

STATE OF MICHIGAN
COURT OF APPEALS

BONNIE LOU JOHNSON,

Plaintiff-Appellant,

v

ONE SOURCE FACILITY SERVICES, INC.,
f/k/a ISS CLEANING SERVICES GROUP, INC.

Defendant-Appellee.

UNPUBLISHED

April 26, 2002

No. 230940

Macomb Circuit Court

LC No. 99-001444-NO

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition, pursuant to MCR 2.116(C)(10), in this slip and fall negligence action. We affirm.

I. Background Facts and Procedural History

On December 13, 1996, plaintiff was walking down a flight of terrazzo¹ stairs at the Chrysler Corporation Administration Building in Sterling Heights when she fell and sustained severe injuries. At the time of plaintiff's accident, her employer, Chrysler, contracted the daily maintenance and care of these stairs to defendant. The purchase order between Chrysler and defendant required defendant to check the stairwells daily and vacuum and/or mop them once a week.

During her deposition, plaintiff testified that she was holding onto the stair railing when she slipped on the second step and "did the splits going down the steps." Plaintiff admitted that she did not know what defendant could have done to make the stairwell slippery. Plaintiff did not know if the stairs were being cleaned at the time she fell but noted that they were devoid of any dirt or debris. Plaintiff further testified that she did not see any "Caution-Wet-Floor" signs.

On October 18, 1995, about a year before plaintiff's accident, another Chrysler employee, A.S. Beckerman, fell in the same stairwell. At the time Beckerman fell, Christopher Phillips was

¹ Terrazzo is a marble-like material.

in charge of cleaning the stairwell for defendant. In Phillips' deposition, he claimed that he waxed the stairwell daily but could not remember the type of wax that he used. Phillips was terminated by defendant in December 1995 or January 1996.

After Beckerman's accident, R.A. Baker, the Building Manager for Chrysler, conducted an investigation. Baker issued a memorandum stating that the cause of Beckerman's fall was the improper application of wax, thinned with water, to the stairs. Baker informed defendant that it should either increase employee training on correct floor care procedures regarding top-coat usage on hard and resilient surfaces or limit the application of top coats to those with prior experience in floor care work. The memorandum further instructed defendant to discontinue any further use of wax on the hard floor surfaces. Despite this memorandum, Phillips testified in his deposition that defendant never told him to change his cleaning methods or to remove any of the wax previously applied. On September 30, 1997, Baker provided an affidavit concerning the Beckerman incident and stated that defendant was "advised that no type of top-coat, wax or finish was to be used on the terrazzo stairs." Baker also stated that defendant was advised that the standard policy for cleaning the stairwell was to damp mop only.

Defendant hired Michael Clay in June 1996. Clay was the individual in charge of cleaning and maintaining the stairwell when plaintiff fell.² During his deposition, Clay stated that he used only water to clean the stairs in the summertime; but in the winter he stated he would add light vinegar to the water as a salt neutralizer. Clay further stated that the stairs were never stripped of any wax build-up during the time he was there. Clay testified that it was part of his job to inform someone if he was given the wrong cleaning materials. Clay also admitted that sometime in 1998, more than a year after plaintiff's accident, he fell in the stairwell but did not know what caused him to slip.

Another employee of Chrysler, William Gentz, provided deposition testimony that the stairwell was often slippery. Gentz claimed that sometime before plaintiff's accident he slipped on the stairs. Gentz further stated that he did not remember smelling vinegar in the stairwell or seeing anyone stripping old "coatings" off the stairs. Chrysler installed strips on the edge of the stairs shortly after Clay fell.

Plaintiff filed an amended complaint on June 30, 1999.³ The complaint stated that defendant owed a duty to plaintiff to use reasonable care in cleaning and maintaining the stairwell. According to the complaint, defendant breached this duty by using inappropriate cleaning compounds and failing to timely remove or eliminate the unsafe conditions caused by these improper cleaning methods. The complaint stated that as a result of defendant's negligence, plaintiff suffered severe injuries and had to undergo multiple surgeries.

On August 2, 2000, defendant moved for summary disposition, pursuant to MCR 2.116(C)(10). The motion stated that plaintiff failed to present any evidence that defendant breached its duty to clean the stairway in a reasonable manner. Defendant noted that plaintiff

² The record does not identify the individuals or the methods used to clean the stairwell between January 1996 and June 1996.

³ Plaintiff filed her first complaint on April 9, 1999.

could not identify exactly what defendant did while cleaning the stairs that caused her to fall. According to defendant, plaintiff's only evidence was the improper application of a floor finish almost a year before her accident. Given the high pedestrian traffic on the stairwell, defendant claimed that there was no evidence that the floor finish could have remained on the stairs a year later. Nonetheless, defendant stated that the floor finish was slip resistant and would not have caused the steps to be slippery.⁴

In plaintiff's response to defendant's motion, she stated that she fell because the surface of the steps was slippery due to defendant's improper maintenance. Plaintiff also argued that defendant admitted to improperly maintaining the steps because it stated that it had applied wax at one point and that it never removed the wax. Moreover, defendant's employee admitted that he never used cleaning solutions with anti-skid properties on the stairway. Plaintiff further noted a maintenance pamphlet from the National Terrazzo & Mosaic Associations (NTMA), attached to defendant's motion for summary disposition, required that a cleaner with non-skid material should have been used on the stairs. Defendant's contract with Chrysler placed a duty upon defendant to properly and reasonably maintain the stairwell.

In defendant's two replies to plaintiff's response, it argued that plaintiff failed to present evidence that any floor finish was still on the stairwell when she fell or that the floor finish used did not have anti-skid properties. Defendant further claimed that the NTMA publication was inadmissible hearsay because plaintiff never retained an expert witness to authenticate the document or opine on the proper care and maintenance of terrazzo floors. Nonetheless, defendant argued that the NTMA publication did not state that the failure to use a sealer with anti-skid components would result in a slippery floor. Rather, the NTMA recommended such a sealer to improve the appearance of the floor. Thus, defendant stated that it did not have a duty to make the stairs less slippery through the use of a floor finish.

After a hearing on defendant's motion, the trial court issued a written opinion granting defendant's motion for summary disposition. The trial court concluded that while defendant applied some type of wax or floor finish, there was no evidence that these products were applied for the six months preceding plaintiff's fall. Additionally, the trial court stated that plaintiff failed to present any evidence that the wax or floor finish was still on the stairway at the time of her fall or that it caused the stairs to be slippery. Rather, the evidence established that defendant only applied water and vinegar to the stairwell in the six months before the accident. The trial court noted that there was no investigation at the time of plaintiff's fall to establish what was on the stairs. Absent evidence of a foreign substance on the stairs at the time of plaintiff's accident, that would have caused the stairs to be slippery, the trial court held that plaintiff failed to uphold her burden of proof.

⁴ Defendant provided an affidavit from Thomas Mitchell, the Director of Research and Development at Spartan Chemical Company, that claimed that Spartan Floor Finish 418 was formulated to be slip resistant.

II. Analysis

A. Standard of Review

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). After the moving party specifically identifies matters that have no disputed factual issues, it is incumbent upon the non-moving party to present admissible documentary evidence that a material fact exists. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

B. Negligence Claim

To establish a prima facie case of negligence, plaintiff must prove that: (1) defendant owed plaintiff a duty; (2) defendant breached that duty; (3) defendant's actions were the actual and proximate cause of plaintiff's injuries; and (4) plaintiff suffered damages as a result. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Legitimate inferences may establish a prima facie case of negligence as long as there is sufficient evidence to take them beyond mere conjecture. *Berryman v K Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992).

1. Presence of Wax on the Stairwell

Plaintiff essentially argues that questions of fact remain concerning the existence of wax on the stairs at the time she fell. We disagree.

Plaintiff maintains that there is conflicting evidence regarding the presence of wax on the stairwell at the time of her accident. Specifically, plaintiff points to testimony that the stairs were slippery and suggests that there is a legitimate inference that this was due to the wax applied by defendant. Plaintiff claims that defendant failed to present evidence that the wax applied in January 1996, and possibly until June 1996, was ever removed from the stairwell. Thus, according to plaintiff, the wax must have been present on the stairs when she fell.

The record in this case indicates that January 1996 was the last time that any type of wax was applied to the stairwell. There is no evidence in the record concerning the care of the stairwell between January 1996 and June 1996. Moreover, there is nothing in the record to indicate that plaintiff asked defendant to provide this information. Nonetheless, even assuming that wax was applied as late as June 1996, we find that plaintiff has failed to satisfy her burden of proof that wax was present on the stairs when she fell in December 1996.

Plaintiff argues that viewing the evidence in the light most favorable to the nonmoving party, the trial court could not find that only water and vinegar was applied to the stairs after June 1996. Specifically, plaintiff contends that there were several inconsistent versions of how the floors were cleaned. Plaintiff suggests that Clay's testimony, that only water mixed with

vinegar was used on the stairs for the six months prior to plaintiff's fall, is inconsistent with defendant's unsupplemented interrogatory response. Plaintiff further notes that there was also testimony that wax and Spartan FF418 (a floor finish) was used on the stairs.⁵

However, we find the testimony consistent with regard to the maintenance of the stairs at the time plaintiff fell. In its responses to plaintiff's interrogatories, defendant stated that it was unaware of the type of floor surface or how the stairwell was cleaned at the time plaintiff fell. However, defendant further stated that October 1995 was the last time that polish was applied and that any floor finish applied in 1996 contained anti-skid elements. Defendant also stated that no cleaning solution or polish was applied to the stairwell after June 1996. Additionally, Clay testified that he never applied any cleaning solution or polish to the floor since he was hired in June 1996.⁶ Rather, Clay maintained that he used clean water to wash the stairwell and in the wintertime added light vinegar to neutralize the salt.⁷ Thus, plaintiff has failed to present a question of fact that anything but water mixed with vinegar was applied to the stairwell for the six months preceding plaintiff's accident.

Even assuming arguendo that wax was used until June 1996, the only other evidence plaintiff presents is that fact that other individuals thought the stairs were slippery. This is insufficient to establish a logical inference that plaintiff's fall was due to any negligence by defendant. While a permissible inference can be made between the prior use of wax and a subsequent slip and fall, "evidence of slipperiness alone [is] insufficient . . . to give rise to a factual question proper for jury determination." *Pollack v Oak Office Bldg*, 7 Mich App 173; 180; 151 NW2d 353 (1967). However, the facts in *Pollack* do not compare to plaintiff's situation. In that case, the janitor admitted to waxing the floor within a week of the plaintiff's accident. *Id.* at 179. There was also "a sticky substance" and "skid marks" discovered on the soles of the plaintiff's shoes. *Id.* at 178.

In the present case, plaintiff has presented no such evidence. Rather, plaintiff testified that there was no debris on the stairs when she fell. Moreover, there was no evidence presented

⁵ Specifically, plaintiff notes Phillips' deposition testimony that he used wax until he was fired in January 1996, and defendant's interrogatories that stated it used Spartan FF418 before June 1996.

⁶ Plaintiff claims that defendant never supplemented its interrogatory answers after Clay's deposition testimony. However, MCR 2.302(E)(1)(b) only requires a party to seasonably amend a prior response if the party knows that:

(ii) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing *concealment*. [Emphasis added.]

Plaintiff has failed to show how defendant's failure to supplement amounted to a knowing concealment.

⁷ We note that Gentz claimed that he could not recall smelling vinegar in the stairwell. However, the record does not indicate whether Gentz used the stairwell while it was being cleaned. Moreover, there is no evidence that a solution of light vinegar mixed with water would create a vinegar odor that would be readily recognizable.

that the stairs were wet at the time of plaintiff's accident. The fact that other people fell on the same stairwell, either before plaintiff's accident or nearly two years later, does not establish that wax was on the stairs the day of plaintiff's accident. Therefore, we find that plaintiff has failed to create a genuine issue of material fact for the jury.

2. Application of a Slip-Resistant Floor Finish

Plaintiff further asserts that defendant had a duty to properly maintain the property by applying a floor finish with an anti-slip element. We disagree.

To support this argument, plaintiff cites several portions of the NTMA publication to show the proper maintenance of terrazzo. While defendant contests the admissibility of the pamphlet, a careful review of its maintenance suggestions fails to support plaintiff's position. The NTMA pamphlet states that most owners want to see a high sheen on their floor and that this can be safely accomplished with a slip-resistant sealer.⁸ However, the pamphlet never states that a sealer must be affirmatively applied for safety purposes - but rather, to improve the appearance of the floor. The NTMA does specify that purely surface waxes should not be applied at the risk of making the surface slippery. However, plaintiff presented no evidence that the wax previously used by defendant was still on the stairs at the time she slipped.

Moreover, the pamphlet does not suggest that the failure to use a neutral cleaner would cause a terrazzo surface to be slippery. Indeed, the NTMA encourages the use of cold water to rinse off any neutral cleaner to ensure that the surface does not become slippery. Thus, there is nothing in the NTMA suggestions to indicate that defendant's practice of using water, mixed with light vinegar, would create a dangerously slippery condition on a terrazzo surface.

Plaintiff has failed to establish a question of fact that defendant's actions were negligent and that this negligence caused her accident. Viewed in the light most favorable to plaintiff, defendant's application of wax to the stairwell, as late as June 1996, was clearly negligent. However, this fact does not merit the automatic assumption that the wax remained on the stairwell nearly six months later. Moreover, plaintiff does not offer any testimony or evidence, other than the NTMA pamphlet, about the proper care of a terrazzo floor. Because the NTMA pamphlet does not require a neutral cleaner or floor finish for safety purposes, we find that plaintiff failed to present any evidence that defendant's failure to do so was the proximate or actual cause of plaintiff's accident.

Affirmed.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly

⁸ We note that the pamphlet does not suggest that a floor finish must be applied to make the surface less slippery. Rather, the pamphlet states that *if* a floor finish is applied it should be slip-resistant.