STATE OF MICHIGAN

COURT OF APPEALS

GEORGE TIMMERMAN,

Plaintiff-Appellant,

v

AUTO ZONE, INC,

Defendant-Appellee.

UNPUBLISHED
December 20, 2002

No. 234779
Hillsdale Circuit Court
LC No. 00-000437-NO

Before: Whitbeck, C.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff George Timmerman appeals as of right following the trial court's order granting summary disposition to defendant Auto Zone, Inc., in this premises liability action. We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

On December 22, 1998, at around 9:15 a.m., Norman Ledyard drove Timmerman to the Auto Zone store in Hillsdale, Michigan. Ledyard stopped the car so Timmerman could enter the store directly, without crossing the parking lot. Ledyard, who did not go in the store, then parked his car in the fourth space from the front door. This was the first space available in which he could park because the first two spaces were designated for handicapped parking and another vehicle was occupying the third space. When Timmerman completed his purchases in the store, he walked toward where Ledyard had parked the car. As Timmerman was cutting across the two empty handicapped parking spaces, he slipped and fell on ice. He hit his left shoulder and elbow, as well as his head, on the concrete surface. Ledyard did not see the accident, but saw Timmerman on the ground. After Ledyard helped him to his feet, Timmerman went into the store to tell employees about his fall and to warn them that they needed to salt or sand the area to reduce the slippery conditions.

In April 2000,Timmerman sued Auto Zone. He claimed that he suffered severe injuries in his slip and fall on the ice and that Auto Zone had breached its duty to salt, sand, or take other precautions to prevent his accident. As one of its affirmative defenses, Auto Zone claimed that the ice was open and obvious, and therefore it was not liable for Timmerman's injuries.

In April 2001, Auto Zone moved for summary disposition, arguing that the slippery condition was not only open and obvious, but that it was apparent that Timmerman could have

walked safely to the car by using the sidewalk, which was clear of ice and snow, rather than cutting across the parking spaces. As support for this argument, Auto Zone pointed to Timmerman's deposition testimony, in which he admitted that he was not watching where he was walking when he slipped and fell even though he was aware of the cold temperature and snow on the ground. Asked whether, when leaving the store, he had seen any ice between the store's front door and the place he slipped, Timmerman said, "I didn't recognize any ice. I wasn't looking down." In fact, Timmerman did not see the ice even after he fell. He formed his opinion regarding the cause of his accident from Ledyard's observations. Ledyard described the parking space where Timmerman fell as being covered by a mixture of bare, icy, and snowy patches. Ledyard clarified that snow was not covering the ice and that he "knew there was ice on [the parking space] when I pulled in[to the parking lot]. You could see ice on the concrete." Ledyard, however, said he did not tell Timmerman about the icy conditions. Ledyard also said that he did not observe anything that looked like salt in the space where Timmerman fell, though he assumed that the store had been open since 8:00 that morning. When asked whether "there really was any other way to walk where the car was parked without going over the ice," Ledyard replied, "Yes. Right up the sidewalk." Ledyard, however, said that if someone were to walk through the parking lot, that person would have to encounter the ice to get to a parked car.

The trial court heard arguments on the motion for summary disposition in May 2001. At the time, the trial court was concerned with the evidence *not* in the record, such as the time the store opened or when the snow and ice accumulated. At the conclusion of the brief hearing, the trial court announced its decision from the bench. After reviewing the legal standards applicable to a motion for summary disposition brought under MCR 2.116(C)(10), the trial court said:

> I have read the deposition of plaintiff. Said he fell in handicap spot. Wasn't looking where he was going. Doesn't know what he fell on. There is snow on the ground. It was cold. Doesn't know if the parking lot was snow covered. Doesn't know if the parking lot was plowed. Claims the parking lot wasn't salted.
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> Deposition of Mr. Ledyard. There was ice on the lot. You could see ice on the concrete. It was on the ground. He had no problem seeing the ice there. The ice was not covered with snow. Said that his friend, Mr. Timmerman, could have walked on the sidewalk, sidewalk had no obstructions. Just in part that's what transpired.
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> * * *
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> I have not – I have not one reference to a deposition. I have not one photograph. I have no affidavits. I have no documentary evidence whatsoever.
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> The nonmoving party must by documentary evidence set forth specific facts showing there is a genuine issue for trial and may not rest upon mere allegations or denials in the pleadings. . . . That's what the Supreme Court requires. I don't have it. All I've got is general denials, mere allegations.

The trial court concluded that the record was insufficient for it to allow the case to go to trial.

On appeal, Timmerman contends that the trial court erred in granting the motion for summary disposition because: (1) the ice was not open and obvious; (2) even if the ice was open and obvious, Auto Zone had an obligation to reduce the risk the ice posed; and (3) the trial court erred in requiring him to meet a higher evidentiary burden than the standards for deciding a motion for summary disposition require.

II. Standard Of Review

This Court reviews de novo a trial court's decision to grant a motion for summary disposition.[1]

III. Summary Disposition

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.[2] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.[3] "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."[4] Only if there is no factual dispute would summary disposition be appropriate.[5] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[6]

IV. Premises Liability

"[A] landowner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land."[7] A landowner typically does not have a duty to remove open and obvious dangers because the invitee knows or can reasonably be expected to discover the dangerous conditions himself.[8] In this case, the evidence on the record establishes that the icy condition of the parking space was open and obvious because an "average" person "with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection."[9] Ledyard testified directly that the icy

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[1] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[2] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[3] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

[4] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[5] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

[6] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[7] *Corey v Davenport College of Business*, 251 Mich App 1, 3; 649 NW2d 392 (2002).

[8] *Id*.

[9] *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

condition was plainly visible as he drove into the parking lot. Timmerman, who said that he was not watching where he was walking, pointed to no contradictory evidence. The record leaves no doubt that an average person with ordinary intelligence would have been able to discover the icy concrete and the risk it presented had they been looking at the ground.

Because there is no factual dispute that this danger was open and obvious,

> "the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability."[10]

Although he never uses the precise terminology, Timmerman contends that the special aspect of this ice was that an invitee had no choice but to encounter it in order to reach a car parked in the parking lot. However, he points to no place in the record that says that the ice was unavoidable. In fact, Ledyard said that people could avoid the ice simply by walking on the cleared sidewalk. Evidently, only a person who steered clear of the safe sidewalk to cross the openly and obviously icy parking lot itself would encounter the ice. Thus, as in other recent cases involving slips and falls on ice, the trial court properly granted summary disposition to Auto Zone.[11]

Further, though Timmerman contends that the trial court applied an incorrect evidentiary burden to him when examining the evidence, we disagree. Case law does not require a party opposing summary disposition to *present* additional evidence to counter the grounds for the motion – at least if the evidence presented by the moving party reveals a material factual dispute. Still, as the trial court properly recognized, if the moving party's evidence on the record supports granting the motion for summary disposition, the nonmoving party must come forward with evidence of the material factual dispute to survive the motion.[12] Timmerman did not do so.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Christopher M. Murray

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[10] *Corey*, *supra* at 6, quoting *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-518; 692 NW2d 384 (2001).

[11] See *Corey*, *supra* at 6-9.

[12] See MCR 2.116(G)(4).