SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2594-21

ANDREA BREGMAN and
GARY BREGMAN, her husband,

Plaintiffs-Appellants,

v.

SIMON DEGIROLAMO and
JANET DEGIROLAMO,

Defendants-Respondents.

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Argued April 18, 2023 – Decided April 26, 2023

Before Judges Geiger and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1440-20.

William R. Stoltz argued the cause for appellants (Law Offices Rosemarie Arnold, attorneys; William R. Stoltz and Paige R. Butler, on the briefs).

Sarah K. Delahant argued the cause for respondents (Methfessel & Werbel, attorneys; Fredric Paul Gallin and Sarah K. Delahant, on the brief).

PER CURIAM

In this trip and fall case, plaintiffs Andrea Bregman[1] and Gary Bregman appeal from Law Division orders granting summary judgment to defendants Simon Degirolamo and Janet Degirolamo and denying plaintiffs' motion for reconsideration. We reverse and remand for trial.

We take the following facts from the summary judgment record, viewing them in the light most favorable to plaintiffs. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

On July 23, 2018, while visiting defendants' residence in Ortley Beach, Andrea tripped and fell while ascending an interior staircase at about 1:00 a.m., and suffered serious injuries, including a displaced, comminuted cervical fracture, vertebral artery injury, and an ulnar ligament tear. Andrea alleges the stairway was unlit and that she fell because her foot hit a large, unlit decorative candle on the landing between two sets of steps, startling her and causing her to lose her balance and fall backwards.[2] Decorative candles were placed on every other step and a larger candle was placed on the landing.

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[1] Because plaintiffs and defendants share surnames, we refer to them by their first name. We intend no disrespect.

[2] Janet testified that she "assumed" she turned the candles on because she "definitely turned them on when there is company." However, at another point during her deposition, she testified that she was "90 percent sure" that the

Before the fall, plaintiffs and defendants went out to dinner, where they consumed alcoholic beverages. Upon their return, they consumed additional alcoholic beverages.

Although Andrea acknowledges that she had earlier ascended and descended the same stairway once or twice during daylight hours, she claims she did not notice the decorative candles prior to her fall. Prior to the accident, Andrea had last been to defendants' residence about a year earlier. Defendant had not yet purchased the decorative candles at that point.

Janet testified that there were ceiling lights at the base of the staircase and the landing. A light switch at the bottom of the staircase controlled those lights.

Plaintiffs filed a two-count complaint in April 2020. The first count alleged defendants negligently failed to maintain and control the premises and to keep it free and clear of hazardous and dangerous conditions. The second

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candles were lit. Simon testified that the candles were lit when he went up to bed that evening, shortly before the accident, but also stated the candles "were probably on" and acknowledged that he was not "distinctly paying attention to see if they were on," and stated "I'm assuming they were on." Andrea testified that she "[did not] remember seeing any light on from them at that time" when she ascended the stairs immediately before her accident. In his oral decision, the judge found there was evidence in the record that the candles were not lit. Whether the candles were lit or unlit was a material fact in dispute.

count asserted Gary's derivative loss of consortium claim. Discovery ensued after defendants filed a contesting answer.

Plaintiffs did not serve an expert's report as to liability. At the close of discovery, defendants moved for summary judgment. Following oral argument on March 4, 2022, the trial court issued an order and oral decision granting summary judgment dismissal of plaintiffs' complaint. The court found:

> The testimony seems to be pretty clear that the plaintiff in this case had been up and down these stairs once or twice and that's also without question that upon these stairs were a set of four large battery-operated decorative candles which apparently weren't lit at the time of the accident; although . . . I didn't see any evidence in the record[] I read to suggest that the room itself was dark; just that the candles themselves were not lit.
>
> And so tragically, plaintiff went up the stairs. The time the parties decided to go to bed which everyone seems to agree was between 12:45 and 1:30 in the morning, after they had been out to dinner and then spent some time together and then plaintiff, because one of the candles tripped and sustained a fracture . . . .
>
> There's been no argument on causation or damages here. The issue comes down to solely at least be it solely before the [c]ourt today is whether the defendants can be found to have breached their duty to plaintiffs as social invitees.

Relying on Parks v. Rogers, 176 N.J. 491 (2003), Berger v. Shapiro, 30 N.J. 89 (1959), and the Restatement (Second) of Torts § 342 (Am. Law Inst. 1965) (Restatement), the court found:

> The record reflects although on prior visits to the house, these decorative candles weren't there. They were there on this occasion and this wasn't plaintiff's first trip up those stairs that night.
>
> Without reaching the conclusion as to whether those candles themselves posed a danger, even to the extent that they did pose a danger, under these circumstances, subsections C of the [R]estatement is spot on in that the plaintiff had the opportunity to observe these candles and to know of their existence and that being the case under the social invitee subsection of the [R]estatement of [T]orts I cannot find that the defendant can be held liable under those set of facts.

Plaintiffs moved for reconsideration. Following oral argument on April 14, 2022, the court issued an order and oral decision denying reconsideration. The court found the case differed factually from Parks, noting that in this case, "[p]laintiffs had been in the house, they'd been up and down the stairs, they had the opportunity to observe the candles." For that reason, the court felt that defendants had met the duty they owed to plaintiffs. The court reasoned that because defendants did not violate their duty to warn, comparative negligence

did not apply. Therefore, the court found its initial decision was correct and that there was no basis for reconsideration. This appeal followed.

Plaintiffs raise the following points for our consideration:

> POINT I
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> THE MOTION COURT ERRED IN RULING THAT THE UNLIT BATTERY POWERED CANDLES PLACED ON THE STAIRWAY WERE OPEN AND OBVIOUS AS A MATTER OF LAW.
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> POINT II
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> THE MOTION COURT'S DECISION TO DOUBLE DOWN ON [ITS] OPEN AND OBVIOUS ANALYSIS ON RECONSIDERATION CONSTITUTED AN ABUSE OF DISCRETION AND AS SUCH THE APRIL 14, 2022 ORDER DENYING RECONSIDERATION SHOULD ALSO BE REVERSED.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show there are no "genuine issues of material fact," and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). We must give the non-moving party "the benefit of the most

favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)). We owe no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018).

Legal questions dependent upon the operative facts should not be decided by summary judgment when those facts are in dispute. Central Paper Distrib. Servs. v. Int'l Rec. Storage and Retrieval Serv., Inc., 325 N.J. Super. 225, 232 (App. Div. 1999). When deciding a summary judgment motion, the trial court's function is not "to weigh the evidence and determine the outcome but only to decide if a material dispute of fact exist[s]." Gilhooley v. Cnty. of Union, 164 N.J. 533, 545 (2000). Accordingly, a "motion for summary judgment should be denied when determination of material disputed facts depends primarily on credibility evaluations or when the existence of a genuine issue of material fact appears from discovery materials or from the pleadings and affidavits on the motion." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3.2 on R. 4:46-2 (2023) (citing Parks, 176 N.J. at 502).

A plaintiff's negligence does not bar recovery "if such negligence was not greater than the negligence of the person against whom recovery is sought."

N.J.S.A. 2A:15-5.1. When a defendant claims the plaintiff was negligent, the jury "determine[s] the comparative fault of each party." Filipowicz v. Diletto, 350 N.J. Super. 552, 561 (App. Div. 2002). However, "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). Here, the evidence is not so one-sided in favor of defendants.

Defendants do not dispute that plaintiffs were social guests. Section 342 of the Restatement explains the duty owed by a landowner to social guests:

> A possessor of land is subject to liability for physical harm caused to licensees [social guests] by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees [social guests], and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees [social guests] of the condition and the risk involved, and
>
> (c) the licensees [social guests] do not know or have reason to know of the condition and the risk involved.

See also Model Jury Charges (Civil), 5.20F, "Social Guest – Defined and General Duty Owed" (approved Mar. 2000). The standard is objective, "whether

the landowner should realize the condition posed an unreasonable risk of harm." Parks, 176 N.J. at 499 (citing Taneian v. Meghrigian, 15 N.J. 267, 277 (1954)). "Once the proofs show that the landowner knew of a particular condition of the property, '[t]he inquiry is not whether the defendant realized the condition held any risk but whether a reasonable man would be cognizant of it.'" Id. at 498 (alteration in original) (quoting Berger, 30 N.J. at 100).

"A host's duty to a social guest includes an obligation to warn of a known dangerous condition on the premises except when the guest is aware of the condition or by reasonable use of the facilities would observe it." Tighe v. Peterson, 175 N.J. 240, 241 (2002).

The court found the decorative candles were not present during plaintiffs' prior visit to defendants' residence a year earlier. Although Andrea had used the staircase once or twice earlier in the day, that does not prove that she noticed the candles or should have been aware of their presence, particularly at night with disputed lighting. The trial court found Andrea "had the opportunity to observe these candles and to know of their existence . . . ." As in Parks, "[w]e disagree that the record supports such an irrefutable conclusion." 176 N.J. at 494. This case is clearly more like Parks and Berger, where the Court found the jury should decide whether the plaintiffs should have realized that the missing

bricks, Berger, 30 N.J. at 95, 1010, and defective handrail, Parks, 176 N.J. at 502-03, posed an unreasonable risk of harm, rather than Tighe, where the plaintiff was injured by diving into the shallow end of a pool that he had previously used numerous times and was generally familiar with, Tighe, 175 N.J. at 241-42.

Viewing the evidence in the light most favorable to plaintiffs, we conclude that a reasonable jury could find defendants knew or should have known the candles posed an unreasonable risk of danger to Andrea, that the risk was not obvious, that Andrea was unaware of the danger, and that defendants failed to either disclose or remove the danger the candles posed. "With genuine issues of material fact in dispute, the jury must decide whether" the unlit candles and lack of ambient lighting "posed an unreasonable risk of harm," and whether Andrea should have observed the presence of the candles "through the reasonable use of her faculties" during her prior use of the staircase. Parks, 176 N.J. at 502. Summary judgment dismissal of plaintiffs' complaint was error.

Considering our decision, we do not separately address the denial of plaintiffs' motion for reconsideration.

Reversed and remanded. We do not retain jurisdiction.