STATE OF MICHIGAN

COURT OF APPEALS

CROCKETT WELCH,

Plaintiff-Appellant,

v

TOTAL PETROLEUM, INC.,

Defendant-Appellee.

UNPUBLISHED
May 14, 1999

No. 208505
Saginaw Circuit Court
LC No. 97-007759 NO

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

Plaintiff, who injured himself after tripping on an uneven concrete surface in defendant's parking lot, appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We reverse and remand.

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997). Like the trial court, this Court looks at the entire record, views the evidence in favor of the nonmoving party, and decides whether a relevant factual issue about which reasonable minds might differ exists. *Id.* If, as in the instant case, the nonmoving party would bear the burden of proof at trial, that party, in order to avoid summary disposition, must provide documentary evidence showing the existence of a disputable issue. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 574 NW2d 314 (1996).

Plaintiff first argues that in ruling on the summary disposition motion, the trial court misconstrued the evidence and failed to view it in plaintiff's favor. We agree. In its opinion and order, the trial court stated that "[p]laintiff admitted he would have seen the raised concrete had he looked ahead." Plaintiff, however, made no such admission on the record, and the trial court erred in concluding that he did. The trial court additionally stated that plaintiff had testified that it had been "between light and dark outside" at the time of the accident. It was a different witness, however, who testified to this "in between" condition; plaintiff himself unequivocally testified that it had just turned dark at the time of the accident and that there were no lights illuminating the uneven concrete. Since courts, in assessing summary disposition motions, are to refrain from resolving credibility contests and are to view the evidence in the nonmoving party's favor, *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998),

the trial court should have accepted plaintiff's assertion that dark had already fallen at the time of the accident.

Next, plaintiff argues that if the trial court had not misrepresented the evidence and had viewed it in the proper light, the court could not reasonably have found that the danger posed by the uneven concrete was open and obvious as a matter of law. We agree. As this Court stated in *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993), the test for whether a danger is open and obvious is whether an average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. Here, an average person traversing the parking lot of defendant's indisputably busy gas station at night, or even at dusk, while necessarily keeping a watchful eye on traffic, would likely not have discovered the 1 to 1 ½ inch heave in the concrete. Although the heave was sufficiently large to trip someone, it was not necessarily large enough to be visible in ill-lit, distracting conditions, especially since both the low and high surfaces of the uneven concrete were the same dull, gray color. Accordingly, the trial court erred in concluding that the danger posed by the heave was open and obvious as a matter of law. It is up to a jury to decide whether defendant should have posted a warning sign, added lights to the parking lot, or repaired the concrete so as to avoid accidents such as that suffered by plaintiff.

Next, plaintiff argues that even if the danger posed by the concrete *had* been open and obvious as a matter of law, the trial court erroneously dismissed his negligent maintenance claim because the open and obvious doctrine can obviate only claims of failure to warn. Contrary to plaintiff's argument, the obvious nature of a danger can obviate a negligent maintenance claim as well as a failure to warn claim, as long as the danger is not unreasonable – i.e., as long as awareness of the danger eliminates the potential hazard. *Millikin v Walton Manor Mobile Home Park, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 207051, issued 3/19/99), slip op, pp 4-5; *Hottmann v Hottmann*, 226 Mich App 171, 176; 572 NW2d 259 (1997). In other words, if a plaintiff's "only asserted basis for finding that [something] was dangerous was that she did not see it," then a finding of openness and obviousness would nullify a negligent maintenance claim. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611, 621; 537 NW2d 185 (1995); see also *Millikin, supra* at 4 n5, 4-5. Here, the heaved concrete posed a danger of tripping only if someone could not see it; upon seeing it, one could easily step around the defect or step up to the elevated portion of the concrete and avoid harm. Therefore, if the heave's danger had indeed been open and obvious as a matter of law, plaintiff's negligent maintenance claim would not have survived. It is only when a condition remains dangerous in spite of the obviousness of the danger – i.e., it is only when a condition is unreasonably dangerous – that a claim for negligent maintenance can survive. *Bertrand, supra* at 611; *Millikin, supra* at 4-5.

Finally, plaintiff argues that allowing the open and obvious doctrine to nullify negligent maintenance claims violates sound public policy by encouraging landowners to keep or make defects as large as possible so that they will be deemed obvious dangers, thus relieving the landowners of liability. This argument is unfounded, however, given that landowners remain liable for obvious dangers where the danger is unreasonable in spite of its obviousness. *Id*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald