STATE OF MICHIGAN

COURT OF APPEALS

PRISCILLA J. KLOS,

Plaintiff-Appellant,

v

PERRIEZ, INC.,

Defendant-Appellee.

UNPUBLISHED
November 16, 2010

No. 293515
Oakland Circuit Court
LC No. 08-091343-NO

Before: SERVITTO, P.J., and ZAHRA, and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. We affirm.

Plaintiff argues on appeal that the evidence presented a question of fact regarding whether defendant created an unsafe condition on its premises. We disagree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This court reviews "a motion under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Moreover, the court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111.

"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 Atl & Pac Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "The duty owed by a landowner depends upon the status of the injured party at the time of the injury." *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000) quoting Doran v Combs, 135 Mich App 492, 495; 354 NW2d 804 (1984).

In this case, plaintiff, a customer of Milford House Restaurant, was a business invitee:

> An 'invitee' is 'a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception . . . The Court of Appeals correctly recognized that invitee status is commonly afforded to persons entering upon the property of another for business purposes. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).]

However "[a] premises possessor is generally not required to protect an invitee from open and obvious dangers." *Kennedy*, 274 Mich App at 713.

Plaintiff argues that there is circumstantial evidence that defendant had replaced two loose bricks beside the step and that these bricks caused plaintiff to fall on the steps. We disagree.

The rule, as first stated by the Michigan Supreme Court, is that a storekeeper,

> "is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it." [*Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), quoting *Carpenter v Herpolsheimer's Co*, 278 Mich 697; 271 NW 575 (1937).]

In *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3; 279 NW2d 318 (1979), the Court elaborated on this rule, stating that,

> [n]otice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it. Where there is no evidence to show that the condition had existed for a considerable time, however, a directed verdict in favor of the storekeeper is proper. [*Id.* at 8.]

We agree with the trial court that plaintiff did not establish that defendant caused the alleged hazard. Here, plaintiff fell while walking down the steps of defendant's restaurant. Plaintiff and her friend, Susan Mysliewiec, testified that plaintiff fell because of a loose brick, while other witnesses stated there was no brick. Although there may be a question of fact regarding the existence of a loose brick, plaintiff offers no evidence that defendant placed or replaced loose bricks near the step at any time prior to plaintiff's fall. Therefore, plaintiff has failed to produce evidence that defendant caused the alleged hazard.

Further, there is no evidence that other customers that used the steps regularly noticed a defective brick or sustained injury. Indeed, plaintiff testified that while standing above the step on her way into the restaurant she did not see the defect. The alleged defect is at the side of the single step adjacent to the railing post. It would be most unusual for plaintiff to access a brick on the lateral side of the step given the railing's configuration. Plaintiff would literally have to

swing around the railing post to access the brick. If the brick was in place as plaintiff claims, there is an absence of evidence to raise a justiciable question of fact as to defendant's knowledge of the condition or that it is in fact a defect. *See Winfrey v S S Kresge Co*, 6 Mich App 504; 149 NW2d 470 (1967).

Further, we reject plaintiff reliance on res ipsa loquitur in this case. Res ipsa loquitur "entitles a plaintiff to a permissible inference of negligence from circumstantial evidence." *Jones v Porretta*, 428 Mich 132, 155-156; 405 NW2d 863 (1987).

There are three elements of res ipsa loquitur:

> 1. The event must be of a kind which ordinarily does not occur in the absence of someone's negligence.
>
> 2. The event must have been caused by an agency or instrumentality within the exclusive control of the defendant.
>
> 3. The event must not have been due to any voluntary action or contribution on the part of the plaintiff. [*Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995), citing *Jones*, 428 Mich at 150-151.]

We conclude plaintiff fails to meet the first and third elements of res ipsa loquitur. Regarding the first element, it is possible that falling on steps may occur in the absence of negligence. Plaintiff's fall, and the injuries she sustained, are not exclusive to matters of negligence. Further, with respect to the third element, this event may have been due to contribution on the part of plaintiff. While she blames an allegedly loose brick, plaintiff suffered from many health problems, some of which caused dizziness, poor eyesight, and an ulcer on the heel of the foot on which she tripped. While such health problems certainly do not constitute a voluntary action, they may have contributed, in part, to cause her fall. This theory is bolstered by Milford House manager Kristine Sinacola's written statement, which reports that plaintiff stumbled and fell on another customer as she walked through the restaurant. Thus, the res ipsa loquitur doctrine does not apply to this case. Further, as discussed above, plaintiff has failed to prove that defendant was negligent and caused her injuries. Therefore, summary disposition was properly granted.

Affirmed.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio