STATE OF MICHIGAN

COURT OF APPEALS

CATHY PARKS

Plaintiff-Appellant,

v

K. SCHUSTER MARKETS, INC., doing business as YE OLDE MARKET BAR, a Michigan Corporation,

Defendant-Appellee.

UNPUBLISHED
September 27, 1996

No. 182087
LC No. 93-317596-NO

Before: Michael J. Kelly, and Markman and J. L. Martlew,* JJ.

PER CURIAM.

Plaintiff worked as a grill cook at defendant's bar-restaurant where she had been employed for five years. On May 29, 1992, plaintiff finished her work shift and stayed after to celebrate the birthday of another employee. At the party, plaintiff injured herself when the legs on a chair that she sat on broke and the chair collapsed. On June 22, 1993, plaintiff filed a complaint alleging that defendant was negligent with regard to the defective chair. Defendant subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(10) which was granted. On appeal, plaintiff asserts that there was a genuine issue of material fact as to whether defendant had prior notice of the defective chair in which plaintiff injured herself. We affirm.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed de novo by this Court. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). In order to establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by defendant to plaintiff; (2) a breach of that duty; (3) causation of the injury by the breach of duty; and (4) damages. *Schultz v Consumer's Power*, 443 Mich 445, 449; 506 NW2d 175 (1993). In the instant case, plaintiff argues that defendant had a duty to inspect its chairs for defective or dangerous conditions. Specifically, as a business invitor, defendant owes a duty of care to its customers to maintain its premises in a reasonably safe condition and to exercise ordinary care to keep the premises safe. *Schuster v Sallay*, 181 Mich App 558, 565; 450 NW2d 81 (1989).[1]

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* Circuit judge, sitting on the Court of Appeals by assignment.

Based upon the evidence presented to the trial court, we are persuaded that the chair in controversy constituted an unanticipated danger, one which could not likely have been discovered by defendant upon inspection. "There is no liability for harm resulting from conditions from which no reasonable risk was to be anticipated or those which the occupier did not know and could not have discovered with reasonable care." *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965); See also *Williams v Cunningham Drugstores*, 429 Mich 495, 500; 418 NW2d 381 (1988).

Plaintiff's own deposition testimony supports defendant's position that defendant could not have reasonably known about the defective chair. First, plaintiff noted that, as a longtime employee herself, she had never noticed any defects with defendant's chairs before her fall, nor had she heard of anyone else having difficulty with the chairs. Second, she indicated that immediately prior to the fall, another patron had used the chair and had encountered no problems with it. Third, she stated that the chair appeared to be sturdy as she sat upon it and did not wiggle or make any noise.

Because the chairs were in daily use and were regularly inspected visually, we are hard-pressed to understand what additional reasonable inspections or precautions could have been undertaken by defendant to maintain them in safe condition. The manager of defendant testified that he had never before seen a chair break on the premises. Nor is there evidence that would indicate that any alternative means of inspecting the chairs would have avoided the accident incurred by plaintiff. Consequently, we believe that defendant did not breach its duty to plaintiff. Since defendant could not have reasonably been expected to discover the defective chair, it cannot be held liable for negligence, *Kroll*, supra at 373, and the trial court's decision regarding defendant's lack of notice was proper. See also *Rose v McMahon*, 10 Mich App 104; 158 NW2d 791 (1968).[2]

Plaintiff alternatively argues that since defendant threw out the broken chair after its collapse that she is entitled to an inference that the evidence would have been adverse to defendant and favorable to plaintiff.[3] Generally, where a party deliberately destroys evidence, the courts presume that the evidence would operate against the party who destroyed it. *Hamann v Ridge Tool Co*, 213 Mich App 252; 539 NW2d 753 (1995); *Ritter v Meijer*, 128 Mich App 783, 785; 341 NW2d 220 (1983). However, such a presumption is only available when there has been a "deliberate destruction of evidence." *Andrews v K Mart Corporation*, 181 Mich App 666, 671; 450 NW2d 27 (1989). In *Andrews*, this Court concluded that where evidence had been destroyed "within the regular course of business" (in that case, a tour book containing observations made during an inspection), no presumption was entitled in favor of the other party. *Id*.

The instant case, in our judgment, is more closely analogous to *Andrews* than to either *Hamann* or *Ritter*. Defendant argues reasonably that he was not aware that plaintiff had injured herself by her fall since she did not complain of any injury at the time, she remained at the party and she returned to work the next day where again she failed to tell anyone that she was injured. Plaintiff did not request that the chair be preserved prior to it being discarded; nor did she provide notice of her injury to defendant, much less her intent to file a lawsuit, prior to the chair being discarded. Defendant, again reasonably, contends that the chair was thrown out as a part of the normal business practice of discarding broken chairs. The chair could not be fixed and there was no purpose in keeping it.

In asserting that there is a material issue of fact in dispute, plaintiff makes the conclusory statement that:

> Defendant admittedly was aware that Plaintiff was injured as a result of a defective chair. Despite this knowledge, Defendant intentionally destroyed the evidence. Defendant threw away the chair.

Her sole support for this proposition is her representation of what Defendant's Answer to Plaintiff's Interrogatory numbers 3 and 26 are, neither of which are attached to plaintiff's Brief on Appeal or to her Response Brief. She also sets forth her own unsigned and undated affidavit wherein she states that:

> Defendant knew that I was injured as a result of the broken chair. Yet he intentionally threw the chair out before an inspection could be made by me or someone on my behalf.

Such conclusory assertions by plaintiff are not sufficient, in our judgment, to establish a material issue of fact. *Bowerman v Malloy Lithographing*, 171 Mich App 110, 115-16; 430 NW2d 742 (1988); *Burroughs Corp v City of Detroit*, 18 Mich App 668; 171 NW2d 678, 675 (1969). MCR 2.116(G)(4) requires that an adverse party must "set forth *specific* facts showing that there is a genuine issue for trial." [Emphasis added.] *McCart v J. Walter Thompson* USA, 437 Mich 109, 115; 469 NW2d 284 (1991). We do not believe that plaintiff's unsupported assertions concerning defendant's knowledge of her injuries and its motives for throwing out the chair are sufficient in this regard.

We conclude that the trial court did not err in finding that there was no material issue of fact in controversy and that it properly granted summary disposition under MCR 2.116(C)(10).[4]

Affirmed.

/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew

Judge Michael J. Kelly not participating.

[1] Although plaintiff was an employee of defendant's, at the time of the injury, she was off-duty and celebrating a birthday party with other patrons of defendant's. As the result of such, plaintiff was an invitee, rather than an employee, for purposes of determining her status at the time of the accident.

[2] In *Rose,* this Court was presented with an extremely similar factual situation to the instant case. In upholding the trial court's directed verdict in favor of defendant, we stated:

> The plaintiff's made no showing that the defendant had either actual or constructive knowledge of any defect in the chair. They made no showing that the defendant proprietor was guilty of any breach of his duty to exercise reasonable care in providing

> a reasonably safe place for his patrons… Given the barren state of plaintiffs' evidence in this record, any finding would, we think, necessarily have involved conjecture.

Id. at 107-08.

[3] We do not address the issue here whether, if plaintiff is entitled to the benefit of this inference, a case of negligence might be based on the fact that the chair was negligently inspected by defendant. *Ritter v Meijer*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

[4] Plaintiff's argument that, since the trial court stated on the record during the motion hearing that "there probably is a question of fact here", it erred in granting defendant's motion cannot be sustained. While such a statement indicates that the trial court was leaning toward denying the motion at the time arguments were made, the court emphasized at the same time that it was taking the matter under advisement. That the court may have subsequently changed its mind does not render its ultimate decision on the motion in error.