STATE OF MICHIGAN

COURT OF APPEALS

MELISSA HARRIS-DIMARIA also known as MELISSA HARRIS, also known as MELISSA DIMARIA, Plaintiff-Appellant,	UNPUBLISHED February 22, 2018
v	No. 336379 Oakland Circuit Court
LAVIE CARE CENTERS, LLC, Defendant,	LC No. 2016-151122-NO
and WHITEHALL OF NOVI HEALTHCARE, LLC, d/b/a WHITEHILL HEALTHCARE CENTER OF NOVI, Defendant-Appellee.	

Before: JANSEN, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right an order granting defendant's[1] motion for summary disposition. We affirm.

On August 19, 2013, plaintiff, an employee of a mobile medical diagnostic company, was scheduled to perform an ultrasound on a patient at defendant's facility. Plaintiff slipped and fell in a puddle of water that had leaked from a sink onto the bathroom floor adjoining her patient's room. Plaintiff argues that the trial court erred when it granted summary disposition in favor of defendant because the puddle of water created by the leaky sink was not open and obvious and

[1] LaVie Care Centers, LLC, was dismissed as a defendant in a stipulated order granting dismissal, and does not participate in this appeal. Any reference to "defendant" herein is a reference to Whitehall of Novi Healthcare, LLC.

the hazard was effectively unavoidable, and because defendant had notice that the sink was malfunctioning. We disagree.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Arias v Talon Dev Group*, *Inc*, 239 Mich App 265, 266; 608 NW2d 484 (2000). "A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim." *Id.* This Court considers the "pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party" when reviewing a motion brought under subrule (C)(10). *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "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." *Id*. A genuine issue of material fact "exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

I. NOTICE OF HAZARD

Plaintiff argues that defendant had notice of the hazardous condition posed by the wet floor and is thus liable for her injuries. We disagree.

To establish negligence in a premises liability action, a plaintiff must show " '(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages.' " *Mouzon v Achievable Visions*, 308 Mich App 415, 418; 864 NW2d 606 (2014) (citations omitted). Plaintiff argues that defendant owed her a duty of care based on her status as a business invitee, which defendant does not dispute. A business invitee is "a person invited on the land for the owner's commercial purposes or pecuniary gain . . . . " *Benton v Dart Props*, *Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006).

Landowners must exercise reasonable care in order to protect invitees from any unreasonable risk of harm that is caused by dangerous conditions on the premises. *Taylor v Laban*, 241 Mich App 449, 454; 616 NW2d 229 (2000). A landowner may be subject to liability for physical harm to invitees if the landowner:

> (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).]

Thus, plaintiff, a business invitee, must demonstrate that defendant "knew about the alleged water . . . or should have known of it because of its character or the duration of its presence." *Lowrey v LMPS & LMPJ*, *Inc*, 500 Mich 1, 11; 890 NW2d 344 (2016).

In her deposition testimony, plaintiff stated that she was gone from the hospital room for no more than 30 seconds, and that the water had covered the floor by the time she returned. Prior to her leaving the room, she had stood at the sink with the water running for approximately

two minutes while she waited for it to warm, and it had not flooded the floor or come out from under the sink. Based on the brief 30-second period in which the sink leaked a puddle of water onto the floor, plaintiff cannot demonstrate that defendant had constructive notice of the dangerous condition because the duration of the puddle's presence was so short that it could not have been discovered before plaintiff fell.

Plaintiff also argues that defendant had actual notice of the condition of the defective sink. Plaintiff's sole basis for arguing that defendant had actual notice is based on a conversation between plaintiff and an individual that plaintiff assumed worked for defendant. Plaintiff testified during her deposition that a young woman came to the hospital room following her fall, and that she believed that the woman was a nurse's aide. When questioned regarding her basis for that belief, plaintiff testified that "she didn't have the correct color on for the nurses, nurses were dressed in a different color," but plaintiff could not remember which color the nurses and nurse's aides were wearing at defendant's facility that day. Plaintiff testified that she got into an argument with the nurse's aide regarding the condition of the sink, and that the nurse's aide "had told [her] that this was a plugged up sink and it was not broken."

As the nurse's aide's statement is plaintiff's only supporting proof that defendant had notice that the sink was broken, plaintiff and defendant focus their arguments on the question of whether the conversation between plaintiff and the nurse's aide is admissible. Plaintiff argues that the nurse's aide's statement is admissible as a statement by a party opponent under MRE 801(d)(2), "which allows as nonhearsay, an admission by a party opponent." *Merrow v Bofferding*, 458 Mich 617, 633; 581 NW2d 696 (1998). MRE 801(d)(2) "allows admission of a statement offered against a party when it is the party's own statement, in either an individual or representative capacity." *Id.*

However, plaintiff merely testified to the fact that she had a conversation with a woman that she *assumed* was a nurse's aide at defendant's facility. Plaintiff did not establish with any certainty that this individual was a nurse's aide who was acting as a representative of defendant. "A statement cannot be used as a party admission unless the party made the statement." *Id.* There is no further evidence in the record of the identity of the nurse's aide, proof that she was acting as an agent or employee of defendant, or any other information that would lay a proper foundation for admitting the conversation with plaintiff as a statement of a party opponent. "Plaintiff never established, but rather merely asserted, that the declarant was a representative or agent" of defendant. *Tobin v Providence Hosp*, 244 Mich App 626, 640; 624 NW2d 548 (2001).

Additionally, it is not clear that the testimony of the nurse's aide would be useful or relevant even if it were admissible. First, plaintiff contradicts her own deposition testimony by ascribing significance to the statement that the sink was plugged. In her deposition testimony, plaintiff stated that she "believe[d] that the water was coming from underneath the sink," and saw a piece of PVC pipe float across the floor through the puddle. Plaintiff also testified that there was no indication that water was backing up into the sink. Conversely, on appeal, plaintiff argues that the statement regarding the sink must be admitted because it demonstrates that defendant had notice that the sink was clogged or plugged. However, it is unclear from the record what the nurse's aide meant when she told plaintiff that the sink was "plugged up."

Without any further explanation in the record, it cannot be said that the nurse's aide unequivocally intended to convey to plaintiff that she knew that the sink was clogged or otherwise broken. Plaintiff's assumptions that the nurse's aide knew that the sink was clogged, and also that she was an employee or representative of defendant, are insufficient to show that defendant had notice of the malfunctioning sink or the puddle on the floor. Moreover, regardless of the meaning of the statement to plaintiff, "[p]laintiffs cannot create an issue of fact by contradicting their own testimony." *Mitchell v Dougherty*, 249 Mich App 668, 680; 644 NW2d 391 (2002). It appears that plaintiff attempted to contradict her own deposition testimony by arguing that the sink was clogged, when she previously testified that it was not clogged but that the water came from a burst or broken pipe under the sink. Thus, there is no genuine issue of material fact with regard to whether defendant had notice that the sink malfunctioned. Accordingly, plaintiff's claim must fail.

Given the above conclusion, we need not address plaintiff's argument concerning whether the condition was open and obvious or her alternative argument whether the hazard caused by the wet floor was effectively unavoidable.

Affirmed.

/s/ Kathleen Jansen
/s/ Deborah A. Servitto