STATE OF MICHIGAN

COURT OF APPEALS

PAMELA MONROE,

Plaintiff-Appellant,

v

ROBERT MONROE,

Defendant-Appellee.

UNPUBLISHED
January 13, 2022

No. 356818
Monroe Circuit Court
LC No. 19-142519-NO

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

Plaintiff slipped and fell in defendant's (her father-in-law's) garage; she is married to Mark Monroe (Mark), defendant's son. Plaintiff and Mark had previously lived with defendant and his wife in the home where plaintiff's injury occurred. But they moved out well before this incident, while continuing to regularly visit the house.

On the day of plaintiff's injury, she and Mark arrived at defendant's home around noon, intending to allow their dog to play in defendant's yard. Upon arriving, plaintiff went into defendant's garage to get a chair. While walking across the garage floor, plaintiff slipped and fell. Plaintiff testified at her deposition that she slipped on a pile of wet leaves. At the time, the garage floor was visibly damp and covered with leaves and other debris. Both plaintiff and Mark testified

that they were aware of these conditions before plaintiff's fall. However, plaintiff argued that there was slippery mud[1] and a stray glove concealed beneath the leaves that contributed to her fall.

After falling, plaintiff complained of pain in her foot, and Mark took her to the emergency room. Plaintiff ultimately required two ankle surgeries to treat this injury, and she testified to suffering pain even after recovering from those treatments.

On October 21, 2019, plaintiff filed a premises liability action against defendant, alleging that defendant was responsible for the hazardous condition and that he was liable for her injuries. Plaintiff further alleged that she was an invitee on defendant's property at the time she injured her foot and that defendant had breached his duties to her as the landowner. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that the alleged hazardous condition (the damp leaves) was open and obvious as a matter of law. In her response to this motion, plaintiff argued that the condition was not open and obvious because the slippery mud was obscured by leaves and, therefore, was not observable on casual inspection.

After a hearing on defendant's motion, the trial court agreed with defendant, concluding that the condition was open and obvious as a matter of law. The trial court stressed plaintiff's familiarity with the premises and her awareness of the condition of the garage floor (in particular, the damp ground and scattered leaves and debris) before her fall. It also reasoned that numerous unpublished cases from this Court cited by defendant were factually similar to plaintiff's circumstances, and were therefore persuasive in the present case, while an unpublished case cited by plaintiff was factually distinguishable. Accordingly, the trial court granted defendant's motion for summary disposition. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(10) "tests the *factual sufficiency* of a claim." *Id*. at 160. Courts must consider all evidence in a light most favorable to the nonmoving party. *Id*. The motion may only be granted when there is no genuine issue of material fact. *Id*. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018).

A moving party satisfies its burden under MCR 2.116(C)(10) by either "submit[ting] affirmative evidence that negates an essential element of the nonmoving party's claim[] or by demonstrat[ing] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (quotation marks and citation omitted). Once this initial burden is met, the nonmovant must "set forth specific facts showing that a genuine issue of material fact exists" and "may not rely on mere allegations or denials in the pleadings." *Id*. (citation omitted). "If the

[1] While plaintiff testified at her deposition, and alleged in her complaint, that she had slipped on ice concealed beneath the leaves, she argued in response to defendant's motion for summary disposition—and argues now on appeal—that the hidden condition was slippery mud.

opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id*. (citation omitted). We review de novo issues of law. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008).

III. ANALYSIS

Plaintiff argues that the trial court erred by finding that the subject condition was open and obvious. We disagree.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013).

As an invited guest on defendant's property visiting for a social purpose (given that plaintiff and Mark were visiting the home to allow their dog to play in defendant's yard), plaintiff was a licensee at the time of her fall.[2] See *Kelsey v Lint*, 322 Mich App 364, 371; 912 NW2d 862 (2017) ("[A] 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent.").

> A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).]

Landowners need not warn licensees of dangerous conditions that are "open and obvious." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012); see also *Stopczynski v Woodcox*, 258 Mich App 226, 229, 234; 671 NW2d 119 (2003) (granting summary disposition to the defendant when the plaintiff-licensee was injured on an open and obvious hazard). "[S]uch dangers, by their nature, apprise [a licensee] of the potential hazard, which the [licensee] may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 461. A condition is considered open and obvious if, objectively, "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*.

Plaintiff argues that the condition that allegedly caused her fall—slippery mud--was not open and obvious because there was no evidence to suggest that an average person of ordinary intelligence would have discovered the mud, which was hidden beneath leaves, on casual inspection. Plaintiff notes that defendant could not see the mud before plaintiff's fall and that Mark also only discovered the mud after plaintiff had fallen and disturbed the leaves; and she also points out that all three individuals present at the time of the incident testified that no mud was visible before plaintiff's fall. Plaintiff also asserts that the trial court erred by considering

[2] In the proceedings below, the parties disputed whether plaintiff was an invitee or a licensee. Nevertheless, plaintiff concedes that this determination does not affect the issue on appeal, because the open and obvious doctrine applies to both equally.

plaintiff's familiarity with the premises and by suggesting that she should have taken additional steps beyond casual observation to discover the hazard. Plaintiff also attempts to distinguish this Court's prior holding that black ice can be an open and obvious hazard despite the ice itself not being objectively observable. See, e.g., *Slaughter*, 281 Mich App at 481 ("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."). Relying on *Bialick v Megan Mary, Inc*, 286 Mich App 359; 780 NW2d 599 (2009), plaintiff argues that this Court has explicitly rejected expanding the reasoning of its black ice cases outside the context of winter weather.

Additionally, plaintiff argues that this Court's unpublished opinion[3] in *Atlas v Michigan Commercial Real Estate LLC*, unpublished per curiam opinion of the Court of Appeals, issued July 24, 2018 (Docket No. 339988), which held that a 12-inch hole in a parking lot (which by itself would have been observable upon casual inspection) was not open and obvious when it was obscured by leaves. Plaintiff also relies on *Blackwell v Franchi*, 318 Mich App 573, 577-579; 899 NW2d 415 (2017), which held that an otherwise observable step inside the defendant's home was not open and obvious when it was obscured by darkness.

In response, defendant points to several unpublished opinions of this Court holding that the danger of slipping on wet leaves or tripping on a hazard obscured by leaves was open and obvious. See *Clogg v Jnl Ventures*, unpublished per curiam opinion of the Court of Appeals, issued February 16, 2012 (Docket No. 303197) (concluding that a leaf-covered sidewalk on which the plaintiff tripped was an open and obvious hazard); *Williams v Holiday Venture Apartments*, unpublished per curiam opinion of the Court of Appeals, issued March 1, 2011 (Docket No. 296051) (concluding that a leaf-obscured hazard was nevertheless open and obvious); *Haden v Walden Pond Condo Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2004 (Docket No. 249476) (concluding that "[t]he potential danger posed from slipping on . . . leaves or tripping over something hidden under the leaves was open and obvious upon casual observation").

We agree with defendant and the trial court and conclude that the visibly damp floor and presence of scattered leaves and debris rendered the condition open and obvious as a matter of law. Unlike the condition in *Blackwell*, 318 Mich App at 575-579, there was no conflicting testimony regarding whether the hazard was visible or obscured by darkness; rather, all parties testified that damp leaves were clearly visible on the garage floor before plaintiff's fall, although no party specifically testified to seeing mud under the leaves. And unlike the hazard in *Bialick*, 286 Mich App at 360, the trial court in this case did not conclude that the outside weather conditions affected the open and obvious nature of an indoor hazard. *Id*. at 364. And the alleged hazard in this case is substantially differed from the 12-inch hole obscured by leaves in *Atlas*, unpub op at 1, 6. In fact, this Court stated in *Atlas*, in response to the defendant's argument that hazards hidden beneath leaves are always open and obvious:

[3] "Unpublished opinions are . . . not binding authority but may be persuasive or instructive." *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5, 957 NW2d 858 (2020).

> *while leaves may pose some obvious hazards, such as slipping on the leaves themselves or tripping on slightly uneven ground beneath the leaves*, the danger of stepping into a 12-inch deep hole on what otherwise appears to be relatively level ground scattered with leaves is not open and obvious. [*Id*. at 5 n 4. (Emphasis added).]

Here, plaintiff simply slipped on wet leaves, or the wet dirt beneath them, on a garage floor in February. Michigan residents are undoubtedly aware that damp, leaf-covered walking surfaces are frequently a commonplace occurrence. Casual observation would have alerted the average individual of the potential danger of slipping on the leaves or tripping over something hidden under the leaves.

The factual similarity of *Clogg*, *Williams*, and *Haden*, and this Court's decisions in those cases, bolster our conclusion. The leaves alone should have alerted a reasonable person that some danger could be hidden beneath. We are also unpersuaded by plaintiff's reliance on *Bialick*, 286 Mich App at 360-364. While *Bialick* did stress that the open and obvious inquiry must be limited to the objective nature of the condition of the premises at issue, it made no mention whatsoever of this Court's wintry-conditions precedent. *Id*. at 364. We read *Bialick* as holding merely that *an indoor condition* cannot be found open and obvious by virtue of weather conditions *outside the premises*. See *id*. The case does not, however, preclude reasoning that certain conditions, like snow or leaves, by their nature apprise ordinary individuals that certain dangers may be hidden beneath, whether they are found indoors or outdoors.

It is undisputed that the garage floor was visibly damp and covered with leaves and other debris when plaintiff fell. Those conditions should have alerted plaintiff to the potential danger of slipping on the leaves. *Hoffner*, 492 Mich at 461. Specifically, the damp and dirty ground would alert the average person of ordinary intelligence that either water or mud could be hidden under the leaves. And the damp ground, debris, and leaves were all visible upon casual inspection. *Id*. The trial court did not err by granting defendant's motion for summary disposition. *El-Khalil*, 504 Mich at 159.

Affirmed.

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