STATE OF MICHIGAN

COURT OF APPEALS

SHERRILL SCHMITTER, Plaintiff-Appellant,	UNPUBLISHED March 2, 2004
v	No. 244933 Oakland Circuit Court
CHARTER ONE FINANCIAL, INC., Defendant-Appellee.	LC No. 2001-036652-NO

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

In this premises liability case arising from a slip and fall at defendant's bank, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I

On January 14, 2000, plaintiff arrived at defendant's bank at 9:40 a.m. to make a deposit. It had been lightly snowing that morning. The bank opened for business at 9:30 a.m. Defendant waited in the teller line inside the bank, completed his transaction, and went to exit the bank. After taking a few steps, plaintiff slipped on a puddle of water on the floor. Plaintiff, however, was unsure if he slipped at this time or at 11:00 a.m., when he believed he may have returned to do additional banking. On December 4, 2001, plaintiff filed this negligence action.

On June 28, 2002, defendant filed a motion for summary disposition. Defendant argued that summary disposition was appropriate because plaintiff could not present evidence establishing that defendant had actual or constructive notice of the hazardous condition, i.e., the puddle of water. Defendant asserted that plaintiff's deposit ticket showed that he was at the bank at 9:40 a.m. only, and thus, the puddle of water caused by partially melted snow had been on the floor for no more than ten minutes. Defendant argued that this was an insufficient time to put defendant on notice of the condition. Defendant also argued that, based on the evidence, a jury would be required to speculate as to how long the melting snow had been on the floor; the evidence was insufficient to allow the jury the make a reasonable inference.

Plaintiff responded and argued that the evidence presented was sufficient to create a factual dispute as to whether defendant knew or should have known of the puddle. Plaintiff testified that after he fell, he noticed that the water was dirty and had footprints in it. Plaintiff

asserted that a reasonable jury could infer that the water had been on the floor for a sufficient time to put defendant on notice as to its existence.

At the summary disposition motion hearing, the parties reiterated their arguments outlined above. In addition, plaintiff argued that defendant's motion should fail because it did not assert lack of notice as an affirmative defense. The trial court granted defendant's motion, finding that plaintiff slipped less than fifteen minutes after the bank opened, there was no evidence that plaintiff returned to the bank at a later hour and fell at that time, nor was there any evidence that defendant's employees tracked in the snow when they arrived at work. Therefore, the court concluded that plaintiff failed to produce sufficient evidence to establish a factual dispute as to whether the condition had been on the floor for more than fifteen minutes.

II

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Such a motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id*. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

III

An invitor owes a duty to his invitees to inspect the premises and make any necessary repairs or warn of discovered hazards. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). An invitor's liability must arise from active negligence, through an unreasonable act or omission, or through a condition of which the invitor knew or a condition of such a character or duration that the invitor should have known of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001).

Here, the trial court concluded that plaintiff presented no evidence from which a reasonable jury to infer that the wet spot on the bank lobby floor had been there for a sufficient time to put defendant on notice as to its existence. Plaintiff argues on appeal that because defendant did not plead lack of notice as an affirmative defense, it waived the defense. Thus, the trial court erred in basing its ruling on this defense. However, plaintiff fails to cite any authority for the proposition that, in premises liability cases, the issue of notice is an affirmative defense and we do not construe it as such.[1]

[1] The cases plaintiff cites, *Chmielewski v Xermac, Inc*, 216 Mich App 707; 550 NW2d 797 (1996), and *Grand Blanc Landfill, Inc v Swanson Environmental Inc*, 200 Mich App 642; 505 NW2d 46 (1993), rev'd in part 448 Mich 859 (1995), stand for the general proposition that affirmative defenses must be raised within certain timeframes, else they are waived. See MCR 2.111(F)(3).

Duty is an essential element in all negligence cases. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In the situation presented in this case, whether an invitor owes a duty to an invitee depends on whether the invitor had actual or constructive notice of the hazardous condition. *Clark, supra* at 419. Therefore, the issue of notice must be resolved in order to determine if an invitor is subject to liability. Accordingly, we find that the trial court did not err in considering whether defendant knew or should have known of the wet spot when it made its summary disposition ruling.

Defendant also argues that the trial court erred in granting defendant's motion because the fact that plaintiff asserts the water was dirty and had footprints in it is sufficient to establish a factual dispute as to how long the condition had been on the floor. We disagree. At his deposition, plaintiff testified that the floor was "wet with snow," but then clarified this statement and said, "It was like slush, not snow, but slush." He did believe that it was more than just water on the floor. Only in his post-deposition affidavit did plaintiff assert that the water/slush was "dirty with footprints in it." A party may not create a factual dispute by submitting an affidavit which contradicts his own sworn testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001).

Even if plaintiff's statement in his affidavit was not considered "contradictory," but merely additional, we do not find that this information created an issue of material fact. It is undisputed that the bank opened for business at 9:30 a.m. and that the employees arrived at 9:00 a.m. Plaintiff also testified that there were four or five people in line ahead of him at the bank of teller windows. The deposit slip from the bank indicates that plaintiff completed his banking transaction at 9:40 a.m. Assuming that the water/slush on the floor was dirty and footprints could be seen, this could have been caused by the other invitees in line ahead of plaintiff. This fact is not dispositive of whether the floor was wet for a significant enough time that defendant should have known about it.

There is no evidence to support plaintiff's belief that he may have been there at 11:00 a.m. And, in fact, plaintiff testified that he believed his was at the bank only once. Evidence also indicated that the bank is regularly cleaned overnight. The fact that the wet spot was slushy further indicates its presence on the floor for a short period of time. Thus, given the evidence presented, we find that the trial court did not err in concluding that defendant neither knew or should have known about the wet spot. Accordingly, we hold that the trial court properly granted defendant's motion for summary disposition.

IV

Lastly, plaintiff argues that the trial court erred in refusing to infer that the bank's security camera videotape and plaintiff's accident report, which defendant failed to provide, would have been adverse to defendant. The jury instruction that permits such a presumption, SJI2d 6.01(c),

> is to be given where a question of fact arises regarding whether a party has a reasonable excuse for its failure to produce the evidence, the court finds that the evidence was under the party's control and could have been produced by the party, and the evidence would have been material, not cumulative, and not equally

available to the other party. [*Clark v Kmart Corp*, 249 Mich App 141, 147; 640 NW2d 892 (2002).]

Defendant asserts that it routinely reuses or discards the videotapes. Plaintiff offers no evidence to contradict defendant's claim. Thus, we find that defendant had a reasonable excuse for failing to produce the videotape. In regards to the accident report, plaintiff does not explain why the incident report is material and not merely cumulative of the evidence already presented. This is not a situation where the contents of the report are unknown to plaintiff, as he himself filled out the report in the presence of one of the bank employees. Accordingly, we find that plaintiff failed to establish that he was entitled to a presumption that the videotape and incident report would have been adverse to defendant.

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski