STATE OF MICHIGAN

COURT OF APPEALS

DONALD WILCOX,

Plaintiff-Appellant,

v

BRETT GRIFFIS SR., PAM GRIFFIS, BRETT GRIFFIS JR., and DAVID S. WORDEN, d/b/a DAVID S. WORDEN BUILDING & MASONRY,

Defendants-Appellees,

UNPUBLISHED
October 11, 2007

Nos. 268341 & 270928
Roscommon Circuit Court
LC No. 04-724592-NO

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right the directed verdict in favor of defendants. Plaintiff also appeals as of right from the order awarding attorney fees and costs to defendants. We affirm in part and reverse in part.

This case arose after plaintiff fell from a ladder and sustained serious injuries while working for defendants Brett Griffis Sr. and Pam Griffis at their home. At the time of plaintiff's fall, the only people in the house other than plaintiff were defendants David Worden and Brett Griffis Jr. Brett Sr. and Pam Griffis hired Worden to install hardwood flooring in the house. Brett Jr. was helping Worden in order to learn how to install flooring. Both Brett Sr. and Pam Griffis were not at or near the house when the accident occurred.

Contrary to defendants' theory that plaintiff simply lost his balance and fell, plaintiff testified that either Worden, Brett Jr., or both placed plastic sheeting underneath the ladder, causing the ladder to slip out from under plaintiff. Plaintiff testified that the ladder initially had no plastic underneath it before he left the area to finish priming an upstairs bedroom. While upstairs, plaintiff did not see or hear anyone move the ladder. He eventually returned to descend the ladder from the second floor, but he did not look down. Once on the ladder, plaintiff testified that it began to slip, and upon looking down, he noticed the plastic sheeting. Unable to steady the ladder, plaintiff fell and suffered serious injury.

Plaintiff brought a premises liability action against Brett Sr. and Pam Griffis and an ordinary negligence action against Brett Jr. and Worden. After plaintiff closed his proofs at trial and pursuant to defendants' motions for directed verdict on all counts, the trial court granted a directed verdict in favor of defendants. The court found insufficient evidence to sustain a claim

of negligence against Brett Jr. and Worden, and, with regard to the premises liability claim, found the plastic sheeting to be open and obvious. Following trial, defendants moved for sanctions under MCL 600.2591, and the trial court awarded costs and attorney fees for defendants. These appeals followed.

Plaintiff first argues that the trial court incorrectly applied the open and obvious doctrine. Plaintiff contends he had no reason to look down before climbing his ladder because there was no plastic underneath the ladder 15 to 20 minutes before and he assumed conditions would remain the same. We disagree. A trial court's decision concerning a motion for a directed verdict is reviewed de novo. *Tobin v Providence Hosp*, 244 Mich App 626, 642; 624 NW2d 548 (2001). "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 428; 711 NW2d 421 (2006). The evidence is viewed in the light most favorable to the non-moving party, making all reasonable inferences in favor of the non-moving party. *Tobin*, *supra* at 643.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). A premise owner owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty does not extend to dangers that are open and obvious unless there are special aspects of the condition that make it unavoidable or give rise to a uniquely high likelihood of harm, rendering the condition unreasonably dangerous.[1] *Corey v Davenport College of Business*, 251 Mich App 1, 2-4; 649 NW2d 392 (2002). Whether a condition is open and obvious depends on whether it is reasonable to expect a person of ordinary intelligence to discover the danger upon casual inspection. *Weakley v Dearborn Hgts*, 240 Mich App 382, 385; 612 NW2d 428 (2000).

Even viewing the evidence in light most favorable to the plaintiff, we conclude that a reasonable person would have discovered the condition upon casual inspection. Plaintiff stresses that he had no reason to look down because he assumed conditions would be the same as they were 15-20 minutes before. However, this Court should focus on the objective nature of the condition of the premises at issue, rather than the subjective degree of care used by the plaintiff. *Lugo*, *supra* at 523-524. Plaintiff admits that had he looked down before stepping onto the ladder, he would have seen the plastic underneath the ladder. A casual inspection would have, at the least, involved a glance toward the foundation of the ladder, especially when plaintiff acknowledged the possibility for serious injury if the ladder was not properly grounded. The danger was not hidden, but in plain sight. Plaintiff should have discovered the plastic underneath the ladder upon casual inspection, and therefore the condition was open and obvious.

Next, plaintiff argues that the trial court erroneously concluded that plaintiff could not establish who placed the plastic underneath the ladder. Plaintiff contends that a prima facie case

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[1] Plaintiff does not allege any special aspects of the condition that give rise to a uniquely high likelihood of harm.

of negligence can be established by legitimate inferences if there is sufficient evidence to take the inferences out of the realm of conjecture. To that end, plaintiff maintains that sufficient evidence was presented to show either Worden or Brett Jr. placed the plastic underneath the ladder and that the Court should allow the jury to judge a credibility contest between the defendants. We disagree.

"'A prima facie case of negligence may be established by use of legitimate inferences, as long as sufficient evidence is introduced to take the inferences out of the realm of conjecture.'" *Berryman v Kmart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), quoting *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983). "'"The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result."'" *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994) (Citations omitted). "[I]f there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such determination, notwithstanding the existence of other plausible theories with or without support in the evidence." *Kaminski v Grand Trunk R*, 347 Mich 417, 422; 79 NW2d 899 (1956) (Citation omitted). However, where there are two or more plausible explanations as to how an event happened and the evidence is without selective application to any one of them, they remain conjectures. *Id.*

Viewed in the light most favorable to the plaintiff, there is insufficient evidence to present a prima facie case of negligence to the jury. Plaintiff's testimony concludes that someone put plastic underneath the ladder and that Brett Jr. and Worden were the only other individuals in the house at the time of the accident. The evidence suggests three theories: 1) Worden moved the plastic underneath the ladder; 2) Brett Jr. moved the plastic underneath the ladder; or 3) both Worden and Brett Jr. moved the plastic underneath the ladder. Plaintiff testified he did not know who moved the plastic. The evidence is not selective toward any theory of causation and each theory remains only a possibility. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. "We cannot permit the jury to guess[.]" *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957). Where the cause is one of conjecture, it is the duty of the court to direct a verdict for the defendant. *Skinner, supra* at 165.

Plaintiff next argues that the trial court clearly erred in finding that the premises liability and ordinary negligence claims were so frivolous that sanctions against plaintiff and his counsel were appropriate. We agree. A trial court's determination that a pleading is frivolous is subject to review for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). A decision is clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *Id.* at 661-662. A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

The relevant part of MCL 600.2591(3)(a) states that a civil action is frivolous if "[t]he party's legal position was devoid of arguable legal merit." If a party asserts a frivolous claim or defense under MCL 600.2591, the imposition of sanctions is required. MCR 2.625(A)(2); MCL 600.2591; MCR 2.114(F).

Plaintiff's legal position proposes that because his testimony established that Brett Jr., Worden, or both, moved the plastic, the issue of liability should be determined by a credibility contest between the two. What plaintiff suggests is that he only needs to present evidence that someone, without knowing who, moved the plastic underneath the ladder, and that the jury should be left to speculate as to which of the defendants caused the accident. Defendants emphasize their view that plaintiff's position was unsupported by prevailing Michigan law, but give no consideration to the language of MCR 2.114(D)(2), part of the court rule governing sanctions for frivolous claims. MCR 2.114(D)(2) indicates that a legal argument may be supported by "a good-faith argument for the extension, modification, or reversal of existing law." We believe that one could plausibly, though ultimately unsuccessfully, argue for the extension and modification of alternate liability to cases where one defendant may not have acted negligently. Under this modified alternate liability theory, the burden of proof would be shifted on the element of causation to defendants once the plaintiff demonstrates that one of the defendants acted tortiously; if the defendants could not meet this burden and exculpate themselves, joint and several liabilities would be imposed.[2] Indeed, in at least one other jurisdiction, this extension of alternate liability is supported. See *Litzmann v Humboldt Co*, 273 P2d 82 (Cal App, 1954).

Nevertheless, we decline to accept plaintiff's invitation to alter Michigan law. It is well grounded under Michigan law that defendants in personal injury cases may only be held severally liable, requiring the plaintiff to prove all elements of negligence toward all defendants. MCL 600.6304(4). The burden of proof always rests with the complaining party; an accident alone creates no presumptions. *Skinner*, *supra* at 165. "[T]he plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165. Were this Court to follow plaintiff's reasoning, plaintiff's lack of knowledge would shift the burden of proof upon the defendants, and sheer ignorance would be the most powerful weapon in the law. Prosser, *Res Ipsa Loquitor: A Reply to Professor Carpenter*, 10 So Cal L Rev 457, 464 (1937).

In regard to the premises liability claim, we observe that the open and obvious doctrine defense is an emerging and evolving area of law. Although tenuous, it is at least plausible to argue that repeatedly checking a ladder for safety is outside the scope of casual inspection when regularly using the ladder. We therefore cannot conclude that plaintiff's argument was "devoid of arguable legal merit."

We affirm the trial court's decision directing a verdict in favor of defendants, but reverse the award of costs and attorney fees.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra

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[2] As opposed to normal alternate liability, which requires plaintiff prove *all* the defendants acted tortiously before the burden of proof is shifted to the defendants to exculpate themselves. *Abel v Eli Lilly & Co*, 418 Mich 311, 331-332; 343 NW2d 164 (1984).