NO. 23595

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

MARIE GOTTSCHALK, Plaintiff-Appellant, v.
ASSOCIATION OF APARTMENT OWNERS OF THE KONA BILLFISHER,
Defendant-Appellee

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 97-055K)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Foley, JJ.)

Plaintiff-Appellant Marie Gottschalk (Gottschalk) appeals the circuit court's[1] June 15, 2000 grant of summary judgment in favor of Defendant-Appellee Association of Apartment Owners of the Kona Billfisher (the Association). Specifically, Gottschalk challenges the court's May 3, 2000 "Order Granting Defendant Association of Apartment Owners of the Kona Billfisher's Motion for Summary Judgment" (May 3, 2000 Order). We vacate the June 15, 2000 judgment, reverse the May 3, 2000 Order, and remand for further proceedings consistent with this opinion.

BACKGROUND

On appellate review of the granting of summary judgment, all facts are viewed in the light most favorable to the

[1] Circuit Court Judge Ronald Ibarra presided in this case.

nonmoving party. Rodriguez v. Nishiki, 65 Haw. 430, 653 P.2d 1145 (1982), *reconsideration denied*, 65 Haw. 682 (1982). Viewed most favorably to Gottschalk, the relevant facts are as follows.

On Monday, September 18, 1995, at 3:00 p.m., Gottschalk was walking on a paved walkway owned, operated, and maintained by the Association. Without notice, water sprinklers in the area activated, saturating the walkway and causing the walkway to become slippery. Gottschalk, in answer to an interrogatory, stated that "[p]rior to [the] accident, I was unloading our vehicle and moving into [a] condo unit. While walking from the building to the parking lot, on pavers, the sprinklers went on and I slipped on the wet surface and fell." At the time, Gottschalk was accompanied by a couple who were walking in front of her. Upon falling, she "fractured [her] right ankle, necessitating surgery on two separate occasions[.]"

On March 25, 1997, Gottschalk filed a complaint alleging that she "was walking on a slippery walkway negligently owned, operated and maintained" by the Association and that the Association "negligently failed to warn [Gottschalk] of the slippery condition." She sought special and general damages plus attorney fees, costs, and pre-judgment and post-judgment Does, Doe Corporations and Partnerships, and Governmental Entities as

defendants. However, no additional parties were ever identified and served to be included as party defendants in the case.

On February 19, 1998, a notice of proposed dismissal was filed informing Gottschalk of her failure to file a pretrial statement within eight months after filing her complaint as required by the Rules of the Circuit Courts of the State of Hawai‘i, Rule 12(q). Gottschalk filed an objection to the notice on February 24, 1998, and an Order Withdrawing Notice of Proposed Dismissal was filed on March 2, 1998, on the condition that Gottschalk file her pretrial statement no later than April 2, 1998. When Gottschalk failed to file her pretrial statement by April 2, 1998, the court entered its Final Order of Dismissal on April 27, 1998. On April 30, 1998, Gottschalk moved to set aside the final order of dismissal. The court denied that motion on June 1, 1998. Then on June 9, 1998, Gottschalk filed a motion for reconsideration of the order denying her motion to set aside the April 27, 1998 dismissal. On July 21, 1998, the court set aside the April 27, 1998 dismissal and ordered Gottschalk to reimburse the Association's fees and costs in the amount of $517.99.

The case was then sent through the Court Annexed Arbitration Program. The arbitration hearing was held on October 28, 1998. On November 9, 1998, the arbitration award was

filed. On November 18, 1998, Gottschalk filed a notice of appeal and request for trial de novo.

On March 31, 2000, the Association filed a motion for summary judgment alleging that it did not have actual or constructive notice of any potentially dangerous conditions. In support, it submitted the affidavit of Tom Metz (Metz), the owner of Triad Management, Inc., stating that during his nine years as the account manager for the Association, "there have been no prior accidents at the same or similar area of the premise, or from the same or similar cause/s as cited by [Gottschalk] or suggested in this case."

On April 12, 2000, the Association filed a motion to dismiss Gottschalk's claims.

On April 17, 2000, Gottschalk filed her opposition to the motion for summary judgment in which she argued that "[t]he issue, therefore, is whether by turning the sprinkler system on during a time when the pathway was in use, [the Association] created a defect which foreseeably caused harm to [Gottschalk]."

On May 3, 2000, the court entered its order granting summary judgment in favor of the Association. On May 16, 2000, the court entered its order denying the Association's motion to dismiss Gottschalk's claims. Judgment was entered on June 15, 2000.

## STANDARD OF REVIEW

### A. Summary Judgment

> We review a circuit court's award of summary judgment *de novo* under the same standard applied by the circuit court. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted). As we have often articulated:
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> > [s]ummary judgment is appropriate if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
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> Id. (citation and internal quotation marks omitted); *see* Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c) (1990). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted).
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> Konno v. County of Hawai'i, 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997) (quoting Dunlea v. Dappen, 83 Hawai'i 28, 36, 924 P.2d 196, 204 (1996)) (brackets in original). "The evidence must be viewed in the light most favorable to the non-moving party." State ex rel. Bronster v. Yoshina, 84 Hawai'i 179, 186, 932 P.2d 316, 323 (1997) (citing Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)). In other words, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable [to the party opposing the motion]." Maguire, 79 Hawai'i at 112, 899 P.2d at 395 (citation omitted).
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> Morinoue v. Roy, 86 Haw. 76, 80, 947 P.2d 944, 948 (1997).

Estate of Doe v. Paul Revere Ins. Group, 86 Hawai'i 262, 269-70, 948 P.2d 1103, 1110-11 (1997).

## DISCUSSION

The general rule is that a landowner must have either actual or constructive notice of risks posed by potential hazards before it can be held liable for injuries occurring on the

property. *See* Corbett v. Association of Apartment Owners of Wailua Bayview Apartments, 70 Haw. 415, 772 P.2d 693 (1989); *reconsideration denied*, 70 Haw. 661, 796 P.2d 1004 (1989); *see also*, 62 Am. Jur. 2d *Premise Liability* §§ 29-31 (1990). Absent some statutory provision to the contrary, no presumption of negligence is created by the fact that a plaintiff is on the premises of the defendant at the time of the injury, and no presumption of negligence on the part of an owner or occupant arises merely upon a showing that an injury has been sustained by one rightfully on the premises. *See* Carlos v. MTL, Inc., 77 Hawai'i 269, 883 P.2d 691 (App. 1994).

An exception to this general rule, however, is that when the defect causing the injury was created by the defendant or by someone whose conduct the defendant is responsible for, notice of the defective condition is not required. *See* 62 Am. Jur. 2d *Premise Liability* § 39 (1990); *see also*, Merlo v. Zimmer, 231 A.D.2d 952 (N.Y. App. Div. 1996); Dulles v. Safeway Stores, Inc., 810 P.2d 627 (Az. App. 1991); Reed v. Wal-Mart Stores, Inc., 700 N.E.2d 212 (Ill. App. 1998). In this case, the defective condition is the wet surface of the walkway.

Viewing the assertions made by the parties in the light most favorable to Gottschalk, the water sprinklers which caused the paved walkway to become wet (a) were under the control of the Association, (b) were activated at 3:00 p.m. while Gottschalk was

walking on the paved walkway, and (c) caused the paved walkway to become dangerous to pedestrians. Therefore, actual or constructive notice to the Association of the defective condition was not required.

CONCLUSION

Accordingly, we vacate the circuit court's June 15, 2000 judgment, reverse the circuit court's May 3, 2000 "Order Granting Defendant Association of Apartment Owners of the Kona Billfisher's Motion for Summary Judgment," and remand this case for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai‘i, May 25, 2001.

On the briefs:

Michael R. Goodheart
for Plaintiff-Appellant.

Chief Judge

Paul T. Yamamura,
Lila B. Kanae, and
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for Defendant-Appellee.

Associate Judge

Associate Judge