occasion to review the viability of the public invitee status in Michigan jurisprudence. The Court's decision in *Stitt, supra*, presented slightly different facts from the instant case because the plaintiff in *Stitt* was an individual who visited a church for Bible study. However, while considering the plaintiff's status on the church's land, our Supreme Court set forth general principles regarding the invitee status that are of guidance in the instant case. Noting the divergence in Michigan law regarding the circumstances that give rise to invitee status, the *Stitt* Court, speaking through Justice Young, opined:

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[3] We note that the learned trial court issued its order granting summary disposition to defendant without the benefit of the Supreme Court's decision in *Stitt, supra*, which was released one year later.

> [W]e conclude that the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests. It is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. In short, we conclude that that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owned to invitees. Thus, we hold that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose. [*Id.* at 604 (emphasis in original).]

In the instant case, there is no indication in the record that defendant held his premises open for a commercial purpose to the extent that plaintiff can be classified as an invitee.[4] Consequently, where it is undisputed that plaintiff received defendant's permission to enter on his premises, she is properly classified as a licensee.

In *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987), our Supreme Court described the licensee status in the following manner:

> A licensee is a person who is privileged to enter the land of another by virtue of the possessor's consent, without more. . . . A landowner only owes a licensee a duty to *warn* the licensee of any hidden dangers he knows or has reason to know of, if the licensee does not know or has no 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.*, citing Prosser & Keeton, Torts (5th ed), § 60; Restatement Torts, 2d § § 330, 342 (internal quotation marks omitted; emphasis in original); see also *Stitt, supra* at 596.]

Moreover, this Court has recently articulated the well-settled principle that a landowner "has no obligation to take any steps to safeguard licensees from conditions that are open and obvious." *Pippin v Atallah*, 245 Mich App 136, 143; ___ NW2d ___ (2001) (citation omitted); see also *DeBoard v Fairwood Villas Condominium Ass'n*, 193 Mich App 240, 242; 483 NW2d 422 (1992). Considering defendant's motion for summary disposition, the trial court reasoned that the danger of plaintiff tripping and falling on items stored haphazardly in defendant's garage was open and obvious. A condition is open and obvious where "it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997) (citation omitted). This test is an objective one, requiring us to consider whether genuine issues of material fact exist with regard to whether a reasonable person would foresee the "particular risk at issue." *Id.* at 11.

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[4] A review of the record reveals that plaintiff and defendant were attempting to enter into a business venture before their relationship ended in March of 1998. However, this business venture related to a sports bar, and there is nothing in the record to suggest defendant held his home open for a "commercial purpose" in relation to this business venture. See *Stitt, supra* (emphasis omitted).

In our opinion, the trial court correctly concluded as a matter of law that the risk that plaintiff would trip over the debris and items accumulated in defendant's garage was open and obvious. During deposition, plaintiff testified that when she arrived at defendant's home at approximately 3:00 p.m. on April 17, 1998, the garage was well-lit and she could see the various items gathered in piles in the garage. A review of photographs included in the lower court file substantiates the trial court's conclusion that the large amount of debris accumulated on the garage floor was readily apparent to anyone entering the garage. Viewing the record evidence in the light most favorable to plaintiff, we are satisfied that genuine factual disputes do not exist with regard to whether a reasonable person would have foreseen the risk of tripping on debris in defendant's garage. The trial court's grant of summary disposition was therefore appropriate.[5]

Plaintiff also argues that the trial court erred in summarily dismissing her nuisance claim.[6] To the extent that plaintiff has made only cursory reference to this issue in her appellate brief, she has waived it on appeal. *Eldred v Ziny*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 229230, issued 5/22/01), slip op p 5. In any event, plaintiff's assertion that the trial court erroneously granted summary disposition of her nuisance claim is without merit. As this Court observed in *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995):

> [a]n actor is subject to liability for private nuisance for a non-trespassory *invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with*, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct. [*Id.*, quoting *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992), in turn citing Restatement Torts, 2d, § § 821D-F, 822, pp 100-115 (emphasis supplied).]

Further, § 821E of the Restatement, pp 102-103 specifies that those who have "property rights and privileges in respect to the use and enjoyment of the land" include: "(a) possessors of the land, (b) owners of easements and profits in the land, and (c) owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment." Similarly, comment c to § 821E provides:

> [t]he liability for private nuisance exists only for the protection of persons having property rights and privileges, that is, *legally protected interests*, in respect

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[5] We will not reverse a trial court's decision where it reached the correct result, although its decision was grounded in faulty reasoning. See *Kefgen v Davidson*, 241 Mich App 611, 632 n 13; 617 NW2d 351 (2000).

[6] Though not specifically alleged as such, it appears from a review of the record that plaintiff brought forth a claim of private, rather than public, nuisance because she did not allege "an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1992).

> to the particular use or enjoyment that has been affected. . . . One having property rights and privileges in land can maintain an action under the rule here stated, only if the conduct of the actors interferes with the exercise of the particular rights and privileges that he owns. [*Id.* at 103 (internal quotation marks omitted; emphasis supplied).]

In our view, the trial court's grant of summary disposition of plaintiff's nuisance claim was proper because plaintiff failed to demonstrate that she had "property rights and privileges" in defendant's land. *Id.* Plaintiff is not a possessor of land who has suffered significant harm resulting from defendant's unreasonable interference with her use or enjoyment of her property as contemplated by the law of nuisance. See generally *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). Although plaintiff lived with defendant in defendant's home for approximately ten months, she left the premises in March 1998, a month before the incident giving rise to this appeal. As our Supreme Court observed in *Adkins*, *supra* at 308, the law of nuisance "require[s] that the plaintiff have some interest in the land that was interfered with." Because plaintiff failed to present evidence that she possessed property rights or privileges with respect to defendant's property, the trial court's grant of summary disposition was proper.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell