STATE OF MICHIGAN

COURT OF APPEALS

CONNIE NAGEL,

Plaintiff-Appellant,

v

OLD SHILLELAGH, INC.,

Defendant-Appellee.

UNPUBLISHED
January 13, 2022

No. 355669
Wayne Circuit Court
LC No. 19-009366-CZ

Before: BOONSTRA, P.J., and CAVANAGH and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On August 22, 2018, plaintiff slipped on a lemon wedge on the floor of defendant's bar. Claiming that the resulting fall caused her injury, plaintiff filed suit against defendant on a premises liability theory. She asserted that she did not notice the lemon wedge before she fell because of the dim lighting in the bar. According to an affidavit from plaintiff, she immediately informed defendant's manager of the incident and requested that the manager preserve video surveillance from that night.[1] Plaintiff also stated in her affidavit that she observed no effort by defendant's employees to clean spills in the bar after her fall, that she saw several people slipping on spilled drinks after her fall, and that she observed that the lemon wedge on which she had slipped was still on the floor for "a while" after her fall.

[1] Plaintiff's affidavit is actually much more ambiguous and unclear than the generous (to plaintiff) interpretation we have given it; it states: "After my fall I immediately requested to speak to a manager, and requested that I filled out an incident report as well as request that the manager preserve the video surveillance of that night."

During the discovery period, plaintiff filed a motion to compel discovery responses from defendant, asserting that defendant had been unresponsive to plaintiff's requests. The trial court ordered defendant to respond to plaintiff's discovery requests. In answering plaintiff's interrogatories, defendant stated in relevant part that it was attempting to recover surveillance footage from the night plaintiff fell. Plaintiff subsequently filed a second motion to compel discovery responses from defendant, stating that defendant had failed to provide the surveillance footage. Defendant responded that it did not have any footage of the incident because there had been no written request to preserve the footage, and the footage from the night in question had been recorded over.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had failed to establish that defendant had notice of the danger posed by the lemon wedge. In response, plaintiff argued that her affidavit established a question of fact as to whether defendant had notice of the lemon wedge. Plaintiff also argued that the trial court should sanction defendant for spoliation of evidence and, when deciding defendant's motion for summary disposition, infer that the missing surveillance footage would have been adverse to defendant's position. The trial court declined to apply such a sanction, stating that it could not consider spoliation sanctions at the summary disposition hearing and that it could only consider the fact there was no footage of the incident. The trial court held that plaintiff had failed to establish a genuine issue of material fact as to whether defendant had notice of the danger posed by the lemon wedge, and granted defendant's motion.

This appeal followed.

II. DISCOVERY SANCTION

Plaintiff argues that the trial court erred by not applying an adverse inference against defendant at the summary disposition stage as a sanction for failing to preserve evidence. We disagree. This Court reviews for an abuse of discretion a trial court's exercise of an inherent power, such as the decision whether "to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation has commenced." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 24; 930 NW2d 393 (2018) (quotation marks and citation omitted).

Spoliation may occur when a party fails to preserve relevant evidence once the possibility of litigation arises, regardless of whether the evidence is missing as a result of a deliberate act or simple negligence. *Brenner*, 226 Mich App at 160. If "the other party is unfairly prejudiced because it is unable to challenge or respond to the evidence" because of spoliation, a trial court has the inherent authority to make rulings as necessary to promote fairness and justice, and it "properly exercises its discretion when it carefully fashions a sanction that denies the [culpable] party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Id*. at 160-161. One such sanction is to instruct a jury that it may infer that the missing evidence was adverse to the party that failed to preserve it. *Pugno*, 326 Mich at 24; *Brenner*, 226 Mich App at 161. An adverse inference may be appropriate where a party failed to preserve relevant evidence once the possibility of litigation arose, even if that party did not destroy or lose the evidence. *Brenner*, 226 Mich App at 161-162. An adverse inference instruction,

however, is appropriate only when "(1) the evidence was under the [culpable] party's control and could have been produced; (2) the [culpable] party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party." *Pugno*, 326 Mich at 24.

The trial court did not err by refusing to apply an adverse inference against defendant as a sanction when considering defendant's motion for summary disposition. We note that there is no evidence that the surveillance footage from the night in question was material to plaintiff's case, i.e., it is unknown whether it even captured plaintiff's fall, demonstrated the lighting conditions of the bar, or otherwise might have aided the factfinder in determining the issue of liability. *Pugno*, 326 Mich at 24. It is therefore unclear, and plaintiff does not adequately explain, what the trial court should have inferred from the lack of footage. Although plaintiff argues that the trial court could have inferred that the footage would have established a genuine issue of material fact regarding defendant's notice of the alleged hazard, her argument is based on pure speculation.

More importantly, even if the trial court could have appropriately provided an adverse inference instruction to a *jury* in this case, neither this Court nor our Supreme Court has held that a trial court may apply an adverse inference as a spoliation sanction *at the summary disposition stage*. At this stage of the proceedings, the trial court is already required to consider the evidence in the light most favorable to the nonmoving party. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). Therefore, even if plaintiff were entitled to an adverse inference, it is unclear how this would have altered the trial court's analysis. The effect of the inference likely would have been merely to duplicate the trial court's duty to draw inferences in plaintiff's favor at the summary disposition stage. Moreover, to survive summary disposition, plaintiff was required to establish a genuine issue of material fact with documentary evidence. MCR 2.116(G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Plaintiff has not presented this court with any binding authority indicating that an adverse inference is sufficient, by itself, to support a party's position at the summary disposition stage.

Because the application of an adverse inference at the summary disposition stage is not explicitly recognized in Michigan law, the trial court did not exceed "the range of principled outcomes" by refusing to consider a spoliation sanction at the summary disposition stage and, therefore, did not abuse its discretion. See *Pugno*, 326 Mich App at 24.

III. SUMMARY DISPOSITION

Plaintiff also argues that the trial court erred by granting summary disposition in favor of defendant, because her affidavit established a question of fact as to whether defendant had notice of the danger posed by the lemon wedge. We disagree. This Court reviews "de novo a trial court's decision on a motion for summary disposition." *El-Khalil*, 504 Mich at 159. A trial court may only grant summary disposition under MCR 2.116(C)(10) if, "consider[ing] all evidence submitted by the parties in the light most favorable to the party opposing the motion," there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 160; MCR 2.116(C)(10). The moving party may satisfy its burden under MCR 2.116(C)(10) by submitting affirmative evidence negating an essential element of the nonmoving party's claim or by demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of its claim. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016). Then,

if the nonmoving party bears "the burden of proof at trial on a dispositive issue," it "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id*.; MCR 2.116(G)(4). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 159 (quotation marks and citation omitted). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Lowrey*, 500 Mich at 7.

A premises possessor generally owes invitees a duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land."[2] *Banks*, 477 Mich at 983. This duty of care to invitees arises when a premises possessor has actual or constructive notice of a dangerous condition on its premises, and the plaintiff bears the burden of proving notice. *Lowrey*, 500 Mich at 8. Actual notice exists when an unsafe condition is known to the premises possessor and constructive notice exists when the condition "is of such a character or has existed a sufficient length of time that [the premises possessor] should have knowledge of it." *Id*. at 10. A premises possessor breaches its duty of care to invitees when it had notice of the dangerous condition "of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Lowrey*, 500 Mich at 8 (quotation marks and citation omitted).

In this case, plaintiff failed to present any evidence establishing that defendant had actual notice of the dangerous condition posed by the lemon wedge. Plaintiff informed defendant's employees of the lemon wedge *after* she slipped on it, but she did not present evidence that any of the employees were aware of the lemon wedge *before* her fall. Moreover, although knowledge of a dangerous condition may be imputed to the premises possessor when the premises possessor created the condition, *Pippin v Atallah*, 245 Mich App 136, 145 n 2; 626 NW2d 911 (2001), plaintiff provided no evidence to show that defendant's employees caused the lemon wedge to be on the floor. The evidence plaintiff offered did not create a genuine issue of material fact regarding whether defendant had actual notice of the lemon wedge. *Lowrey*, 500 Mich at 10.

Plaintiff also failed to establish a genuine issue of material fact regarding whether defendant had constructive notice of the dangerous condition posed by the lemon wedge. "Constructive notice may arise not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Banks*, 477 Mich at 983. "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact," *id*. at 984; however, our Supreme Court has held that failure to present evidence as to when a dangerous condition arose weighs against a defendant having constructive notice of the condition, *Lowrey*, 500 Mich at 12.

In this case, plaintiff presented no evidence indicating how long the lemon wedge was on the floor before her fall. Rather, plaintiff appears to argue the trial court could have inferred that the lemon wedge was on the floor long enough for defendant to have constructive notice of it because it was still on the floor for some time *after* her fall. Plaintiff's argument is unpersuasive;

[2] Neither party disputes that plaintiff was an invitee of defendant at the time of the incident.

the relevant time period was *before* the fall, and the appropriate question is how long the condition existed *before* the fall, not how long it took defendant to remedy the condition *after* being informed of it. See, e.g., *Clark v Kmart Corp*, 465 Mich 416, 420-421; 634 NW2d 347 (2001) (holding that the jury properly inferred that spilled grapes had been on the floor for a sufficient period of time for the defendant to have constructive knowledge of their existence because the facts indicated that the grapes had been on the ground for at least an hour *before* the plaintiff slipped on them). Similarly, plaintiff's statement that she observed people slipping on spilled drinks after her fall does not aid her argument. Without more, the trial court would have had to speculate that those conditions existed for some period of time before her fall. Such speculation is insufficient to defeat summary disposition under MCR 2.116(C)(10). See *Quinto v Cross and Peters Co*, 451 Mich 358, 371-372; 547 NW2d 358 (1996) (stating a plaintiff cannot establish a question of fact with an affidavit that contains mere conclusory allegations that are devoid of detail); *Bennett v Detroit Police Chief*, 274 Mich App 307, 319; 732 NW2d 164 (2006) (stating that conjecture or speculation cannot establish a genuine issue of material fact); *Berryman v K Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992) (stating that inferences are only appropriate if sufficient evidence takes them out of the realm of conjecture).

Plaintiff additionally argues that defendant would have discovered the lemon wedge if it had properly inspected its premises. Our Supreme Court has stated that a defendant need not "present evidence of a routine or reasonable inspection under the instant circumstances to prove a premises owner's lack of constructive notice of a dangerous condition on its property." *Lowrey*, 500 Mich at 10. Moreover, the mere fact that plaintiff did not observe employees cleaning the bar does not establish that the lemon wedge was on the floor for a sufficient period of time for defendant to be charged with constructive notice of it. See *Serinto v Borman Food Stores*, 380 Mich 637, 643-644; 158 NW2d 485 (1968) (holding that the plaintiff's testimony that she heard no sound resembling a jar breaking while she was in a store could not justify an inference that a broken mayonnaise jar was on the floor before she entered). Plaintiff failed to establish a genuine issue of material fact regarding defendant's constructive notice of the lemon wedge. See *Banks*, 477 Mich at 983.

Viewing the evidence in the light most favorable to her, plaintiff failed to set forth specific facts to establish a genuine issue of material fact regarding defendant's actual or constructive notice of the lemon wedge. *El-Khalil*, 504 Mich at 159; *Lowrey*, 500 Mich at 7. Because plaintiff failed to meet her burden of establishing a genuine issue of fact regarding an essential element of her claim, the trial court properly granted summary disposition in favor of defendant. *Lowrey*, 500 Mich at 7.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael J. Riordan