

STATE OF MICHIGAN  
COURT OF APPEALS

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STEVEN P. BEYER,

Plaintiff-Appellant,

v

K-MART CORPORATION,

Defendant-Appellee.

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UNPUBLISHED  
September 13, 2012

No. 306689  
Ottawa Circuit Court  
LC No. 10-001975-NO

Before: WILDER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals the trial court's grant of defendant's motion for summary disposition. We affirm.

Plaintiff sued defendant after slipping on a puddle in its store. Defendant moved for summary disposition under MCR 2.116(C)(10). In response, plaintiff claimed that there was a genuine issue of material fact as to whether the puddle existed for a sufficient duration before the accident to put defendant on constructive notice of its presence. The trial court granted defendant's motion for summary disposition.

A trial court should grant a summary disposition motion under MCR 2.116(C)(10) when there is no genuine question of material fact and the movant is entitled to a judgment as a matter of law. MCR 2.116(C)(10). In evaluating a motion for summary disposition, the trial court must consider pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "Once the moving party has supported its position by documentary evidence, the burden shifts to the opposing party to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, summary disposition may properly be granted." *Abbott v John E Green Co*, 233 Mich App 194, 197-198; 592 NW2d 96 (1998).

Plaintiff argues that because defendant failed to produce evidence of the condition of the puddle, he is entitled to an adverse inference that the puddle had been on the floor long enough

to establish constructive notice.<sup>1</sup> An adverse inference allows a trier of fact to conclude that evidence under a party's control would be adverse to that party, if that party failed to produce the evidence. *Ward v Consolidated Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005). We assume for purposes of analysis that the adverse inference doctrine applies in a summary disposition decision. Cf. *Banks v Exxon Mobil Corp*, 477 Mich 983, 984-985; 725 NW2d 455 (2007) (KELLY, J., concurring) (issue of whether adverse inference is taken into consideration on summary judgment has not been decided.) We decline to decide that issue, however, because plaintiff was not entitled to an adverse inference based on the facts presented in this case.

A jury may draw an adverse inference against a party that has failed to produce evidence only when: “(1) the evidence was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party.” *Ward*, 472 Mich at 85-86. In this case, the trial court appeared to conclude that defendant's excuse for not producing evidence of the spill was reasonable, in that defendant cleaned up the puddle after plaintiff fell, rather than leave the puddle on the floor. An adverse inference was unavailable to plaintiff here because one of the aforementioned preconditions had not been met, i.e., the party had a reasonable excuse for failing to produce the evidence.

Plaintiff also argues that the condition of the puddle created a genuine issue of fact regarding whether someone else made tracks through the puddle before he fell. Plaintiff claims this fact is material because if tracks were made, the puddle may have existed for a sufficient duration to attribute constructive notice of the puddle to defendant. Plaintiff conceded in deposition, however, that the tracks may have been his own. The evidence was thus not sufficient to raise a genuine issue of material fact.

In *Clark v Kmart*, 465 Mich 416; 634 NW2d 347 (2001), the plaintiff sued the defendant after slipping on a grape on its floor. The Michigan Supreme Court held that because there was evidence of how long the dangerous condition existed, independent of the condition of the grape itself, there was a question of fact for the jury. *Id.* at 419-420 ([T]his case . . . presents evidence independent of the condition of the grapes, indicating that the grapes had been on the floor for a substantial period of time). Specifically, there was testimony that the checkout aisle in which the plaintiff slipped had been closed for an hour, so it could be inferred that the grape had been in the aisle floor for at least an hour, which would be long enough to put defendant on notice of the condition of the floor. In the case before this Court, there is no such independent evidence. Even if the tracks through the puddle had come from a third party, there was no evidence indicating when the tracks were made. It would be just as likely that the tracks were made shortly before plaintiff's fall as it would be that they were made long enough before plaintiff's fall to put defendant on notice of the puddle. Plaintiff's evidence is simply too speculative to raise a genuine issue of material fact. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993) (“[P]arties opposing a motion for summary

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<sup>1</sup> Plaintiff raised this argument in his brief in opposition to summary disposition and at the summary disposition hearing.

disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact. A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.” [citations omitted]).

Even viewing the evidence in a light most favorable to plaintiff, plaintiff has failed to move beyond speculation and raise a genuine issue of material fact. Summary disposition for defendant was proper.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Peter D. O’Connell  
/s/ Kirsten Frank Kelly