

STATE OF MICHIGAN
COURT OF APPEALS

MARY B. LUPO and BEN LUPO,
Plaintiffs-Appellants,

UNPUBLISHED
August 17, 2004

v

EASTLAND 038 PARTNERS,
Defendants-Appellees,

No. 248440
Wayne Circuit Court
LC No. 01-101679-NO

and

SHOPCO and SHOPCO ADVISORY
CORPORATION,

Defendants/Third Party Plaintiffs-
Appellees,

and

SERVICE MANAGEMENT SYSTEMS, INC.,

Defendant/Third Party Defendant-
Appellee.

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's summary dismissal of their premises liability action. We affirm.

On December 30, 1999, plaintiff¹ was shopping at Eastland Mall when she slipped and fell on a french fry or its grease that was on the floor in a common area. She brought this

¹ Plaintiff Ben Lupo's claim is derivative of his wife's; therefore, the term "plaintiff" refers to Mary Lupo.

premises liability action against the mall owner (Eastland) and manager (Shopco), as well as the maintenance service provider (Service Management). On May 22, 2001, plaintiff filed a motion to compel Eastland and Shopco to provide discovery. On June 13, 2001, the trial court entered a stipulated order compelling Eastland and Shopco to provide the requested discovery within fourteen days. On July 26, 2001, the trial court entered stipulated orders compelling Eastland and Shopco to produce specific documents and specific answers in response to plaintiff's discovery requests.

On October 25, 2001, plaintiff filed a motion for sanctions, including default, and costs against Eastland and Shopco for failure to provide the discovery ordered by the court on July 26, 2001. On that date, plaintiff also filed a motion to compel Eastland and Shopco to provide other requested discovery. Defense counsel for Eastland and Shopco failed to file written responses to the motions and did not appear at the November 9, 2001, hearing. Plaintiff's counsel indicated at the hearing that since the trial court entered the order on July 26, 2001, he had not received any of the ordered discovery. The trial court granted the motion for default as to Eastland and Shopco, and entered an order compelling them to provide the other requested discovery to permit plaintiff to proceed against Service Management. On November 27, 2001, the trial court entered the default orders, pursuant to MCR 2.602(B)(3), without objection. On January 2, 2002, Eastland and Shopco filed a motion to adjourn mediation and extend discovery to which plaintiff argued they had no such right since they were in default. On January 18, 2002, the trial court dismissed their motion.

On March 1, 2002, Service Management filed its motion for summary disposition, pursuant to MCR 2.116(C)(10), arguing that plaintiff was unable to prove that it was either (1) responsible for the foreign substance being on the ground or (2) knew or should have known about the substance prior to the fall. In particular, plaintiff told security immediately after the fall that she stepped and slipped on a french fry, which she noticed after her fall, that was about one inch in size, and appeared stepped on but not dirty, tracked through, or dried up. In her deposition, plaintiff testified that she slipped due to a greasy spot near the french fry. Service Management also argued the open and obvious doctrine as an alternate grounds for summary disposition because the condition was obvious and was not unreasonably dangerous. Plaintiff opposed the motion, responding that she did not step on the french fry but on the grease near the crushed french fry of which Service Management did know or should have known was present. Further, plaintiff argued, the open and obvious doctrine was inapplicable because Service Management was not the premises holder and, even if it was applicable, would not bar the claim because the grease was not open and obvious. On April 26, 2002, after hearing oral arguments the trial court granted the motion, citing *Clark v Kmart*, 465 Mich 416; 634 NW2d 347 (2001), and holding that Service Management did not have actual or constructive notice of the condition.

On April 1, 2002, Eastland and Shopco filed a motion to set aside the default pursuant to MCR 2.603(D)(1), arguing that good cause existed because they substantially complied with plaintiff's material discovery requests, particularly those filed June 28, 2001. Plaintiff opposed the motion, arguing that the defaults were entered because of Eastland's and Shopco's violation of the trial court's previous orders which compelled their response to plaintiff's initial discovery requests of January 31, 2001, consisting of interrogatories and requests to produce. Further, they were still in violation of the court's orders at the time they filed the motion to set aside the default. Accordingly, plaintiff argued, Eastland and Shopco could not meet the "good cause"

requirement of MCR 2.603(D)(1). On May 3, 2002, the trial court heard oral arguments on the motion and took the matter under advisement after ordering the parties to provide supplemental documentation regarding responses to plaintiff's discovery requests. Subsequently, the trial court granted the motion, apparently on the ground of substantial compliance with discovery requests.

On March 7, 2003, Eastland and Shopco filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff could not establish that they created the alleged condition that led to the fall or that they had actual or constructive notice of the condition. Plaintiff opposed the motion, arguing that (1) a surveillance camera was operational and monitored with regard to the area in which she fell, (2) the french fry was crushed, (3) plaintiff testified that she had not stepped on it, (4) there was no french fry on plaintiff's shoe after her fall, and (5) there were grease streaks on the floor; accordingly, a jury could infer that the french fry had been stepped on by another patron or several patrons for some period of time before plaintiff fell and, thus, Eastland and Shopco should have known about the condition. On March 25, 2003, the trial court heard oral arguments and granted the motion, holding that there was no evidence that Eastland or Shopco had actual notice of the condition and no evidence regarding the length of time that the french fry or grease was on the floor and, without such time frame, constructive notice could not be established. An order was entered accordingly and this appeal followed.

First, plaintiff argues that the trial court erred in setting aside the default entered against Eastland and Shopco because they failed to meet the "good cause" requirement of MCR 2.603(D)(1). After review for an abuse of discretion, we disagree. See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

Challenges to defaults not based on lack of jurisdiction should only be successful if good cause is shown and an affidavit of meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler, Inc, supra* at 229. Good cause is established by (1) a procedural defect or irregularity, or (2) a reasonable excuse for not complying with the requirements that created the default. *Id.* at 233.

Here, the default was entered after Eastland and Shopco failed to provide court-ordered discovery. Their counsel neither filed a written response to the plaintiff's motion for sanctions nor appeared at the motion hearing to explain the failure.² Over four months after the default was entered, defense counsel for Eastland and Shopco filed a motion to set aside the default. They argued that they had substantially complied with plaintiff's discovery requests and, therefore, had a reasonable excuse for not providing the additional and duplicitous discovery. After requesting and reviewing the discovery requests and responses, the trial court granted the motion to set aside the default. We are constrained to defer to the trial court's exercise of discretion, which occurred after thoughtful review, on this matter. See *Alken-Ziegler, Inc, supra* at 228. However, we find objectionable and wish to dispel the implication that counsel for a

² In keeping with past practices, Eastland and Shopco's counsel has failed to submit a brief in response to plaintiff's appeal.

party may ignore court orders, motions, and hearings on motions. Eastland and Shopco's counsel has rendered a disservice to his clients by his failure to properly attend to the requirements of the litigation, and has wasted the trial court's, as well as this Court's, time and resources as a consequence of his apparent cavalier attitude. Accordingly, pursuant to MCR 7.216(A)(7) and 7.219(I), defense counsel for Eastland and Shopco is ordered to reimburse plaintiff for all reasonable expenses and attorney fees related to plaintiff's October 25, 2001, motion for sanctions, and all of plaintiff's reasonable expenses and attorney fees related to Eastland and Shopco's April 1, 2002, motion to set aside the default. This matter will be remanded to the trial court for the purpose of enforcing this order.

Next, plaintiff argues that the trial court's grant of summary disposition in Eastland and Shopco's favor was erroneous because Eastland and Shopco knew or should have known of the existence of the french fry and grease on the floor since they utilized surveillance cameras and the french fry was crushed, but not by plaintiff. We disagree. After de novo review of the factual sufficiency of plaintiff's claim, we conclude that plaintiff failed to establish a genuine issue of material fact; thus, Eastland and Shopco were entitled to judgment as a matter of law. See MCR 2.116(C)(10); *Maiden v Rozwood*, 461 Mich 109, 118, 120; 597 NW2d 817 (1999).

Plaintiff is correct that storekeepers are liable for injuries resulting from an unsafe condition caused by its active negligence or someone else's that the storekeeper knew about or should have known about because it existed for a sufficient length of time. See *Clark, supra* at 419, quoting *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968). Here, plaintiff does not contend that Eastland or Shopco caused the allegedly unsafe condition by its active negligence; rather, she contends that they should have known about it either because they utilized surveillance cameras to monitor that area or because the condition was present for some period of time as can be inferred by the fact that the french fry was crushed.

However, the fact that surveillance cameras were in use does not give rise to an inference that Eastland or Shopco should have known that the condition existed – obviously if it was that readily observable, plaintiff would have avoided the area. Further, the evidence does not support the inference that the french fry or its grease was on the floor for a significant period of time. Immediately after the fall, plaintiff told security personnel and a witness that she “slipped on a potato chip causing her to lose her balance and fall.” There was, in fact, one french fry on the floor; that it was crushed is consistent with the fact that she stepped on it and slipped. However, even if plaintiff did not slip on the french fry itself but its grease, she offers no evidence from which a reasonable jury could infer, without significant reliance on speculation and conjecture, that the french fry or its grease had been on the floor for a sufficient length of time for Eastland and Shopco to have known of its existence. See MCR 2.116(G)(4). Accordingly, we affirm the trial court's summary dismissal of this action.

Next, plaintiff argues that the trial court's summary dismissal of her claim against Service Management was erroneous because it should be charged with notice of the condition since it provided janitorial services to the Mall. Assuming that Service Management owed a duty to plaintiff, we reject this claim for the same reasons discussed with regard to Eastland and Shopco—plaintiff offers no evidence to support a conclusion that Service Management had actual or constructive notice of the condition.

Affirmed, but remanded for determination of attorney fees and costs owed to plaintiff consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad