STATE OF MICHIGAN

COURT OF APPEALS

SANDRA ELLIS,

Plaintiff-Appellee,

and

GORDON ELLIS,

Plaintiff,

v

JAMES HATCHEW,

Defendant-Appellant.

UNPUBLISHED
December 9, 2008

No. 279930
Mecosta Circuit Court
LC No. 05-016890-NO

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this premises liability case, defendant appeals as of right from a judgment entered in plaintiffs' favor following a jury trial. Plaintiff Sandra Ellis[1] was injured when she tripped on a metal grate that was located on the floor of defendant's garage just in front of a doorway leading into a breezeway that connected to the home. The jury found that defendant had been negligent and that plaintiff sustained past economic and noneconomic damages.[2] The jury also concluded that plaintiff had been 49 percent negligent.[3] Defendant's issues on appeal deal only with prejudgment decisions of the trial court including the trial court's denial of defendant's motion for summary disposition under MCR 2.116(C)(10), wherein he argued that the condition plaintiff tripped on was open and obvious and that because of plaintiff's intoxication her claim was barred

[1] References to "plaintiff" in the singular throughout this opinion refer to plaintiff Sandra Ellis.

[2] The jury did not award plaintiffs future damages and plaintiff Gordon Ellis was awarded no damages on his loss of consortium claim.

[3] The trial court accordingly reduced the judgment total by 49 percent.

pursuant to MCL 600.2955a(1).[4] When viewing the evidence in the light most favorable to plaintiff, plaintiff did not create a justiciable question of fact to negate the application of the open and obvious doctrine and thereby avoid defendant's motion for summary disposition. Therefore, we conclude that the trial court erred when it denied defendant's motion for summary disposition predicated on the open and obvious doctrine and reverse and remand for entry of judgment in favor of defendant.

Plaintiff and defendant are cousins and next-door neighbors. On July 31, 2004, at approximately 10:30 p.m., plaintiff was injured when she tripped on a metal grate that was located on the floor of defendant's garage. The metal grate was located in an opening separating the garage and a breezeway that led into defendant's home. The parties agree that the metal grate was approximately 2 feet x 14½ inches x 1½ inches and contained 21 rails that run from one side of the grate to the other. Defendant testified at his deposition that the purpose of the metal grate was for people to scrape dirt of their shoes before entering the home.

In the afternoon of July 31, 2004, plaintiffs were raking leaves at their home. Later that afternoon, plaintiff was going through some pictures that had belonged to her grandmother and found defendant's birth announcement. According to plaintiff, at approximately 8 or 9 p.m., she went to defendant's home to give him the birth announcement. Plaintiff testified that she talked with defendant, his mother, and his daughter Melissa in the driveway about the birth announcement. Plaintiff testified that she informed defendant and his brother William that she had a CD that contained pictures of their deceased father that they expressed an interest in seeing. Plaintiff left defendant's home. Around 10:30 p.m., according to plaintiff, she returned to defendant's home carrying the CD and two unopened cans of beer. Plaintiff admitted that prior to returning to defendant's home she had consumed beer that day but denied that the alcohol she consumed had any effect on her. Defendant believed that because plaintiff had beer cans in her hand, she had been drinking all day, but he admitted that he did not have any personal knowledge on which to base his assumption.

Plaintiff testified that when she returned to defendant's home, she went into his garage where he and other guests at defendant's home were located. According to plaintiff, the only light on in the garage was near defendant's workbench on the opposite side of the garage. There was enough light, she testified, that she could see the area where defendant and the others were standing, but she could not see everyone. She also stated that there was not enough light to see where one would place his or her feet when walking or the threshold leading from the garage into the breezeway. Defendant testified that his garage contained multiple overhead fluorescent lights that provided plenty of light. Defendant and Melissa testified that all of these lights were on in the garage at the time of plaintiff's trip and fall. They were certain all of the lights were on in the garage because the lights are all connected to a single switch and if one light is on, all of

[4] MCL 600.2955a(1), which provides an absolute defense to a negligence claim where the injured party had an impaired ability to function due to intoxication and was more than 50 percent at fault, is not implicated in this appeal.

the lights are on. Plaintiff admitted during her deposition that if the lights were on in the garage, she would have seen the metal grate.

According to plaintiff, after she had been at defendant's home for a few minutes, she asked Melissa and others if they wanted to see the CD. Plaintiff, Melissa, and William then decided to go into defendant's house to look at the pictures. Plaintiff followed behind Melissa. After Melissa had cleared the metal grate, plaintiff proceeded to step into the breezeway, but caught her foot on the metal grate. Plaintiff further testified that she immediately felt a crunch in her right knee and fell to the ground. Plaintiff stated that after she had fallen, Melissa and others came to her aid. Plaintiff did not know what she had tripped on. As a result of the fall, plaintiff sustained serious injuries to her right knee requiring multiple surgeries and physical therapy.

Plaintiff asserted that despite having visited defendant's home on previous occasions, she had no knowledge of the metal grate because she usually entered through the side door to the house. She clarified that "[t]he only time [she] went through that particular door was the night" of the accident.

After entertaining oral argument on defendant's motion for summary disposition where parties' arguments centered on the applicability of the open and obvious doctrine, the trial court concluded that a question of fact existed whether the open and obvious doctrine applied and denied defendant's motion for summary disposition under MCR 2.116(C)(10). Thereafter the matter proceeded to jury trial where plaintiff prevailed. Defendant now appeals as of right.

Defendant argues that the trial court erred when it denied his motion for summary disposition predicated on the argument that the grate was an open and obvious danger. "This Court reviews de novo the grant or denial of a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law." *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party is entitled to a judgment as a matter of law when viewing the evidence in the light most favorable to the nonmoving party, *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), and drawing all reasonable inferences in favor of the nonmovent, *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005), the court finds that no genuine issue of material fact exists. *Maiden*, *supra* at 120. This Court must "'consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party.'" *Morales v Auto Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998), quoting *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A party opposing a motion for summary disposition brought pursuant to MCR 2.116(C)(10) may not rest on mere allegations or denials in the pleadings, but must establish by admissible documentary evidence the existence of a disputed issue of fact. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001); MCR 2.116(G)(4) and (6).

It is undisputed that plaintiff was a licensee on defendant's property at the time of the accident. A premises owner has a duty to warn licensees of "any hidden dangers the owner knows or has reason to know if the licensee does not know or have reason to know of the dangers involved." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). However, the premises owner has no duty to inspect or takes steps to make the premises safe for the licensee. *Id.* Nor does a premises owner have an obligation to warn or safeguard a

licensee from open and obvious conditions on the land. *Pippen v Atallah*, 154 Mich App 136, 143; 626 NW2d 911 (2001). "The test to determine whether a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993) (alteration by *Joyce*).

Here, the raised metal grate at issue measured approximately 2 feet x 14½ inches x 1½ inches, was heavy in weight, and dark in color. At the time of the accident, it sat on a lighter concrete floor and was placed at the entrance area separating the garage and a breezeway that led into defendant's home. Given the size of the grate, its elevation from the garage floor, and the contrast between the color of the grate and the color of the floor, an average user of ordinary intelligence would likely have been able to discover the existence of the metal grate and the potential tripping hazard it posed on casual inspection. But, plaintiff argues that the metal grate was not open and obvious due to the lighting conditions in the garage at the time of the accident. Plaintiff testified in her deposition that the only light that was on in the garage was a single light back in a far corner. She stated that this solitary light did not light her path to the breezeway door. Conversely, defendant testified that the garage's overhead fluorescent lights were on at the time of the accident.

Under certain circumstances, this Court has found the existence of a factual dispute where lighting conditions obscured an otherwise open and obvious danger. See, e.g., *Abke v Vandenberg*, 239 Mich App 359, 362-363; 608 NW2d 73 (2000) (concluding that the trial court properly denied a motion for a directed verdict and judgment notwithstanding the verdict where there was conflicting evidence about whether the truck bay at issue was lighted such that it would have been open and obvious); *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992) (concluding that an interior loading dock that was obscured by the dark was not open and obvious as a matter of law). But here, even when viewing the evidence in the light most favorable to plaintiff, we cannot conclude that the dispute concerning the lighting in the garage renders the question whether the grate was open and obvious a factual one on the record presented to the trial court at the time of defendant's summary disposition motion.

At the motion for summary disposition, the deposition testimony of five witnesses was presented to the trial court. Defendant and his daughter Melissa, who were present at the time of the incident, testified that the overhead lights were on when plaintiff fell, and the grate was apparent. Plaintiff testified that a solitary light fixture was on, on the far side of the garage and she could not see where she was placing her feet when walking. Plaintiff admits that she was following Melissa through the doorway in question when her trip occurred and she does not know what she tripped on. She only learned of the grate after the fact. The deposition testimony of two other witnesses concerning the condition was presented to the trial court. The testimony was offered to show defendant's awareness of the grate trip hazard. However, each of those depositions, one by inference and one by observation support the conclusion that the condition was open and obvious. One of the deponents, Susan Szelag, testified that she tripped on the grate although she did not sustain any injuries. Szelag referenced the grate in her excited comments to defendant directly after tripping on the grate that established she actually saw the grate. We also refer to witness Tamara Chamberlain who testified that she tripped on the grate

as well. Chamberlain admitted however that she should have seen it, because she did so after she tripped. What is critically important about the testimony of these two witnesses is that their trips occurred under lighting circumstances as described by plaintiff—the garage was lit only by a light over the workbench.

At the motion for summary disposition, plaintiff was obligated to create a justiciable question of fact on whether the condition was open and obvious. Defendant, through photographic evidence and the testimony of defendant and his daughter displayed that the grate was open and obvious. The trial court in its oral opinion acknowledged from its review of the evidence presented that the condition was open and obvious to it, but was uncertain regarding if it could conclude that it was open and obvious as a matter of law on the record presented. Plaintiff, in opposition presented only her own testimony about the lighting condition that was similar to witnesses Szelag and Chamberlain. Plaintiff testified that she followed Melissa directly through the opening to the breezeway. She tripped, landing in the breezeway between the garage and the home and did not know on what she tripped. Because of her position in the breezeway, she never ascertained the condition. Also, her deposition shows that she was not watching the placement of her feet.

We have scoured the record and have found no other evidence presented by plaintiff to the trial court in opposition to defendant's motion for summary disposition. Therefore, at the time of the trial court's decision, the only evidence on whether the condition was open and obvious was that related by defendant, his daughter, and the two independent witnesses, Szelag and Chamberlain concerning the state of lighting under the circumstance as described by plaintiff. It was incumbent on plaintiff to present admissible evidence to counter the evidence presented by defendant on the subject. Plaintiff's denial fails in its foundational predicate for want of observation. Plaintiff provides only her own conclusory statements regarding the observability of the grate. She asserts that due to the lighting conditions in the garage an average user on casual inspection would not have been able to discover the existence of the grate simply because she did not. This subjective denial alone does not meet the requisite opposition evidence on a motion for summary disposition, when the other evidence submitted to the trial court is admissible and is objectively contrary. *Karbel, supra* at 97; MCR 2.116(G)(4) and (6). Because plaintiff failed in this regard, the trial court erred in denying defendant's motion for summary disposition.[5]

Because of our resolution of this issue, we need not address the two remaining evidentiary issues raised by defendant on appeal.

---

[5] Plaintiff's argument that the trial court properly denied defendant's motion for summary disposition because he initially denied the existence of the grate is not a basis to affirm the trial court. When deciding a motion for summary disposition, a trial court cannot make credibility determinations. *Burkhardt v Bailey,* 260 Mich App 636, 646-647; 680 NW2d 453 (2004).

We reverse and remand for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio