STATE OF MICHIGAN

COURT OF APPEALS

GUY C. VAN DER LAAG,

Plaintiff-Appellant,

v

PALACE SPORTS & ENTERTAINMENT, INC., doing business as DTE ENERGY MUSIC THEATRE,

Defendant/Third-Party Plaintiff-Appellee,

v

G.T.M ENTERPRISES, INC., GREGORY J. TURNER and P.L. & D. ASPHALT,

Third-Party Defendants/Fourth-Party Plaintiffs-Appellees,

v

A & N ASPHALT,

Fourth-Party Defendant.

UNPUBLISHED
February 8, 2005

No. 250641
Oakland Circuit Court
LC No. 02-042743-NO

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff attended a day-long event at DTE Energy Music Theatre, and left after 10:00 p.m. that night. Two of the facility's paved parking lots were separated by a wooded area, with a paved walkway through it connecting the lots. Plaintiff was walking along this strip when he tripped and fell over a loose piece of pavement, suffering serious shoulder injuries as a result.

Plaintiff commenced action, asserting negligent inspection, lighting, and maintenance. Defendant answered with its affirmative defenses, and alternatively commenced action against

third-party defendants, with whom defendant had contracted for paving or asphalt-repair services, who in turn commenced action against fourth-party defendant, a subcontractor. Defendant moved the trial court for summary disposition pursuant to MCR 2.116(C)(10), asserting that it had no notice of an unreasonably dangerous condition and, alternatively, that the condition was an open and obvious one. All of the third-party defendants concurred in the motion.

The trial court observed that defendant's safety administrator provided "uncontroverted evidence" that she had inspected the walkway in question earlier in the day of the accident, and found no debris. The court stated, "There is no evidence that the defendant created the condition. As such the plaintiff has failed to show that the defendant created the defect or had notice of the alleged defect."

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). The court considers the pleadings, affidavits, and other evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Id.* "The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

A business invitor is liable to invitees for injuries resulting from an unsafe condition caused by the invitor's own negligence, or of which the invitor had sufficient knowledge to have taken reasonable steps to abate. See *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968). Accordingly, liability does not follow if the "how and when" of the plaintiff's fall on the premises are "matters of conjecture." *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 10; 279 NW2d 318 (1979). Lacking evidence to suggest either that the dangerous condition itself originated with the defendant's negligence, or "that the condition had existed for a considerable time," resolution of the cause by the court in the defendant's favor is appropriate. *Id.* at 8.

Plaintiff appends to his brief on appeal a reproduction of a photograph purportedly of the location of his fall, taken the day after. This picture plainly shows an object on the pavement, perhaps the size of a large brick. The exhibit does not show, and defendant does not argue, that the loose material originated with some flaw in the pavement at that site.

Plaintiff relies on *Freedman v Palmer Park Theater Co*, 345 Mich 657, 668; 77 NW2d 108 (1956), where our Supreme Court held that the plaintiff was not obliged to prove that the defendant had knowledge of the condition that caused her to fall. However, the rule that emerges from that case is that no such proof is necessary if the condition itself is the result of the defendant's negligence. *Id.* at 668-669. In this case, because there is no allegation that the obstacle over which plaintiff tripped developed from some flaw in the pavement at that location, it is a matter of conjecture whether any negligence on defendant's part brought that obstruction to the walkway, or how long it had been there. In fact, neither party offers a theory of how the piece of pavement came to rest where it did.

"Where the moving party has produced evidence in support of the motion [for summary disposition], the opposing party bears the burden of producing evidence to establish that a genuine issue of disputed fact exists." *Ardt*, *supra*. See also MCR 2.116(G)(4). Because defendant produced evidence in support of its theory that the obstruction was not in the walkway long enough to have triggered a duty to remove it, and because plaintiff produced no evidence to suggest that the offending object had indeed been in place for any period of time before he tripped over it, the trial court properly granted defendant's motion for summary disposition.

Plaintiff complains that the court's ruling related to the claim of negligent maintenance only, and did not reach the claims of negligent inspection or lighting. However, dismissal on the grounds that there was no evidence to suggest either that the condition that caused plaintiff to fall was directly attributable to defendant's negligence, or that the condition existed long enough to obligate defendant to remedy it, necessarily disposed of the claim of negligent inspection along with the claim of negligent maintenance. Concerning negligent lighting, plaintiff cites no authority for the proposition that a business invitor is obliged to illuminate obstructions brought to the premises by forces over which the invitor had neither control nor knowledge. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. see *Yee v Shiawassee County Board of Commissioners*, 251 Mich App 379, 403; 651 NW2d 756 (2002); lv den 468 Mich 852; 658 NW2d 491 (2003).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello