STATE OF MICHIGAN

COURT OF APPEALS

CLIFFORD ANDERSON, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED August 1, 2006
v	No. 267107 Wayne Circuit Court
SINAI HOSPITAL OF GREATER DETROIT, d/b/a SINAI HOSPITAL, Defendant-Appellee/Cross-Appellant.	LC No. 04-424920-NO

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. Defendant cross appeals the trial court's decision to deny the motion on other grounds. We affirm in part and reverse in part.

At defendant hospital, plaintiff was seated in a chair near the labor and delivery room where his daughter was in labor. While seated in the chair, a large framed picture[1] fell on plaintiff's head, and the glass shattered. Security personnel heard the sound of breaking glass and came to plaintiff's aid. Although plaintiff initially declined medical treatment, he was bleeding from the head and was taken to the emergency room for treatment.

Plaintiff filed a complaint alleging negligence. Defendant moved for summary disposition, alleging that it did not owe a duty because a picture hanging on a wall was not a dangerous condition by itself. Moreover, photographs of the wall indicated that the chair had hit the wall, causing an indentation. Defendant further alleged that the condition was open and obvious, and there was no evidence that defendant had actual or constructive notice of an allegedly dangerous condition. Lastly, it was asserted that the doctrine of res ipsa loquitur did not apply because plaintiff could not establish that the instrumentality was in the exclusive control of defendant when defendant retained outside vendors to hang pictures on the premises.

[1] The dimensions for the picture were described as two feet by three feet.

Plaintiff alleged that factual issues precluded summary disposition. Plaintiff asserted that he did not bump the wall and cause the picture to fall. Rather, plaintiff's ex-wife testified that he was seated in the chair for some time before the picture fell. Plaintiff asserted that the open and obvious doctrine did not apply to the picture on the wall because he could not have anticipated that it would fall off and strike him on top of his head. It was further alleged that the doctrine of res ipsa loquitur applied particularly in light of the fact that defendant's employees did not preserve the clips utilized to hang the picture, but rather, destroyed that evidence.

The trial court denied the motion for summary disposition in part, holding that questions of fact existed regarding whether the picture constituted a dangerous condition and whether an average person of ordinary intelligence would have discovered the danger upon casual inspection. However, without addressing the destruction of evidence claim, the trial court granted the motion for summary disposition, concluding that plaintiff could not establish res ipsa loquitur because the event could have been caused by an agency or instrumentality beyond the exclusive control of defendant.

Appellate review of a summary disposition decision is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail do not satisfy the burden in opposing a motion for summary disposition. *Quinto, supra*. When reviewing a motion for summary disposition decision, we consider the evidence presented in the light most favorable to the nonmoving party. *DeBrow v Centry 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001).

To establish a prima facie case of negligence, the plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation, that includes cause in fact and legal or proximate cause; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6 n 6; 615 NW2d 17 (2000). Duty is any obligation owed to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). In determining whether a legal duty is imposed, the court must evaluate factors such as the relationship of the parties, the foreseeability of the harm, the degree of certainty of injury, the closeness of connection between the conduct and the injury, the burden on the defendant, the moral blame attached to the conduct, the policy of preventing future harm, the burdens and consequences of imposing a duty and liability for breach, and the nature of the risk presented. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004); *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). After concluding that a duty exists, the factfinder determines, in light of the facts of each individual case, if there was a breach of duty. *Murdock, supra* at 53-54.

Defendant alleges that the trial court erred in concluding that factual issues were presented regarding the open and obvious nature of the condition and whether the condition was apparent to an ordinary user on casual inspection. We affirm the trial court, albeit on other grounds. The application of the open and obvious doctrine is contingent upon the theory of liability at issue. A defendant may rely on the open and obvious doctrine in response to a premises liability claim for failure to warn. *Laier v Kitchen*, 266 Mich App 482, 489, 502; 702 NW2d 199 (2005). (Neff, J., Hoekstra, J., concurring in part). Although portions of the complaint at issue may sound in premises liability, plaintiff further alleged basic negligence for the hanging and maintenance of the picture. Accordingly, the trial court properly denied the motion for summary disposition claim based on the open and obvious doctrine in light of plaintiff's allegations of negligence.[2]

Accordingly, to maintain his cause of action, plaintiff must establish a duty owed by the defendant, a breach of the duty, causation, and damages. *Case, supra*. Based on the reviewable factors, we conclude that a legal duty exists between plaintiff and defendant. Defendant hospital services the community and invites patients as well as their families onto its premises. It is foreseeable that patrons of the hospital will be injured if precautions are not taken. Defendant chose to decorate its premises and, in doing so, hung pictures over an area designated for patron seating. Thus, it was foreseeable that if a picture above a seating area was not placed appropriately, it could fall and injure a visitor to the premises. Defendant was in a position to prevent future harm and bears the consequences of the nature of the risk presented. After reviewing the applicable circumstances, the factors weigh in favor of imposing a duty upon defendant who could have foreseen and prevented any alleged negligence. *Valcaniant, supra*; *Murdock, supra*.

With regard to the breach of a duty, the evidence viewed in the light most favorable to plaintiff presents a question for the trier of fact. *Murdock, supra*. Defendant alleged that it retained vendors to hang pictures in the hospital. Furthermore, defendant alleged that there was an indentation in the wall. However, in order to obtain summary disposition, defendant must make and support the motion for summary disposition. *Quinto, supra*. Defendant could not present any evidence that the picture at issue was hung by a vendor. Thus, defendant failed to prove that the picture was under the control of another entity, and consequently, the burden did not shift to plaintiff to demonstrate that defendant maintained exclusive control. Moreover, although there may have been an indentation in the wall, defendant failed to establish when the indentation occurred. Plaintiff testified that he was merely seated in the chair when the picture

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[2] The general rule is that a premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty does not extend to the removal of open and obvious dangers. *Id*. Open and obvious dangers are exempt from the rule because overriding public policy encourages people to take reasonable care for their own safety. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995). In this case, the factual scenario does not present a situation where a condition of the land itself presented an open and obvious condition. Rather, defendant added fixtures to its wall and chose to hang a picture over a seating area.

fell. Plaintiff's ex-wife corroborated that he was seated in the chair for a time before the picture fell. Viewing this evidence in the light most favorable to plaintiff, *DeBrow*, *supra*, summary disposition was improper because the issue of causation under these facts presents a question for the trier of fact. *Murdock*, *supra*.[3] Accordingly, the trial court erred in granting defendant's motion for summary disposition.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood

[3] Based on our conclusion that plaintiff may proceed on its negligence claim, we need not address the application of res ipsa loquitur. Moreover, we do not address the issue of destruction of evidence because the trial court did not rule on the issue.