SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3316-16T1

IRENE KURC,

Plaintiff-Appellant,

v.

ALL STAR ONE, KAREN BRENNER, HIMMELSTEIN ASSOCIATES, LLC,

Defendants-Respondents,

and

ALL STAR ONE PARENT BOOSTER CLUB, INC.,

Defendant.

Submitted February 6, 2018 – Decided April 19, 2018

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0181-15.

Escandon, Fernicola, Anderson & Covelli, attorney for appellant (Robert M. Anderson, Of Counsel; Scott M. McPherson, on the briefs).

Law Offices of Charles A. Little, Jr., attorney for respondents (Charles A. Little Jr., on the brief).

PER CURIAM

Plaintiff Irene Kurc appeals the Law Division's February 3, 2017 order granting summary judgment in favor of defendants All Star One, Karen Brenner, Himmelstein Associates, LLC, and All Star One Parent Booster Club, Inc. She also appeals the March 17, 2017 order denying her motion for reconsideration. We affirm.

I.

We summarize the facts in the trial court's February 3 opinion, supplemented with plaintiff's factual assertions.

On January 23, 2013, plaintiff accompanied her granddaughter to cheerleading practice at defendants' facility in Egg Harbor Township. In her deposition, plaintiff testified as follows. She entered the front of the building, and walked to the rear seating/viewing area along a walkway designated for non-athletes. After viewing her granddaughter's practice, plaintiff walked toward the front to meet her waiting granddaughter on the same walkway near the rear reception area. She encountered a young child athlete sitting on a separate moveable mat on the walkway, blocking her path. To pass the seated child, plaintiff stepped off the walkway and onto the

spring mat used for cheerleading. Plaintiff testified that while up on the cheerleading mat, she saw some young girls approaching, and she turned around to step off the mat, which was raised about four inches. The mat moved out from underneath plaintiff, causing her to fall and injure her wrist.

Defendants filed a motion for summary judgment on the grounds that plaintiff failed to offer any proofs establishing they were negligent. The trial court agreed "[p]laintiff failed to put forth any proof showing the actions or inactions of [d]efendants led to an unsafe condition or lack of reasonable care such that it was a proximate cause to [p]laintiff's fall and injury." The court granted summary judgment in favor of defendants. Plaintiff filed a motion for reconsideration, which the court denied.[1] Plaintiff appeals.

II.

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

[1] It is undisputed the trial court denied reconsideration, though it signed plaintiff's proposed order stating its summary judgment order "is hereby vacated."

R. 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "'"[T]he court must accept as true all the evidence which supports the position of the party defending against the motion and must accord [that party] the benefit of all legitimate inferences which can be deduced therefrom[.]"'" Id. at 535 (citations omitted). An appellate court "review[s] the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). We must hew to that standard of review.

III.

Courts "have long held that it is ordinarily a plaintiff's burden to prove negligence, and that it is never presumed." Khan v. Singh, 200 N.J. 82, 91 (2009). "[I]ndeed there is a presumption against it[.]" Buckelew v. Grossbard, 87 N.J. 512, 525 (1981). "To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and; (4) actual

damages.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 584 (2008)).

A.

Thus, "[a] prerequisite to recovery on a negligence theory is a duty owed by defendant to plaintiff." Strachan v. John F. Kennedy Mem'l Hosp., 109 N.J. 523, 529 (1988). "When a person alleges that a landowner has acted negligently, the existence of a duty by a landowner to exercise reasonable care to third persons is generally governed by the status of the third person — guest, invitee, or trespasser — particularly when the legal relationship is clearly defined." Robinson v. Vivirito, 217 N.J. 199, 209 (2014).

Here, it is undisputed plaintiff was a business invitee. A business invitee is a "person . . . invited on the premises for purposes of the owner that often are commercial or business related." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433 (1993). A landowner owes to a business invitee "a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered." Id. at 434. This includes the duty to conduct "a reasonable inspection to discover latent dangerous conditions." Ibid. Therefore, defendants owed a duty of reasonable care to

guard against dangerous conditions they "kn[ew] about or should have discovered." Id. at 433.

Thus, "an invitee seeking to hold a business proprietor liable in negligence 'must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident.'" Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015) (citation omitted). "[T]he mere existence of a dangerous condition does not, in and of itself, establish actual or constructive notice." Prioleau v. Ky. Fried Chicken, Inc., 434 N.J. Super. 558, 571 (App. Div. 2014), aff'd as modified, 223 N.J. 245, 258 (2015).

Here, plaintiff proffered no evidence that defendants had actual knowledge of the child blocking the walkway. There was no evidence that defendants or any of their employees saw the child was sitting on the walkway, heard complaints about the child's presence there, or had any knowledge that the child was blocking the walkway. See Drazin, New Jersey Premises Liability § 6:4 (2018).

A defendant has constructive knowledge "when the condition existed" "'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.'" Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016)

(citation omitted). "The characteristics of the dangerous condition giving rise to the slip and fall or eyewitness testimony" regarding the length of time the conditions existed "may support an inference of constructive notice about the dangerous condition." Ibid.

In Troupe, the plaintiff slipped and fell on a berry located on the floor of the defendant clothing store. 443 N.J. Super. at 600. The court noted the plaintiff did not provide any evidence showing how long the berry remained on the floor, or that any employee should have known the berry was there. Id. at 602. Therefore, the court ruled the defendant had no constructive notice regarding the berry on the floor. Ibid.

As in Troupe, the record here is devoid of any evidence the defendants had constructive notice. Plaintiff simply suggests because she fell near the rear reception desk, the receptionist had constructive knowledge of the child on the walkway and thus a duty to move the child. However, plaintiff proffered no evidence showing the receptionist knew or should have known before plaintiff's fall that there was a child blocking the walkway. Moreover, there was no evidence about how long the child was there, and thus about the amount of time defendant had to discover and remedy the situation. The absence of evidence of "actual or constructive notice . . . is fatal to plaintiff's

claims of premises liability." Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013); see Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984).

Citing cases outside the realm of premises liability, plaintiff argues it was foreseeable that a child athlete would sit in the walkway and would cause spectators to walk on the spring mat. However, plaintiff did not support her argument with any evidence, such as a history of other children sitting and blocking the walkways.

In any event, "the Supreme Court has cautioned that 'imposing a duty based on foreseeability alone could result in virtually unbounded liability[.]'" Pequero v. Tau Kappa Epsilon Local Chapter, 439 N.J. Super. 77, 94 (App. Div. 2015) (quoting Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 319 (2013)). "The duty owed by a premises owner, referred to as premises liability, depends in general upon the application of well-established categories through which the status of the injured party is used to define both duty and foreseeability." Desir, 214 N.J. at 316. "[T]he duty analysis has already been performed in respect of invitees, licensees (social guests), and trespassers. In furtherance of the goal of a 'reasonable degree of predictability[,]' those standards continue to guide" New

Jersey courts. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 45 (2012) (alteration in original) (citation omitted).

Plaintiff falls squarely in the category of business invitee. As she cannot establish the actual or constructive knowledge required for a duty to a business invitee, she cannot rely on general assertions of foreseeability to redefine that well-defined duty. Therefore, the trial court properly found she failed to show defendants had a duty which they breached.

B.

Plaintiff also argues the trial court improperly granted summary judgment on the issue of proximate cause because that is a jury issue. See Perez v. Wyeth Labs. Inc., 161 N.J. 1, 27 (1999) ("Ordinarily, issues of proximate cause are considered to be jury questions." (citation omitted)). Plaintiff raised the same argument in her motion for reconsideration.

However, in denying her motion for reconsideration, the trial court ruled that, even ignoring proximate cause, plaintiff failed to show a breach of duty:

> Although proximate cause is a jury question, [p]laintiff has still failed to put forth any evidence whatsoever this incident stems from a breach of [d]efendant's duty to [p]laintiff, which is not a jury question. The lack of evidence [of breach of duty] is an issue even before reaching proximate cause.

"The issues of whether a defendant owes a legal duty to another and the scope of that duty are generally questions of law for the court to decide." Robinson, 217 N.J. at 208. "[W]hether the duty was breached is a question of fact." Jerkins v. Anderson, 191 N.J. 285, 305 (2007). Because the lack of evidence of a duty breached was the reason the court denied reconsideration, and thus summary judgment, we need not reach the issue of proximate cause.

We also need not consider the validity of plaintiff's argument before the trial court that the spring mat was defective because it was "a known slip-and-fall safety hazard." At both ends of the training area, defendants posted signs that stated: "Only athletes and coaches beyond this point." Plaintiff also cites defendant Karen Brenner's deposition testimony that the signs were posted for "a hundred safety issues," including "[t]ripping and falling." However, Brenner made no specific mention of the spring mat, and did not state the mat was defective, a tripping hazard, or a safety hazard. In any event, in her reply brief, plaintiff concedes that her "theory of negligence is not that the subject mat was defective but rather [d]efendants negligently allowed the pedestrian walkway to be blocked forcing Plaintiff and other parents/spectators to step up onto the cheerleading mat."

We also need not address plaintiff's argument that she did not have to present expert testimony. See Hopkins, 132 N.J. at 449-51 (finding expert testimony was not "necessary in order for plaintiff to establish the existence of a dangerous condition" of an unseen step). In granting summary judgment, the trial court noted but did not rely on defendants' complaint that plaintiff had not provided any sort of expert testimony. We similarly rely instead on the absence of any evidence showing defendants had actual or constructive knowledge of the child blocking the walkway.

Affirmed.