STATE OF MICHIGAN

COURT OF APPEALS

DONALD E. McMINN and SHIRLEY M. McMINN,

Plaintiffs-Appellants,

v

BORMAN'S, INC., d/b/a FARMER JACK SUPERMARKETS,

Defendant-Appellee.

UNPUBLISHED
November 22, 2002

No. 234503
Macomb Circuit Court
LC No. 2000-001310-NO

Before: Jansen, P.J., and Holbrook, Jr. and Cooper, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right the trial court's order granting defendant's motion for summary disposition, pursuant to MCR 2.116(C)(10). We affirm.

On July 4, 1999, defendant's assistant manager, Mr. Raymond Kurtzhals, opened the store in question to the public at 7:00 a.m. Plaintiff was one of the first customers in defendant's store that morning. The evidence shows that at approximately 7:20 a.m., plaintiff tripped and fell on a floor mat in the produce department. According to plaintiff, he fell because he caught his toe on a flared up portion of the floor mat. Plaintiff admitted that when he tripped, he was not watching where he was going because he was looking at one of defendant's employees in the area. It was not until plaintiff got to his feet that he noticed the edge of the floor mat was flared.

Plaintiff initially suggests on appeal that summary disposition was improper because defendant failed to attach documentary evidence to its motion. The court rule states that "[a]ffidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted are required in the motion. . . when judgment is sought based on subrule (C)(10)." MCR 2.116(G)(3)(b). A review of the lower court record shows that defendant's motion for summary disposition is replete with references to the deposition testimony of Mr. Kurtzhals and plaintiff. While defendant failed to attach these depositions to its brief, the court rule does not specifically require the *attachment* of documentary evidence. MCR 2.116(G)(3)(b). More

[1] Shirley McMinn's claims against defendant are derivative of her husband's claims. Thus, the singular term "plaintiff" will be used to refer to Donald E. McMinn.

importantly, we note that plaintiff attached both depositions to his opposing brief. See *Farm Bureau Mut Ins Co v Blood*, 230 Mich App 58, 65-66; 583 NW2d 476 (1998). Thus, the trial court had sufficient documentary evidence to rule on defendant's motion.

Plaintiff next contends that the trial court erred in granting summary disposition because disputed issues of material fact remained regarding defendant's negligence. Specifically, plaintiff claims that he presented sufficient evidence to create a genuine issue of material fact that defendant either created the hazardous condition or had notice of it but negligently failed to act. We disagree. A trial court's decision on a motion for summary disposition is subject to review de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Further, we note that it is insufficient for a party responding to a motion for summary disposition brought under MCR 2.116(C)(10) to promise to offer factual support for a claim; rather, a party must present evidentiary proofs that create a genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999).

Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). As discussed in *Berryman v K Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), a storekeeper must:

> "provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it." [Citations omitted.]

The mere existence of a defect or danger, absent anything more, is insufficient to establish liability. *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965). However, a prima facie case of negligence may be established by legitimate inferences if there is sufficient evidence to take these inferences outside the realm of mere conjecture. *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

In the instant case, plaintiff claims that the evidence supports the legitimate inference that defendant or its employees negligently caused the floor mat to raise up. According to plaintiff, there is direct evidence that the floor mat was in a raised condition at the time of his accident. Because the condition was preexisting, plaintiff opines that it logically follows that either: (1) defendant's employee working in the produce section caused the condition; (2) defendant's

overnight cleaning crew created the condition by rolling up the floor mat; or (3) defendant created the condition by using unreasonably dangerous mats.

Considering the evidence in the light most favorable to plaintiff, we find that any conclusion that defendant caused the mat's condition would be conjecture. Mr. Kurtzhals stated that he checked the floor mats in the produce section to make sure they were flat approximately twenty minutes before plaintiff fell. Moreover, plaintiff admitted during his deposition that he was not looking where he was going and only saw the raised portion of the mat after he fell. Plaintiff presented no evidence that the employee working in the produce department was ever near the mat in question or that the cleaning crew rolled up this mat the previous night.[2] Rather, plaintiff's contentions in this regard are speculative at best and are not based on reasonable inferences. "It is well settled that a case should not be submitted to a jury where a verdict must rest on conjecture or guess." *Kent v Alpine Valley Ski Area, Inc,* 240 Mich App 731, 746; 613 NW2d 383 (2000).

To the extent plaintiff contends that defendant had notice of the floor mat's condition, his argument must also fail. The mere fact that defendant's employee was in the produce department at the time plaintiff fell does not establish that this employee saw or should have seen the hazard. In *Yarington v Huck*, 218 Mich 100; 187 NW 298 (1922), our Supreme Court determined that a ten-inch hole worn through a carpet created a jury question concerning whether the defendant was aware of the dangerous condition. Conversely, there is no evidence in this case to establish when the floor mat became raised or that the hazard existed for a sufficient length of time to give defendant constructive notice. Indeed, the only evidence presented indicates that the mat was flat twenty minutes before plaintiff fell.

Moreover, plaintiff's argument that defendant caused plaintiff's accident because it used unsafe floor mats also lacks merit. While Mr. Kurtzhals testified that the floor mats in defendant's stores would occasionally become raised, he also claimed that this occurred at other store locations that used different types of mats. According to Mr. Kurtzhals, the store location in question was only opened a few months before plaintiff's accident and this was the first time there was a problem with the floor mats. Additionally, Mr. Kurtzhals claimed that the mats used at the instant location were heavier that the other mats in defendant's stores and more likely to stay down. Absent any evidence of falls or injuries with the type of mats used by the store in question, we find that plaintiff has failed to establish a genuine issue of material fact that the floor mats were dangerous.

[2] We note that Mr. Kurtzhals testified that rolling the floor mats could cause them to bend and that the cleaning crew was instructed not to roll the floor mats when moving them.

Because we hold that plaintiff failed to show that defendant caused or had notice of the hazard, we need not address defendant's open and obvious claim.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper