STATE OF MICHIGAN

COURT OF APPEALS

BONNIE CAMPBELL, Plaintiff-Appellant,	UNPUBLISHED May 30, 2013
v	No. 308496 Marquette Circuit Court
H.J. LARSON, INC., d/b/a HOLIDAY INN OF MARQUETTE, Defendant-Appellee.	LC No. 11-048961-NO

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Bonnie Campbell and a friend visited the Holiday Inn of Marquette to enjoy Sunday brunch. Campbell fell while carrying a plate of cheesecake back to their table. From her vantage point on the floor Campbell determined that she had tripped on a folded serving tray stand leaning against a wall. The legs of the tray stand extended about six inches into the pedestrian area of the buffet.

Campbell filed suit against the Holiday Inn[1] asserting claims sounding in negligence and premises liability. The circuit court granted summary disposition in Holiday Inn's favor, finding the tray stand's position open and obvious and that Campbell had not stated a negligence claim. We affirm.

I. FACTS AND PROCEEDINGS

Campbell and her friend, Peter Chapman, were regular guests at the Holiday Inn buffet. On the day she fell, Campbell finished her main course and returned to the buffet table area to choose a dessert. With a plate of cheesecake in one hand and a glass of juice in the other, she set out for the table where Chapman sat. At her deposition Campbell recounted,

[1] Defendant H.J. Larson, Inc. does business as the Holiday Inn of Marquette.

> As I was walking back, I felt something trip me. It caught my left lower leg and foot. And the next thing I knew I was flying in the air and went off in the air more onto my right side.

Campbell emphasized that she saw nothing in her path:

> *Q.* Was there anything on the floor in that pathway as you were walking back with the drink and the cheesecake?
>
> *A.* There wasn't anything on the floor, but what caught my leg and foot was a serving tray.
>
> *Q.* Did you see that serving tray as you were walking back to your table?
>
> *A.* I didn't see it, 'cause I was holding my food and it was underneath the eye level. I could see the chairs. I could see people. I could see the whole restaurant. But it was at the level – it was sticking out from the wall. I saw that after I landed.
>
> *Q.* . . . At any time after you felt your right foot contact something and before you landed on the floor, did you see a tray stand or tray table sticking out into the aisleway?
>
> *A.* No, I don't, but waitresses, you know, go back and forth with trays really quick. And I think it's there where they keep their trays, but it wasn't pushed back out of the way where pedestrians walk.
>
> *Q.* How do you know that?
>
> *A.* Because it was sticking out.
>
> *Q.* Did you see it sticking out at –
>
> *A.* I saw it sticking out.
>
> *Q.* – at any time before your right foot –
>
> *A.* No.
>
> *Q.* – made contact with it?
>
> *A.* No; no.

Chapman did not see Campbell fall. When he arrived at her side while she lay on the ground, he noticed "a folded tray that was sticking out of the walkway."

Holiday Inn sought summary disposition under MCR 2.116(C)(10), contending that "this is a premises liability action," and that the serving tray was open and obvious. Holiday Inn further asserted that it owed no duty to Campbell because it lacked notice that the tray stand

protruded from the wall. In response, Campbell argued that her negligence claim was not governed by the open and obvious danger doctrine and that genuine issues of fact precluded summary disposition of her premises liability claim.

The circuit court granted summary disposition, rejecting that Campbell's claim sounded in ordinary negligence and ruling "from an objective standard . . . the tray stand with the leg sticking out into the walkway is open and obvious." Campbell now appeals.

II. ANALYSIS

This Court reviews de novo the circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Holiday Inn's motion for summary disposition invoked MCR 2.116(C)(10), which tests a claim's factual support. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

Campbell first maintains that because her complaint set forth an actionable negligence count independent of her premises liability claim, the circuit court erred by applying the open and obvious danger doctrine. She insists that because her fall stemmed from a Holiday Inn employee's *conduct* in failing to safely store the tray stand, ordinary negligence principles govern her claim. Courts are not bound by the labels that parties attach to their claims. *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). Despite that a Holiday Inn employee created the condition that led to Campbell's fall, her claim arises from the physical state of the premises. The employee's conduct was negligent only because it created an unsafe condition in the restaurant, rendering this a premises liability action.

"In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land. However, that does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct . . . ." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). If the plaintiff suffers injury arising from a condition on the land rather than an activity conducted on the land, the claim sounds in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). "[T]his is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). Campbell's contention that she tripped on a misplaced tray stand plainly and directly emanates from the Holiday Inn's duty as the owner, possessor, or occupier of the property. As in *James*, the negligence allegation avers that Campbell suffered injury arising from a condition on the land, rather than an activity conducted on the land, and the claim thus sounds in premises liability. *Id*. at 18-19.

Campbell next contends that the tray stand could not have been open and obvious because neither she nor anyone else noticed that its legs protruded into the aisle until after her fall. This argument ignores that the standard for determining whether a danger is open and

obvious is an objective one. Viewed objectively, the legs of the tray stand were visible on casual inspection.

As the property owner in control of the premises, Holiday Inn owed Campbell, a business invitee, a duty to provide reasonably safe aisles and walkways. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Campbell was entitled to "'the highest level of protection'" imposed under premises liability law. *James*, 464 Mich at 20, quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The landowner's duty encompasses not only warning an invitee of any known dangers, "'but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards.'" *James*, 464 Mich at 19-20, quoting *Stitt*, 462 Mich at 597.

While a premises possessor generally must "exercise reasonable care to protect [an] invitee from an unreasonable risk of harm caused by a dangerous condition on the land," this duty "does not encompass a duty to protect an invitee from 'open and obvious' dangers. . . . To determine whether a condition is 'open and obvious,' . . . the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004) (citations omitted). The test of whether a danger is open and obvious hinges on the ability of an average user of ordinary intelligence to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

We conclude that viewed in the light most favorable to Campbell, no genuine issue of material fact exists concerning the visibility of the tray legs. Campbell saw the table clearly after she fell. She admitted that the reason she had not detected it sooner was that she was "holding food and it was underneath the eye level." These facts do not render the object objectively unnoticeable. Further, Chapman estimated that the tray stand's legs stuck out about six inches from the wall. Under these circumstances, the circuit court correctly concluded that the stand's location posed an open and obvious hazard.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra