

STATE OF MICHIGAN
COURT OF APPEALS

GINA EVANS and TODD EVANS,

Plaintiffs-Appellees,

v

PAUL MCBRIDE and JULIE MCBRIDE,

Defendants-Appellants.

UNPUBLISHED
September 5, 2006

No. 267985
Macomb Circuit Court
LC No. 05-000129-NO

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

I. Basic Facts and Procedure

Defendants appeal by leave granted from a circuit court order denying their motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs and defendants were neighbors and friends. On Nov. 23, 2003, plaintiff Gina Evans (“plaintiff”) was interested in seeing some Christmas plates owned by defendant Julie McBride (“defendant”). The plates were in a partially finished attic above defendant’s garage. Defendant, followed by plaintiff, went into the house through the front door, up the stairs, and through a doorway between the house and the attic. After opening the door, defendant walked on the plywood floor of the room, side-stepping an area known by her to be mere drywall and therefore incapable of supporting an adult. Plaintiff, who was one or two steps behind defendant, continued straight with another step or two. She stepped onto the piece of drywall, which allowed access from the garage below. Plaintiff fell through the drywall to the garage floor below and was injured. There was no artificial lighting in the area, but light was available from a window, the doorway, and a minimal amount from the vents. The day of the accident was sunny, and light came in through the window, but according to plaintiff, it was still dark in the room.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). They argued that the drywall through which plaintiff fell was not a hidden danger, and, thus, imposed no duty on them to warn plaintiff, a licensee, about the condition. In response, plaintiffs asserted that there was a question of fact regarding whether the drywall covering the access way was flush with the attic floor (and thus hidden) or the garage ceiling (and thus an exposed hazard).

The trial court denied defendants' motion, concluding that the condition was "not open and obvious," and even if it were, there was an unreasonably high risk of severe harm that precluded summary disposition in favor of defendants. This appeal followed.

II. Analysis

1. Standard of Review

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Moreover, whether a legal doctrine was applied appropriately is also subject to de novo review. *Ghaffari v Turner Constr. Co.*, 473 Mich 16, 19; 699 NW2d 687 (2005).

2. Duty Owed to Licensees

There is no dispute that plaintiff was a licensee at the time of the accident; therefore, the legal doctrine applicable in this premises liability case is firmly set. "[A] landowner owes a licensee a duty to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the hidden danger involves an unreasonable risk of harm and the licensee does not know or have reason to know of the hidden danger and the risk involved." *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 65; 680 NW2d 50 (2004).

3. Genuine Issue of Material Fact

Summary disposition in this case turns on one fact: Whether the drywall through which plaintiff fell was a hidden danger and, as such, imposed upon defendant a duty to warn plaintiff. Plaintiff argues that she did not notice a hole, an opening, or any irregularity in the floor. According to plaintiff, there was nothing to alert her to the fact that there was a hole in the floor; however, what plaintiff knew is irrelevant. Rather, a court must examine whether an average person of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The determination depends on the perception of a reasonably prudent person, not on the perception of a particular plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

We conclude that there is a genuine question of material fact whether the condition was hidden. Specifically, a trier of fact must determine whether the drywall panel through which plaintiff fell was hidden to an average person of ordinary intelligence given all the circumstances.

In light of our conclusion, we need not address the trial court's determination that there were special aspects that made the condition unreasonably dangerous.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra