STATE OF MICHIGAN

COURT OF APPEALS

LIOM OXLEY,

Plaintiff-Appellant,

v

NORTHERN FOOT & ANKLE CENTERS, P.C.,

Defendant-Appellee.

UNPUBLISHED
October 14, 2021

No. 354911
Iosco Circuit Court
LC No. 19-001786-NI

Before: BECKERING, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

In this tort action, plaintiff Liom Oxley, appeals as of right the trial court's order granting defendant's, Northern Foot & Ankle Centers, P.C., motion for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). Plaintiff fell and injured himself while walking down a wooden handicap ramp outside defendant's building. Plaintiff sued defendant, asserting that the ramp was in a dangerous and defective condition, and he argues on appeal that the trial court erred in granting defendant's motion and dismissing his claim. For the reasons set forth herein, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On October 18, 2018, plaintiff, an older gentleman who is diabetic, fell and was injured while exiting defendant's building and walking down the buidling's handicap ramp after an appointment for a nail trim. Plaintiff filed a complaint in the trial court, alleging that his fall was due to defendant's failure to keep the ramp free from ice accumulation. Plaintiff asserted that his fall was caused by an invisible layer of ice that had formed on the ramp while he was in the building for his appointment.

During discovery, plaintiff testified at his deposition that he had been receiving treatment at defendant's office every two months for at least three or four years. He always walked up the same wooden ramp to access the entrance, which he chose over the staircase, and he had never had any prior problems on the ramp. Plaintiff recalled that the weather on the day of the incident was cold and brisk, but the road surfaces were fine when he drove to defendant's office, and they were fine when he left. Upon his arrival at approximately 9:00 a.m. on October 18, 2018, plaintiff used

his cane and successfully walked up the ramp to the entrance. Other than noting that the ramp needed repainting[1], he observed no other problems. It was not slippery, and there was no ice, snow, water, or anything else on the ramp.

Plaintiff waited for around 30 minutes to see the doctor, and his treatment lasted around 5 or 10 minutes. At around 9:40 a.m., plaintiff exited the building and walked down the ramp toward the parking lot. He observed a change in weather since he had arrived, as "[i]t had like moisture in the air." Using his cane in his right hand, as he always did, he walked halfway down the ramp without any problem. He did not hold onto either of the ramp's railings. Suddenly, his cane slipped forward and he fell, he believed onto his right knee. Plaintiff "couldn't believe that the ramp was slippery" and he did not see what caused his cane to slip. He claimed that the ramp was slippery, but he did not see anything slippery on it, and he did not know why it was slippery. He attempted to get up, but could not get any traction because his left leg kept slipping on the ramp. An individual who was either entering or exiting the building saw plaintiff and notified staff that he had fallen and needed help. Staff members loaded plaintiff into a wheelchair and brought him back into the office. Defendant's receptionist, Patricia Corinne Clement-Colombo, called an ambulance and plaintiff's wife. The ambulance crew used the ramp to access and remove plaintiff from the building on a stretcher. Plaintiff testified that as a result of the fall, he tore his right anterior cruciate ligament (ACL), which required surgery to repair.

Sheila Sue Indish, a medical assistant at defendant's office, was one of the staff members who helped plaintiff after he fell. Indish testified at her deposition that she used the ramp frequently because she helped patients out to their cars if they had issues walking. She never found the ramp slippery when helping patients up and down the ramp, and she did not know of anyone else having fallen on the ramp. She indicated that the paint had started to peel from the ramp due to salting and shoveling, but the wood boards were sound. She did not notice any slippery conditions on October 18, 2018, before plaintiff fell; she described it as a typical fall morning, and not misty. As she walked down the ramp toward plaintiff, she noted that it was not slippery until she got to the bottom, where she observed that it was a bit slippery because of frost. By the time the ambulance arrived, which did not take long, Indish saw that the ramp had been salted at the bottom, but she was not the person who salted it.

Colombo testified at her deposition that she typically arrived at the office between 7:45 and 8:00 a.m. She was tasked with checking the ramp and stairs every day before the office opened. She would sweep the ramp and stairs, apply salt if anything was slippery or the weather forecast called for it, and shovel if necessary. When doing this task, she would walk up and down the ramp to check it. Colombo recalled the morning of plaintiff's fall to be nice weather and not misty. She was shocked that plaintiff fell on the ramp because when she went out to check on it between 7:45 a.m. and 8:00 a.m., there was nothing on the ramp; there were no signs of any type of frost or wetness. She recalled plaintiff stating after his fall that the ramp was fine when he entered the office. She believed that Indish had salted the ramp after plaintiff fell. Colombo

[1] Evidence later came to light that the deck was stained, not painted, but the distinction is irrelevant.

checked the ramp again at 11:00 a.m., after plaintiff was taken to the hospital, and it was dry, top to bottom. She was not aware of any other person having slipped and fallen on the ramp.

Dr. Craig Pilichowski, the podiatrist who owned defendant's building, testified at his deposition that the building had one public entrance that was accessible by either stairs or a ramp, and there was a rear employee entrance as well. The stairs outside the public entrance consisted of four or five steps. According to Dr. Pilichowski, the ramp had to be repaired in 2013 after someone backed their car into it and damaged the railing. Dr. Pilichowski asked Phil Zarachowicz, who did maintenance at the building, to repair the ramp in compliance with local, state, and federal laws. Zarachowicz testified that he performed year-round general maintenance work for defendant in the years preceding plaintiff's fall, including grass cutting, spring and fall cleanup, plowing snow from defendant's driveway and salt spreading, hand shoveling and brushing the ramp, and salting if needed. He observed that the staff regularly salted the ramp as well. He did not recall the ramp having been hit by a car, but he did remember removing old carpet that was on it, power washing it, and applying two coats of a solid oil stain with a silica sand additive for antislip protection, which he estimated was in approximately 2014. Zarachowicz testified that the peeling conditions as shown in the photographs around the time of plaintiff's fall were likely due to the application of salt to the ramp that was then pounded into the deck by foot traffic.

Following discovery, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10). Defendant contended that the alleged accumulation of ice on the ramp was open and obvious, that it did not have actual or constructive notice of the sudden development of ice (in the form of frost) in time to tend to it, and that no special aspects existed, as the condition was effectively avoidable because plaintiff could have asked for help or used the stairs, and the hazard did not present a uniquely high risk of severe harm. Plaintiff objected to the motion. While he agreed that the ramp did not become slippery until he was in the office for his appointment, he claimed that the areas of the ramp where stain had peeled became slippery while he was in the office, and that the failure to re-stain the ramp with antislip silicate, in combination with the weather, caused his cane to slip. He also claimed the condition was effectively unavoidable because, while he used a few stairs in his home, he could not navigate the number of stairs or railing at defendant's office, and he did not know he could ask for help by defendant's staff. Following a hearing, at which the trial court observed photos of the ramp, one of which included plaintiff's own demarcation as to where his cane slipped and the trial court noted it was on a stained area, the trial court agreed with defendant and granted the motion. Plaintiff moved for reconsideration, which the trial court denied. He now appeals.

II. ANALYSIS

A. PREMISES LIABILITY

Plaintiff first argues that the trial court erred by granting defendant's motion for summary disposition in regard to his premises liability claim because the hazardous condition of the ramp was not open and obvious. According to plaintiff, there was no visible ice on the ramp and there was no way for him to know that the stain contained an antislip silicate, meaning that areas in which the stain had peeled away were more slippery. We conclude that the trial court did not err by granting defendant's motion because plaintiff failed to provide any evidence to create a genuine

question of material fact regarding defendant's actual or constructive notice of the hazardous condition regardless of the cause of the slippery condition of the ramp.

"This Court reviews de novo a trial court's decision to grant or deny summary disposition." *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, __ Mich App __, __; __ NW2d __ (2021) (Docket No. 351813); slip op at 3. A summary disposition motion brought pursuant to MCR 2.115(C)(10) tests the factual sufficiency of the claim. *Id*. "When reviewing an order granting summary disposition under MCR 2.116(C)(10), this Court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id*. (citation omitted). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted.) This Court also reviews the trial court's determination whether a duty exists de novo. *Id*.

"In a premises liability action, as in any negligence action, the plaintiff must establish the elements of negligence, being (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Id*. at __; slip op 4-5. "However, a claim of premises liability arises merely from the defendant's duty as an owner, possessor, or occupier of land." *Id*. at __; slip op 5 (quotation marks and citation omitted).

In this case, there is no dispute that plaintiff qualified as an invitee on defendant's premises. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000) (stating that "invitee status is commonly only afforded to persons entering upon the property of another for business purposes"). "The possessor of land owes the greatest duty to an invitee, being the duty to use reasonable care to protect the invitee from an unreasonable risk of harm posed by a dangerous condition on the premises." *Jeffrey-Moise*, __ Mich App at __; slip op at 5. Moreover, "the possessor of the premises breaches that duty of care when he or she knows or should know of a dangerous condition on the premises of which the invitee is unaware, and fails to fix, guard against, or warn the invitee of the defect." *Id*. As a result, "[t]he plaintiff must demonstrate that 'the premises possessor had actual or constructive notice of the dangerous condition at issue.' " *Id*. (quoting *Lowrey v LMPS & LMPJ*, Inc, 500 Mich 1, 8; 890 NW2d 344 (2016)).

In regard to a premises owner's notice of the dangerous condition that would result in liability, the Michigan Supreme Court explained that:

> The proprietor is liable for injury resulting from an unsafe condition caused by the active negligence of himself and his employees; and he is liable when the unsafe condition, otherwise caused, is known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have knowledge of it. [*Lowrey*, 500 Mich at 10 (quotation marks and citation omitted)].

In *Lowrey*, 500 Mich at 3-4, the plaintiff and her friends celebrated St. Patrick's Day at the defendant diner. The group used the diner's back stairs several times throughout the evening without any incident. *Id*. at 4. However, upon leaving, the plaintiff slipped on the fifth step from the bottom and fell forward, breaking one of her legs. *Id*. Plaintiff asserted that she slipped on a

wet step because her backside was wet immediately after she fell. *Id*. However, she admitted that she never saw any water on the stairs at any time during the night. *Id*. The plaintiff filed a complaint against the diner, alleging negligence. *Id*. The trial court granted the diner's motion for summary disposition, "holding that [the] plaintiff failed to raise a genuine issue of material fact regarding whether [the] defendant had actual or constructive knowledge of the condition of the stairs; alternatively, the court found the hazardous condition to be open and obvious." *Id*. This Court reversed, concluding that the diner failed to establish that it lacked notice of the hazardous condition, and that it could not invoke the "open and obvious" defense because it had not shown that a reasonable person would have discovered the hazard. *Id*. at 5.

The diner appealed this Court's decision to the Michigan Supreme Court, and the Court reversed, holding that the diner was entitled to summary disposition on the basis that the plaintiff failed to provide sufficient evidence that the diner had actual or constructive evidence of the hazardous condition. *Id*. at 11. According to the Supreme Court, "in order to show notice, [the] plaintiff had to demonstrate that [the] defendant knew about the alleged water on the stairs or should have known of it because of its character or the duration of its presence." *Id*. In regard to actual notice, the Court explained that the plaintiff never observed water on the stairs, the diner's manager testified that no one else reported water on the stairs that night, and the plaintiff's group of friends did not hear about anyone else having trouble with the stairs. *Id*. The plaintiff alleged that an unidentified employee saw her fall; however, the Court concluded that the employee's presence did not prove that he knew about the water on the stairs before the plaintiff fell. *Id*. Similarly, the Court held that the plaintiff also failed to demonstrate that the diner had constructive notice of the alleged water on the stairs. *Id*. Plaintiff's group had used the stairs several times throughout the evening without any incident, which supported the conclusion that the condition could not have existed for the entirety of the evening. *Id*. at 12. Moreover, the Court stated that the plaintiff failed to produce any evidence relating to the character of the condition because it was merely her assumption that there was water on the stairs because her pants were wet after she fell. *Id*. Ultimately, the Supreme Court held that the plaintiff "failed to support an essential element of her claim—[the] defendant's notice of the hazardous condition," and therefore the defendant was entitled to summary disposition. *Id*.

This case is similar to the situation presented in *Lowrey*. Here, receptionist Colombo testified that she checked the ramp at 8:00 a.m. on the morning that plaintiff fell to ensure that it was clear of debris and ice. It was. Plaintiff successfully traversed the ramp to access the building at approximately 9:00 a.m. He saw nothing wrong with the ramp, other than that it needed to be repainted. After his appointment, he walked halfway down the ramp with no problem until his cane slipped forward and he fell. Plaintiff did not know what caused him to fall, and he did not see anything slippery on the ramp. At his deposition he expressed a belief that the ramp was not ADA compliant because he could not see whether the surface was slippery due to the different colors caused by the chipping paint. On the other hand, medical assistant Indish testified that she observed white frost near the bottom of the ramp when she went to help plaintiff.

It is undisputed that the slippery condition of the ramp developed while plaintiff was in the office. And there is no evidence that defendant had either actual or constructive notice of the condition until plaintiff fell. Plaintiff testified that the ramp was fine when he came in at 9:00 a.m., that he saw the doctor at around 9:30 a.m., that his appointment lasted around 5 or 10 minutes, and that he left the office at around 9:40 a.m. He acknowledged that the weather had changed and

there was "moisture in the air" when he attempted to go back down the ramp. As a result, the frost or other slippery substance formed on the ramp within approximately 40 minutes. Plaintiff did not present any evidence that anyone reported any problems with the ramp within that timeframe.

Indeed, plaintiff himself reported that he saw nothing wrong with the ramp when he began descending, and he traveled halfway down the ramp without incident. Indish testified that she did not notice any slippery conditions that day, and that she did not see the frost until she went toward the bottom of the ramp to help plaintiff. Colombo testified that she was shocked that plaintiff had fallen because she checked the ramp that morning and it was clear. The weather report that plaintiff attached to his response to defendant's motion for summary disposition indicated that the temperature at 8:00 a.m. was 36 degrees and increased to 37 degrees at 9:54 a.m. There was no precipitation, although the humidity fluctuated between 76% and 85% (peaking at 85% at 8:18 a.m. and dropping to 76% at 9:54 a.m.). Colombo also reported that she checked the ramp at 11:00 a.m. after plaintiff went to the hospital and it was dry from "top to bottom." Therefore, the evidence does not suggest that defendant's staff had actual notice of the slippery condition of the ramp or that the condition was of such character or existed for a sufficient amount of time for a reasonable property owner to discover it. See *id*. at 11-12.

As for constructive notice, plaintiff revised his theory of the slippery condition from that set forth in his complaint, which was limited to the formation of ice on the ramp. After discovery, plaintiff asserted that his fall was caused by a combination of a change in weather and the fact that the stain with antislip silicate was peeling off the ramp, causing the unstained portions to become slippery. Plaintiff further alleged that defendant was aware the stain was peeling from the ramp, and because it contained antislip silicate, defendant should have known that the ramp would be hazardous in inclement weather.

However, this contention is not supported by the evidence. Dr. Pilichowski testified that when he purchased the building in 1998, the ramp was covered in indoor/outdoor carpeting. The carpeting was removed approximately one year later because it was difficult to keep clean. At that time, Dr. Pilichowski and Indish applied stain on the ramp to protect the wood. This stain did not contain any type of antislip silicate. The stain containing the silica sand was applied in 2013 or 2014. Indish stated that she used the ramp often to help patients back their cars, and she never had another patient slip and fall. Colombo also testified that no other patients had slipped or fallen on the ramp and that she had not received any complaints concerning the ramp. Plaintiff himself testified that he had been going to defendant's office every two months for three or four years, and he had never encountered an issue with the ramp. Zarachowicz, who applied the stain with silica sand, testified that although he believed that using stain with silica sand was a good idea, the ramp would not be unreasonably dangerous without it and the sand would not provide any extra protection from ice or snow. Dr. Pilichowski testified that no one other than plaintiff had fallen in the 24 years he had worked at the building.

Plaintiff provided an affidavit prepared by a building expert who opined that, because the stain with the antislip silicate began to peel away, the ramp likely became slippery, especially in autumn and winter weather, which caused an unreasonable risk of harm to pedestrian traffic. He also opined that this condition had existed for a long time. Nonetheless, plaintiff did not indicate that he slipped and fell on an area of the ramp in which the stain had peeled off. In his disposition, he showed that he fell on the right side of the ramp (while looking down the ramp toward the

parking lot) and the "X" he placed on the photo where his cane slipped was in an area with stain. Further, plaintiff did not provide any evidence establishing that the ramp was unreasonably dangerous without the stain. He successfully used the ramp for the last three or four years without incident, including on the morning that he slipped and fell. Moreover, the ramp had normal stain without the silicate sand from approximately 1999 until 2013, and deposition testimony did not indicate that any slip and falls occurred during this time. Indeed, any surface may become slippery when covered in ice or snow,[2] and even considering the evidence in a light most favorable to plaintiff, he failed to establish a genuine issue of material fact concerning whether defendant's staff knew that the ramp became slippery while plaintiff was in the office or that the slippery condition existed for such a time that they should have known of its existence. Because plaintiff failed to "support an essential element of [his] claim—defendant's notice of the hazardous condition," defendant was entitled to summary disposition. *Id*. at 12. Because we conclude that plaintiff failed to create a genuine issue of material fact as to the notice element of his claim, it is unnecessary to address the trial court's open and obvious ruling or plaintiff's related arguments. See *id*. at 12 n 3.

B. ORDINARY NEGLIGENCE

Plaintiff next argues that the trial court erred by failing to address his ordinary negligence claim. We disagree.

"Unlike a claim of premises liability, a claim of ordinary negligence is based on the underlying premise that a person has a duty to conform his or her conduct to an applicable standard of care when undertaking an activity." *Jeffrey-Moise*, __ Mich App at __; slip op at 4. Further, "Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land." *Id*. "Whether the gravamen of an action sounds in negligence or in premises liability is determined by considering the plaintiff's complaint as a whole, regardless of the labels attached to the allegations by the plaintiff." *Id*. In other words, "[w]here it is alleged that the plaintiff's injuries arose from a dangerous condition on the land, the claim is one of premises liability rather than one of ordinary negligence." *Id*.

In this case, reviewing plaintiff's complaint as a whole, we conclude that his complaint arises from premises liability and not ordinary negligence. He alleges that a condition on defendant's property—frost or moisture forming on the handicapped ramp in which the stain with antislip silicon sand was peeling—created a dangerous condition on the property that caused his cane to slip and he fell and became injured. "Because plaintiff's claim is based on defendant's

[2] This Court explained that in regard "to conditions involving the natural accumulation of ice and snow, our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). In addition, "Michigan courts have generally held that the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." *Id*. at 481.

duty as the possessor of the land on which [he] fell, and not upon defendant's ability to conform to a particular standard of care, [we] treat plaintiff's claim as one of premises liability." *Id*. Moreover, even though plaintiff alleges that the dangerous condition was created by defendant's failure to restain the ramp, such an "allegation does not transform a premises liability action into one of ordinary negligence." *Id*. Therefore, even by specifically considering plaintiff's ordinary negligence claim, the trial court properly granted defendant's motion for summary disposition because plaintiff's complaint sounded in premises liability. See *id*. See also *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 16; 930 NW2d 393 (2018) (holding that the trial court erred by allowing the plaintiff to proceed on an ordinary negligence theory because his allegation that the defendant created a dangerous condition one week before the incident by improperly stacking pallets that later fell on and injured the plaintiff sounded "squarely in premises liability").

C. OPEN AND OBVIOUS DOCTRINE

Finally, plaintiff asserted in his brief that Michigan's premises liability jurisprudence is broken, and that it should be revisited by this Court. But he also accurately conceded at oral argument that we are bound by existing precedent established by the Michigan Supreme Court, and thus, we are unable to grant him any relief. Moreover, because we conclude that defendant was entitled to summary disposition on the basis that plaintiff failed to establish the notice element of his premises liability claim, it is unnecessary for this Court to analyze the open and obvious doctrine.

Affirmed.

/s/ Jane M. Beckering
/s/ Brock A. Swartzle