

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL BANKS,

Plaintiff-Appellant,

v

EXXON MOBIL CORPORATION, d/b/a
WIXOM MOBIL ON THE RUN, DEBRA
SALSBURY, and ROBERT PEMBE,

Defendants-Appellees.

UNPUBLISHED

March 16, 2006

No. 257902

Oakland Circuit Court

LC No. 2003-049526-NO

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff sued defendants for negligence after plaintiff was injured while pumping gas at defendant Exxon Mobil Corporation's gas station. The trial court granted summary disposition for defendants pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

Plaintiff alleges that he was a business invitee at defendant Exxon Mobil's gas station and was pumping gas when the gasoline nozzle suddenly broke and splashed gasoline in his face, causing serious injury to his eyes. Plaintiff's complaint alleges that defendants were negligent for failing to maintain the gas pumps in a reasonably safe condition and failing to repair the gas pump he used, which defendants should have known was unsafe for use by customers. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that they were not actively negligent in damaging the pump, and did not have actual or constructive notice that the pump was damaged. The trial court agreed and granted summary disposition for defendants under MCR 2.116(C)(10).

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiff first argues that the trial court erred in concluding that there was no genuine issue of material fact with regard to whether defendants had constructive notice of the defective

gasoline pump. At his deposition, plaintiff testified that he observed a nozzle lying on the ground when he drove into the gas station. He tried to replace that nozzle on the hanger, but it was broken, so he just set the hose down. He then used another hose on pump 12, which he believed was not damaged. That hose did not initially leak. As plaintiff was pumping gasoline, however, the nozzle detached from the handle and sprayed gasoline in his face.

According to the station's records, a customer used pump 12 at 5:12:12 P.M. to pump \$25.68 worth of gas. Another customer subsequently pumped one cent worth of gasoline on pump 12 at 5:15:51 P.M. Plaintiff began using pump 12 at 5:20:28 P.M. The attendants on duty did not see how pump 12 was damaged, nor did they observe the nozzle on the ground before plaintiff used pump 12.

As plaintiff argues, a business invitor like Exxon Mobil is responsible for providing a reasonably safe environment for customers:

The duties of a storekeeper to customers regarding dangerous conditions are well established and were set forth in *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968):

"It is the duty of a storekeeper to 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.*" [*Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001) (citation omitted) (emphasis added by the *Serinto* Court).]

In *Clark, supra* at 419-421, the Court held that a jury could infer that the grapes that caused the plaintiff's fall had been left on the floor for at least an hour, which was sufficient to prove that the defendant should have discovered and rectified the hazard.

In this case, the trial court properly concluded that the evidence would allow a jury to infer that the hose that caused plaintiff's injuries was damaged, at most, approximately eight minutes before plaintiff used the pump. We agree that this amount of time is insufficient to prove that defendants should have discovered and rectified the hazard. The hazard did not exist for such a length of time that defendants should have had constructive knowledge of it. *Clark, supra*.

Plaintiff argues that the trial court failed to consider that the preceding sale on the same was for only one cent, which should have given defendants notice that the pump was damaged. It is apparent that the trial court took this fact into account because it referred to it in its decision. The one-cent sale occurred less than five minutes before plaintiff used the pump. We agree with the trial court, however, that a one-cent sale was not sufficient to provide notice that there was something immediately wrong with the pump that required immediate action to either turn off or promptly inspect the pump.

Plaintiff also argues that he was entitled to the benefit of an adverse inference based on defendants' failure to produce a surveillance videotape of the incident.

When deciding a motion under MCR 2.116(C)(10), a court is required to draw all reasonable inferences in favor of the nonmoving party. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993). Here, the incident involving plaintiff was captured on a surveillance videotape, but defendants claimed that the videotape was lost and could not be produced. Plaintiff prevailed in his request for an instruction that a jury would be permitted to draw an inference that the videotape would be adverse to defendants. Nonetheless, the availability of an adverse inference instruction did not preclude summary disposition on the issue of notice.

At oral argument before the trial court, plaintiff's counsel argued that the videotape would have shown that another driver hit the pump before plaintiff used it. While such evidence would have been relevant to show that the fuel pump was damaged, and while defendants' failure to produce the videotape could allow a jury to draw an adverse inference against defendants with regard to the question whether the pump was damaged, it does not permit an inference that defendants had actual or constructive knowledge of the defect.¹

Plaintiff also argues that the gas pump was improperly designed or located in a manner to prevent a driver from striking it. Plaintiff did not allege this theory in his complaint, or argue it in the trial court. To the extent plaintiff argues that he should have been allowed to amend his complaint to add this new theory, our review is limited to plain error affecting plaintiff's substantial rights because plaintiff did not preserve this issue by raising it below. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

When a trial court grants summary disposition under MCR 2.116(C)(10), it must give the nonmoving party an opportunity to amend his pleadings pursuant to MCR 2.118, unless amendment would not be justified or it would be futile to do so. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001); MCR 2.116(I)(5).

Although plaintiff's expert witness, George Greene, included in his affidavit an allegation that "[t]he concrete island did not provide adequate protection for the dispensing unit, allowing a motor vehicle to come in contact with and damage the dispensing unit," contrary to National Fire Protection Association's standards, he did not cite any facts in support of this conclusion and he apparently never inspected the pump. Plaintiff appears to argue that the mere fact that a vehicle hit the pump establishes that it was inadequately protected. We conclude that plaintiff has not shown that he has factual support for his new theory that the pump was inadequately protected from being hit by a customer. For this reason, plaintiff has not demonstrated that refusal to allow

¹ Although plaintiff asserts that the trial court should have dismissed defendants' motion for summary disposition as a sanction for their failure to produce the videotape, plaintiff did not raise this issue below and, therefore, it is not properly before this Court. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512-513; 667 NW2d 379 (2003).

him to amend his complaint to add this new theory would be plain error.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot