IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JAMES POWELL, et al., *Plaintiffs/Appellants*,

v.

QUIKTRIP CORPORATION, *Defendant/Appellee*.

No. 1 CA-CV 20-0192
FILED 4-20-2021

Appeal from the Superior Court in Maricopa County
No. CV2019-000152
The Honorable Teresa A. Sanders, Judge

AFFIRMED

COUNSEL

Goldberg & Osborne, LLP, Tucson
By Lisa M. Kimmel, Shawnee Melnick
Counsel for Plaintiffs/Appellants

Burch & Cracchiolo, PA, Phoenix
By Laura Meyer, Daryl Manhart
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Cynthia J. Bailey joined.

C A T T A N I, Judge:

¶1 James Powell appeals the superior court's entry of summary judgment for QuikTrip Corporation ("QT") dismissing his claims for damages resulting from injuries suffered when he slipped and fell at a QT gas station. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Powell visited QT Store #413 on January 24, 2017. As Powell drove up, he noticed a puddle of gasoline on the ground between two pumps that he estimated measured five feet by five feet. QT surveillance video from 15 minutes before Powell's fall showed gasoline on the ground but did not show how the gasoline spilled. QT's manager estimated that during that time of year, gasoline would evaporate completely in 30 to 40 minutes.

¶3 Despite noticing the puddle, Powell parked at the pump and fueled his vehicle, avoiding the gasoline several times. But as he retrieved his receipt and turned back to his vehicle, he stepped into the puddle, slipped, and landed with his right leg bent underneath him. He went by ambulance to a hospital emergency room and later underwent knee surgery.

¶4 In 2019, Powell sued QT, alleging QT "created an unreasonably dangerous condition" and "failed to warn or otherwise take steps to prevent harm and injury to customers at their store." QT filed a motion for summary judgment, arguing that the condition that caused Powell to fall was unknown to QT in spite of reasonable precautions and was open, obvious, and clearly known to Powell. After briefing and oral argument, the superior court granted QT's motion for summary judgment, holding that Powell "was aware of the condition[] and the potential danger it posed to him," and that there was no evidence that QT had actual or constructive notice of the spill.

¶5 Powell timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶6 Powell argues that the superior court erred by granting summary judgment. He asserts that there is a material dispute of fact regarding whether QT had constructive knowledge of the gasoline spill, and that a jury should be allowed to determine whether the hazard at issue was open and obvious.

¶7 Summary judgment is proper only if there is no genuine issue as to any material fact and, based on undisputed facts, the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). We review a grant of summary judgment de novo, viewing all the facts and all reasonable inferences "in the light most favorable to the party against whom judgment was entered." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, 315–16, ¶¶ 2, 8 (App. 1998).

¶8 A business owner is not an "insurer of the safety of a business invitee, but only owes a duty to exercise reasonable care to his [or her] invitees." *Walker v. Montgomery Ward & Co.*, 20 Ariz. App. 255, 258 (App. 1973). In slip-and-fall cases, "the mere occurrence of a fall on the business premises is insufficient to prove negligence on the part of the proprietor." *Preuss v. Sambo's of Ariz., Inc.*, 130 Ariz. 288, 289 (1981). To impose liability on a business owner, the plaintiff must show either: (1) the foreign substance/dangerous condition was the result of the business owner's actions; (2) the business owner actually knew of the foreign substance or dangerous condition; or (3) the business owner had constructive notice of the condition because it existed for such a length of time that, in the exercise of reasonable care, the owner should have discovered it. *Walker*, 20 Ariz. App. at 258.

¶9 Powell does not allege that QT caused the gasoline puddle. Nor has Powell presented evidence that QT actually knew of a hazardous condition. To establish actual notice of a hazard, a plaintiff may rely on, for example, direct evidence of the owner's awareness or evidence that others had complained of the hazard before the accident. *Preuss*, 130 Ariz. at 290. Here, QT's manager testified that store employees were unaware of the spill, and Powell did not provide any evidence that other customers had fallen or complained about the spill before he fell. Although Powell provided an affidavit from a parishioner at the church where he is a pastor, the affidavit described a gas spill "a few days *after* Mr. Powell's fall."

(Emphasis added.) Thus, the superior court did not err by concluding that Powell did not establish that QT did not have actual notice of a hazardous condition before Powell's fall. *Id.*

¶10 Powell next asserts that QT had constructive notice of the hazard based on the surveillance video showing gasoline on the ground before his fall. For these purposes, how long the hazard existed before the injury is critical—it must have been present long enough that an owner exercising reasonable care should have found and remedied the issue. *Walker*, 20 Ariz. App. at 258–59. Powell's only direct evidence of the duration of the hazard was QT's surveillance video showing that the puddle was present 15 minutes before Powell fell. Powell shows no evidence of when or how the gasoline initially spilled. And the only evidence regarding when the spill occurred was the QT manager's testimony that it could not have been more than 40 minutes before the fall because gas evaporates within that timeframe. Although Powell argues that this 40-minute evaporative window "is mere conjecture," he did not controvert this testimony or offer an alternative upper bound for the length of time the gasoline was present. Powell's failure to present such evidence means any assessment of whether the spill had been in place longer than 40 minutes would be purely speculative. *See McGuire v. Valley Nat'l Bank of Phx.*, 94 Ariz. 50, 53–54 (1963) ("Submission of these facts to the jury would require the jury to guess whether the [hazard had been present] for a sufficient length of time. This cannot be permitted.").

¶11 Similarly, Powell failed to present evidence that a gas station owner exercising reasonable care would have discovered the spill in this time period—whether 15 minutes, 40 minutes, or longer. QT presented evidence that it has a policy requiring employees to go outside to complete daily tasks "every half hour to 45 minutes," which they equated to "a few times" a day or "at least ten times a shift." In completing that task, the employees would make sure the parking lot was clean and maintained. Powell did not provide evidence that other gas stations follow a more rigorous standard of care, nor did he otherwise show that QT's policy was deficient. *Cf. Preuss*, 130 Ariz. at 289–90 (reasoning that the owner's practice requiring "periodic checks" for debris "throughout the day" undermined an assertion of constructive notice).

¶12 In sum, Powell did not proffer any evidence to establish that the spill was present for more than between 15 and 40 minutes, and he did not proffer any evidence of what similarly situated gas station operators would be expected to do under the circumstances. Thus, Powell did not carry his burden of proving that the spill had been in existence for a

sufficient length of time such that QT should have discovered the spill. *See Walker*, 20 Ariz. App. at 258–59. Accordingly, the superior court properly rejected Powell's assertion that QT had constructive notice of the spill.[1]

¶13 Because summary judgment was proper on this basis, we need not address Powell's assertion that questions of fact precluded summary judgment as to whether the gasoline puddle was an open and obvious hazard, notwithstanding his clear efforts to avoid it. We therefore affirm the superior court's grant of summary judgment in favor of QT.

CONCLUSION

¶14 We affirm the judgment.

AMY M. WOOD • Clerk of the Court
FILED: AA

[1] For self-service businesses, the mode-of-operation rule may allow a slip-and-fall plaintiff to bypass the traditional notice requirements if the defendant business is of the type that should anticipate regularly occurring hazardous conditions. *Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, 139, ¶ 8 (App. 2006); *see also Bloom v. Fry's Food Stores, Inc.*, 130 Ariz. 447, 449 (App. 1981). But Powell has not argued that the mode-of-operation rule applies here, and in any event, no evidence showed that routine spills presented a hazardous condition. *See Contreras*, 214 Ariz. at 139–40, ¶¶ 9, 12 (drawing a distinction between the frequency of spills and the frequency of hazardous spills). Although multiple employees testified that spills occur "often," Powell offered no evidence showing regular hazardous spills.