

STATE OF MICHIGAN  
COURT OF APPEALS

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MARITA BONNER and DUANE BONNER,  
Plaintiff-Appellants,

UNPUBLISHED  
December 18, 2014

v

KMART CORPORATION,  
Defendant-Appellee.

No. 318768  
Wayne Circuit Court  
LC No. 12-010665-NO

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Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs Marita Bonner (“Marita”) and Duane Bonner appeal as of right an order granting summary disposition to defendant, Kmart Corporation. We affirm.

This case arises from an incident that occurred at defendant’s store on August 18, 2011. On that date, Marita was shopping in the store and sat on a round folding chair (commonly referred to as a papasan chair) set up as a display. When she sat down, the chair collapsed and folded up around her. Marita had to tip the chair over to get out of the chair. She suffered alleged injuries from the incident, and filed suit against defendant. The trial court granted summary disposition to defendant and plaintiffs appeal. On appeal, plaintiffs argue that the trial court erred in granting defendant’s motion for summary disposition. We disagree.

A trial court’s ruling on a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id.* The court reviews “a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

There is no dispute that Marita, as a customer in defendant's store, was an invitee. *Sanders v Perfecting Church*, 303 Mich App 1, 5; 840 NW2d 401 (2013); *Hoffner v Lanctoe*, 492 Mich 450, 469-470; 821 NW2d 88 (2012). Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Hoffner*, 492 Mich at 460. An invitor's liability must arise from active negligence or where the invitor knew or should have known of the dangerous condition. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001).

An invitor is liable for active negligence, which applies to dangerous conditions on the land that the defendant or its agents created. *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991). When a plaintiff can establish active negligence, there is no need for proof of notice. *Id.* In the absence of active negligence, an invitor is liable for conditions of which the invitor had notice, in that they knew or should have known of the dangerous condition. Notice of a dangerous condition can be established two ways: actual notice or constructive notice. *Grandberry-Lovette v Garascia*, 303 Mich App 566, 573; 844 NW2d 178 (2014). Constructive notice occurs when "the dangerous condition is of such a character or has existed for a sufficient time that a reasonable premises possessor would have discovered it." *Id.* at 575.

Initially, we agree with defendant that there was no evidence that the chair was defective or presented a dangerous condition on the land. The evidence did not show that the chair was broken before or after the incident. At most, plaintiffs presented evidence that the fabric on the chair ripped *after* Marita sat in the chair. Even if the chair's fabric did indeed rip, there is no evidence that the rip contributed to Marita's accident. The only evidence in the record regarding the rip at all is the opinion testimony of defendant's former employee Adam Marlow that the fabric ripped under Marita's weight. Regardless, even assuming the chair was defective or dangerous, we also do not agree that defendant was liable to plaintiffs under an active negligence or construction notice theory.

First, plaintiffs assert that defendant was actively negligent because defendant's employee assembled the chair and placed it on display.<sup>1</sup> Plaintiffs allege that defendant's negligent assembly of the chair created the dangerous condition leading to plaintiffs' injuries. Here, plaintiffs' assertion depends on the fact that defendant's employees negligently assembled the chair. However, there is no evidence to support plaintiffs' claim. It is true that defendant's employee Kenneth Crayne agreed with plaintiffs' counsel in deposition that one of defendant's employees "assembled" the chair. However, Crayne elaborated that one of defendant's

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<sup>1</sup> Defendant asserts that plaintiffs did not properly preserve their arguments regarding active negligence and *res ipsa loquitur*, discussed *infra*, in the trial court. To preserve an issue for appellate review, it must be raised, addressed, and decided in the lower court. *Michigan's Adventure, Inc v Dalton Twp*, 290 Mich App 328, 330 n 1; 802 NW2d 353 (2010). After reviewing the record, we disagree with defendant's assertion. Plaintiffs argued against defendant's motion for summary disposition, and the trial court granted the motion for summary disposition over plaintiffs' challenge.

employees took the chair out of a box and opened the chair up. Thus, the chair was a folding chair, requiring no actual assembly. Marita similarly testified that the chair was a folding chair. Moreover, even assuming the chair was “assembled,” there is no evidence to suggest that the “assembly” was negligent or faulty in any way. Therefore, there is no genuine issue of material fact regarding active negligence on behalf of defendant.

Moreover, there is no evidence that defendant had actual or constructive notice of the allegedly dangerous condition. Defendant received no complaints about the chair before the accident. Marita testified that she did not know if the chair was broken before, or even after, she sat in the chair, indicating that any alleged defect or problem was not apparent upon cursory inspection. Only one of three witnesses noticed any problem with the chair, even after the accident. While Marlow testified that the fabric on the chair was ripped, the rip does establish constructive notice because there is no evidence that defendant knew or should have known that the chair was dangerous before Marita sat in the chair. Further, the record contains no evidence of how long defendant displayed the chair in its store or whether anyone else ever sat in it.

Plaintiffs next contend that *res ipsa loquitur* applies because a chair would not ordinarily collapse in the absence of negligence, and, thus, defendant must have been negligent. We disagree.

The doctrine of *res ipsa loquitur* is a Latin phrase meaning, “the thing speaks for itself.” *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005) (internal citations and quotation marks omitted). *Res ipsa loquitur* “entitles plaintiff to a permissible inference of negligence from circumstantial evidence” when they are unable to prove the occurrence of a negligent act. *Id.* at 6-7 (internal citations and quotation marks omitted). In order to establish negligence under a *res ipsa loquitur* theory, four factors must be present:

- (1) the event must be of a kind which does not occur in the absence of someone’s negligence;
- (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
- (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
- (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff [*Id.* at 7 (internal citations and quotation marks omitted).]

With *res ipsa loquitur*, the happening of an accident is not, in and of itself, evidence of negligence. The plaintiff must present some facts that either directly or circumstantially establishes negligence. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 N.W.2d 318

(1979). In *Rose v McMahon*, 10 Mich App 104; 158 NW2d 791 (1968),<sup>2</sup> the plaintiff sat on a chair at the defendant's bar, and it collapsed. *Id.* at 106. This Court held that while it may be assumed that "a chair does not ordinarily collapse except for the negligence of someone, it does not necessarily follow that the collapse of a chair in a bar must imply the negligence of the proprietor. It cannot be simply assumed . . . that [the plaintiff] did not contribute in any way to the collapse of the chair." *Id.* at 107.

The facts in this case are synonymous to the facts in *Rose*. Here, the alleged dangerous condition created by the chair cannot necessarily be imputed to defendant. *Id.* at 107. To establish *res ipsa loquitur*, "the event must not have been due to any voluntary action or contribution on the part of the plaintiff." *Woodard*, 473 Mich at 7. Plaintiffs cannot show that Marita's act of sitting in the chair did not contribute to the accident. Here, the record established that Marita, who weighed 240 pounds, voluntarily sat in a small-sized folding chair with no defects, and the chair collapsed and folded up under her weight. The evidence supports that fact that the chair was not average sized – it was small. Based on these facts, the record supports the contention that Marita's voluntary action contributed to the event. Therefore, we reject plaintiffs' assertion that *res ipsa loquitur* applies to the current case.

Affirmed. Defendant, the prevailing party, may tax costs. MCR 7.219.

/s/ Pat M. Donofrio  
/s/ Karen M. Fort Hood

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<sup>2</sup> While this case is not binding on this Court pursuant to MCR 7.215(J)(1) as it was published prior to November 1, 1990, its conclusion is instructive.