MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Myra Inskeep,
Appellant-Plaintiff,

v.

Gary and Barbara Schwartz d/b/a The Corner Depot Family Restaurant,
Appellees-Defendants

May 19, 2021

Court of Appeals Case No. 20A-CT-2183

Appeal from the Wells Circuit Court

The Honorable Kenton W. Kiracofe, Judge

Trial Court Cause No. 90C01-1804-CT-000011

May, Judge.

[1] Myra Inskeep appeals following the trial court's order granting summary judgment in favor of the defendants, Gary and Barbara Schwartz d/b/a The

Corner Depot Family Restaurant ("Corner Depot"). Inskeep raises two issues on appeal, which we revise and restate as a single issue: whether the trial court erred in granting Corner Depot's motion for summary judgment on the basis that Corner Depot did not have actual or constructive knowledge of a property defect. We reverse and remand.

Facts and Procedural History

[2] On May 8, 2017, Inskeep was walking into the Corner Depot restaurant in Bluffton, Indiana, when she tripped on the walkway leading into the building. Inskeep alleges that the sidewalk was uneven, causing her to fall, and that she sustained injuries as a result. In her complaint, she asserted Corner Depot was negligent "for failing to properly inspect, repair, replace and correct the uneven sidewalk, for failing to adequately mark the sidewalk with bright colored yellow paint, failing to place cones or barricades around the uneven sidewalk and/or failing to warn of the dangerous/hazardous conditions." (App. Vol. II at 16.)

[3] The parties exchanged written discovery, and Inskeep deposed Barbara Schwartz on December 3, 2019. On June 1, 2020, Corner Depot filed a motion for summary judgment "on the grounds that this Defendants' [sic] has no duty to protect Plaintiff from tripping and falling from a slight deviation in the level of adjacent sections of their restaurant's concrete porch and sidewalk." (*Id*. at 21.) Corner Depot designated several photographs of the restaurant's parking lot and the walkway into the restaurant as evidence in support of their motion. One of these pictures showed a less than one-inch deviation in height between

sidewalk blocks on the walkway. Corner Depot asked the court to find "that a fall from a slightly unlevel concrete surface, otherwise in good condition and not deteriorated, is not ordinarily foreseeable, and thereby does not create a duty as a matter of law." (*Id.* at 28.)

[4] Inskeep did not designate any evidence in opposition to Corner Depot's motion, but she argued in response that Corner Depot had a duty to maintain a safe walkway. Inskeep asserted that Corner Depot's argument regarding foreseeability was not applicable in this context because the law has long recognized the duty of property owners to protect invitees from dangerous conditions on the land. Nevertheless, Inskeep also argued the foreseeability that an invitee will trip over an uneven sidewalk requires a fact-specific analysis, necessitating that the matter be resolved at trial.

[5] The trial court held a hearing on Corner Depot's motion for summary judgment on September 8, 2020, and on October 26, 2020, the court issued an order granting the motion. The trial court did not find as a matter of law that no duty existed for landowners to protect invitees from slightly uneven sidewalks. However, the trial court found:

> 9. Here, the Defendants' designated evidence establishes that Barbara Schwartz, owner of the restaurant, did not have actual knowledge that the sidewalk presented any danger to the customers.
>
> 10. Although the Defendants may not have had actual knowledge of the condition of the sidewalk or the danger it may have posed to its customers, they may have had constructive

> knowledge. Indiana courts have defined constructive knowledge "as a condition [that] has existed for such a length of time and under such circumstances that it would have been discovered in time to have prevented injury if the storekeeper, his agents, or employees had used ordinary care." *Schultz v. Kroger Co.*, 963 N.E.2d 1141, 1144[Ind. Ct. App. 2012], citing *Wal-Mart Stores, Inc. v. Blaylock*, 591 N.E.2d 624, 628 (Ind. Ct. App. 1992).
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> 11. Schwartz testified in her deposition that she had owned the restaurant for twenty (20) years. She testified she was aware the sidewalk blocks could shift over time. (Deposition of Barbara Schwartz, page 18, lines 8-25, page 19, line 1-12).
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> 12. Plaintiff's Response did not designate evidence that Schwartz had actual or constructive knowledge that the condition of the sidewalk presented a danger to customers. As such, no contrary evidence demonstrating an issue for the trier of fact has been submitted.

(*Id*. at 14-15) (corrections in brackets added). The trial court then granted summary judgment in favor of Corner Depot.

Discussion and Decision

[6] Our standard of review following a trial court's ruling on a motion for summary judgment is well-settled:

> We review summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Drawing all reasonable inferences in favor of the non-moving party, we will find summary judgment appropriate if the designated evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a

> matter of law. *Id*. A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences. *Id*.

Brown by Brown v. Southside Animal Shelter, Inc., 158 N.E.3d 401, 404-05 (Ind. Ct. App. 2020), *affirmed on reh'g*, 162 N.E.3d 1121 (Ind. Ct. App. 2021). "The summary judgment process is not a summary trial." *Dehoyos v. Golden Manor Apartments*, 101 N.E.3d 874, 876 (Ind. Ct. App. 2018). We err on the side of allowing marginal cases to go to trial rather than risk short-circuiting meritorious claims. *Id*. Consequently, "summary judgment is rarely appropriate in negligence cases because such cases are particularly fact-sensitive and are governed by a standard of the objective reasonable person, which is best applied by a jury after hearing all the evidence." *Id*.

[7] As our Indiana Supreme Court has explained:

> Even though Indiana Trial Rule 56 is nearly identical to Federal Rule of Civil Procedure 56, we have long recognized that 'Indiana's summary judgment procedure . . . diverges from federal summary judgment practice.' *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118, 123 (Ind. 1994). In particular, while federal practice permits the moving party to merely show that the party carrying the burden of proof *lacks* evidence on a necessary element, we impose a more onerous burden to affirmatively 'negate an opponent's claim.' *Id*.

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (emphasis in original). Nonetheless, a trial court's order on summary judgment comes to us with a

presumption of validity, and the appealing party must convince us that the trial court's order was error for us to reverse. *Sizemore v. Erie Ins. Exchange*, 789 N.E.2d 1037, 1038-39 (Ind. Ct. App. 2003).

[8] Negligence requires the plaintiff to prove three elements: "(1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *King v. Northeast Security, Inc.*, 790 N.E.2d 474, 484 (Ind. 2003), *reh'g denied*. In *Goodwin v. Yeakle's Sports Bar and Grill*, our Indiana Supreme Court explained that "for purposes of determining whether an act is foreseeable in the context of duty we assess 'whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it.'" 62 N.E.3d 384, 392 (Ind. 2016) (quoting *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 367 (Tenn. 2008)). Our Indiana Supreme Court held that a bar did not have a duty to protect patrons from a third-party criminal act because the act was not reasonably foreseeable. *Id*. at 394. Relying on *Goodwin*, Corner Depot argued in support of its motion for summary judgment that it did not have a duty towards Inskeep:

> The broad type of plaintiff here is a restaurant invitee, and the harm is the probability of the invitee tripping and falling on a minor change in the elevation of the walkway at the restaurant's entrance. In the broadest sense, all falls anywhere are foreseeable. Here, Plaintiff is, in essence, asking the Court to presume the walkway presented a danger simply because she fell. To impose a blanket duty on proprietors to afford protection to

> their patrons would make proprietor's [sic] insurers of their patrons' safety, which is contrary to the public policy of Indiana.

(App. Vol. II at 27-28.)

[9] However, in *Rogers v. Martin*, which the Indiana Supreme Court handed down on the same day as *Goodwin*, the Court espoused:

> It is well settled that absent a duty, there can be no breach. And whether a duty exists is a question of law for the court to decide. But a judicial determination of the existence of a duty is unnecessary where the element of duty has already been declared or otherwise articulated.

63 N.E.3d 316, 321 (Ind. 2016) (internal citations and quotation marks omitted). Here, Corner Depot owned the sidewalk where Inskeep fell, and Inskeep was an invitee at the time of her fall because the sidewalk was open to Corner Depot customers. *Pickering v. Caesars Riverboat Casino, LLC*, 988 N.E.2d 385, 390 (Ind. Ct. App. 2013) ("An invitee can be categorized as a public invitee, a business visitor, or a social guest."). In Indiana, the law is well-established that a landowner owes a duty of reasonable care to protect invitees while they are on the landowner's property. *See Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991) ("a landowner owes the highest duty to an invitee: a duty to exercise reasonable care for his protection while he is on the landowner's premises"), *reh'g denied*. Thus, Corner Depot had a duty to exercise reasonable care to protect Inskeep from dangerous conditions on the restaurant's property.

[10] This duty to exercise reasonable care requires:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Id. at 639-40 (quoting Restatement (Second) of Torts § 343 (1965)). A landowner has a duty to rectify or warn invitees about dangerous conditions on the property. *See St. Mary's Med. Ctr. of Evansville, Inc. v. Loomis*, 783 N.E.2d 274, 281 (Ind. Ct. App. 2002) (holding hospital's failure to act even though it had notice of tendency for water to collect on pantry floor violated duty of reasonable care). However, the landowner must have either actual or constructive knowledge of the dangerous condition. *Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012). Actual knowledge refers to a specific awareness of the dangerous condition, whereas constructive knowledge refers to a condition which existed long enough that the landowner should have discovered it in the exercise of ordinary care. *Id*.

[11] While Barbara Schwartz testified in her deposition that she was not aware of anyone tripping on the sidewalk before Inskeep and that she was not concerned about the elevation of the sidewalk blocks, she also testified that other Corner

Depot employees were responsible for maintaining the sidewalk and parking lot. Corner Depot did not put forth any evidence regarding those employees' observations. *See St. Mary's Med. Ctr.*, 783 N.E.2d at 279 (employees' knowledge of a dangerous condition may be imputed to the employer). Corner Depot also did not put forth any evidence regarding how long the uneven sidewalk had existed, which goes to whether the uneven sidewalk could have been detected in the exercise of ordinary care. Consequently, we cannot conclude as a matter of law that the designated evidence affirmatively negated any claim by Inskeep that Corner Depot had actual or constructive knowledge of the uneven sidewalk, and therefore, we hold the trial court erred in granting Corner Depot's motion for summary judgment.[1] *See Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1189 (Ind. 2016) (holding summary judgment inappropriate when designated evidence did not affirmatively negate plaintiff's claims).

Conclusion

[1] Similarly, Corner Depot's argument, raised for the first time on appeal, that the uneven sidewalk posed a known and obvious danger that Inskeep should have avoided presents a factual question suitable for resolution by the trier of fact. *See Roumbos v. Samuel G. Vanzanellis & Thiros & Stracci, PC*, 95 N.E.3d 63, 65 (Ind. 2018) (holding defendants failed to negate causation element of plaintiff's claim because genuine issue of fact existed regarding whether cords posed known and obvious danger). Unlike in the recently decided case of *Lowrey v. SCI Funeral Services, Inc.*, Corner Depot did not put forth any evidence that Inskeep observed the difference in elevation between two sidewalk blocks before tripping over the uneven sidewalk or that Inskeep deviated from the designated path of entry into the restaurant. 163 N.E.3d 857, 862-63 (Ind. Ct. App. 2021).

[12] Corner Depot owed Inskeep a duty of reasonable care to protect her from dangerous conditions on the restaurant's property. Corner Depot's motion for summary judgment failed to affirmatively negate Inskeep's negligence claim because genuine issues of material fact continue to exist regarding Corner Depot's knowledge of the uneven sidewalk. Therefore, we reverse the trial court's grant of summary judgment for Corner Depot and remand the case for further proceedings.

[13] Reversed and remanded.

Bailey, J., and Robb, J., concur.