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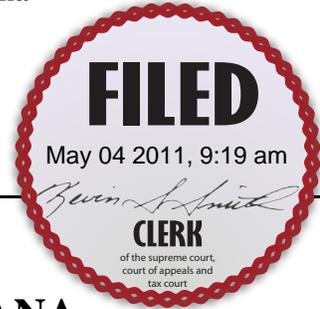
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**IN THE
COURT OF APPEALS OF INDIANA**

PEGGY BRACKEN,)

Appellant-Plaintiff,)

vs.)

No. 84A05-1009-CT-593

MARINE CORP LEAGUE JOSEPH A. BRAY)

DETACHMENT, INC.,)

Appellee-Defendant.)

APPEAL FROM THE VIGO SUPERIOR COURT
DIVISION 2
The Honorable David R. Bolk, Special Judge
Cause No. 84D02-0810-CT-11786

May 4, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, Peggy Bracken (Bracken), appeals the trial court's grant of summary judgment in favor of Appellee-Defendant, Marine Corp League Joseph A. Bray Detachment, Inc., (Marine Corp), with respect to her slip and fall at the premises known as Northside Bingo.

We affirm.

ISSUE

Bracken raises one issue for our review, which we restate as follows: Whether the trial court erred in granting summary judgment in favor of Marine Corp.

FACTS AND PROCEDURAL HISTORY

Bracken has played bingo at Northside Bingo nearly every Saturday evening for the past four or five years. She typically arrives between 5:00 and 5:30 p.m. to ensure that she is able to park in a handicap space in front of the building. On September 15, 2007, during one of her routine visits, she arrived later than usual, at approximately 6:30 p.m. Bracken was unable to find an available handicap parking space because all of the spaces were already taken. As a result, Bracken drove around and parked her vehicle at the side of the building even though the area was not designated as a parking lot. The area was not paved and only had a strip of asphalt road connecting the front parking lot with the back parking lot. Otherwise, it was level ground covered with grass.

At approximately 9:30 p.m., the bingo game ended and Bracken walked out of the building towards her vehicle. While it was dark outside, there was lighting from the front

and back parking lots which cast light on the area where Bracken had parked her vehicle. In fact, Bracken could see the top of her van. Bracken walked approximately the length of one half of a block, when, just before she reached her vehicle, she slipped and fell and sustained injuries to her foot.

On October 23, 2008, Bracken filed a complaint against Marine Corp alleging negligence. On December 5, 2008, Marine Corp, in its answer, denied negligence and asserted contributory fault, assumption of risk, incurred risk, and failure to avoid an injury or to mitigate damages. On February 5, 2010, Marine Corp moved for summary judgment, which was granted by the trial court on May 28, 2010.

Bracken now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, we apply the same standard as the trial court when reviewing a grant or denial of summary judgment. *Hayden v. Paragon Steakhouse*, 731 N.E.2d 456, 457 (Ind. Ct. App. 2000). The granting of summary judgment requires two factors be fulfilled: (1) the designated evidentiary material shows that there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). If the moving party meets these two requirements, the burden then shifts to the non-moving party to respond with specifically designated facts that establish the existence of a genuine issue for trial. *Id.* at 457-58. On review, we may not search the entire record to support the judgment, but may only consider that evidence which was specifically designated to the trial court. *Id.* A presumption of validity clothes a trial court's grant of summary judgment, and the

appellant has the burden of demonstrating to this court that the trial court's grant of summary judgment was erroneous. *Id.* However, we must carefully assess the trial court's decision to ensure the non-moving party was not improperly denied his or her day in court. *Id.*

The tort of negligence consists of three elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by the defendant; and (3) injury to the plaintiff proximately caused by that breach. *Kincade v. MAC Corp.*, 773 N.E.2d 909, 911 (Ind. Ct. App. 2002). Negligence will not be inferred; rather, specific factual evidence, or reasonable inferences that might be drawn therefrom, on each element must be designated to the trial court. *Id.* However, an inference is not reasonable when it rests on no more than speculation or conjecture. *Id.*

Bracken argues that the trial court improperly entered summary judgment in favor of Marine Corp. Specifically, she claims that there are genuine issues of fact with respect to whether the road had been elevated six inches and if there was proper lighting in the area where she parked her vehicle.

First, Bracken presents the road elevation issue. She argues that she fell when she stepped from the road onto the grass because the asphalt road was raised about six inches above the ground level one week before the accident. Marine Corp argued that the asphalt road was at ground level at the time of the accident. In support of its argument, Marine Corp presented an affidavit of its operator, Don McKillop (McKillop), who stated that the asphalt road in question "was at or slightly above the ground level of the grass area where [Bracken] parked her car on September 15, 2007." (Appellant's App. p. 41). He further stated that the

road was not raised until about nine months after Bracken's fall. In support of this affidavit, Marine Corp attached a proposal from a contractor to repave the asphalt road and an invoice showing the payment for the work, all dated nearly nine months after the accident.

Thus, the burden shifted to Bracken and she was required to demonstrate specific evidence establishing the existence of a genuine issue for trial. Bracken focuses on her answers to interrogatories, where she stated: "NOTE: At the time I was not aware that the road had been raised about 6 inches earlier that week so the holes could be taken out and made easier to drive on," demonstrating that someone told Bracken that the road was raised before her accident and she had no personal knowledge of it. (Appellant's App. p. 27). Indeed, when asked about her fall at a deposition on August 25, 2009, Bracken could not say what caused her fall.

In several earlier cases, we have held that summary judgment was appropriate when the plaintiff could not explain why he or she fell. In *Ogden v. Decatur Cnty. Hospital*, 509 N.E.2d 901, 903-04 (Ind. Ct. App. 1987), *trans. denied*, we affirmed summary judgment for the hospital on the plaintiff's claim based on a slip and fall in the hospital's bathroom. The plaintiff suffered a head injury and was never able to state why he fell. *Id.* at 901. Additionally, hospital employees testified that the floor was not wet or slippery and that there were no foreign objects or debris on the floor. *Id.* We held that the designated evidence did not support an inference that the bathroom floor had been negligently maintained, stating, "[f]alling and injuring one's self prove[s] nothing. Such happenings are commonplace wherever humans go." *Id.* at 903.

Likewise, in *Hayden*, a patron exited a restaurant to retrieve his car, but slipped and fell on his way, breaking his wrist. *Hayden*, 731 N.E.2d at 457. The patron sued, alleging that he slipped on snow and ice that had not been properly cleared or salted by the restaurant. *Id.* The trial court granted the restaurant's motion for summary judgment and we affirmed, holding that "absent some factual evidence, negligence cannot be inferred from the mere fact of an accident, and causation may not be inferred merely from the existence of an allegedly negligent condition." *Id.* at 458.

Here, like the plaintiffs in both *Hayden* and *Ogden*, Bracken admitted that she did not know what she slipped on. However, she still invites us to speculate about the cause of her fall. Similar to the restaurant patron in *Hayden*, who *believed* that the cause of his fall was snow and ice, Bracken *believed* the cause of her fall must have been the six inch elevation of the asphalt road. However, like both plaintiffs, Bracken did not provide any specific evidence to support her belief. The only evidence that she designated to the trial court was her testimony that someone told her that the road had been repaved one week before the accident.

As such, because Bracken had no personal knowledge of what caused her fall at the time of the accident, and because she failed to present specific facts showing that Marine Corp was negligent in repaving the road, we find that the evidence that she designated to the trial court is insufficient to deny Marine Corp's request for summary judgment.

Second, with respect to Bracken's second issue, she argues that she fell because Marine Corp failed to properly illuminate the area where she parked. In support of this

argument, she designated her deposition testimony, where she stated that it was so dark outside that she “could not see [her] hand in front of [her].” (Appellee’s App. p. 108). Marine Corp, in turn, designated McKillop’s affidavit, which stated that “the premises known as Northside Bingo” has two parking lots, one in the front and one in the back. (Appellant’s App. p. 41). McKillop further stated that both lots have lights and although there is no direct lighting in the area where Bracken parked her vehicle, lights from the front and back lots cast light on the back area. Bracken claims that this discrepancy creates a genuine issue for trial.

However, Bracken is essentially urging us to ignore the rest of the record, which clearly reveals that she saw the top of her vehicle and walked about one half of a block before she fell. Moreover, the record reveals that there was enough light that other people walking behind her were able to safely reach their vehicles. Nevertheless, because Bracken was required to present specific evidence, and because she failed to do so, we find her allegation that she fell because it was so dark that she could not see anything to be insufficient to overcome summary judgment.

Bracken urges us to follow *Barsz v. Max Shapiro, Inc.*, 600 N.E.2d 151 (Ind. Ct. App. 1992), which she argues is similar to her case. In *Barsz*, a patron slipped and fell in the restaurant on her way to the bathroom. *Barsz*, 600 N.E.2d at 152. The patron testified that she slipped on “something,” but could not identify what that “something” was. *Id.* The trial court entered summary judgment in favor of the restaurant and the patron appealed. *Id.* On appeal, we reversed the trial court’s holding on the ground that, although the patron did not

exactly know what caused her fall, the restaurant failed to rule out all possibilities of negligence on its part because a water glass was found on the floor near the area where the customer fell. *Id.* at 153.

Here, Bracken's reliance on *Barsz* is misplaced. Unlike the restaurant in *Barsz*, Marine Corp presented specific evidence to eliminate all possibilities of its negligence. On the day of the accident, the weather was dry. There was no dew on the grass or elsewhere. The asphalt road was approximately at the same level as the surrounding ground and was not repaved and or raised six inches above the ground until nine months after the accident. Finally, there was enough light for Bracken to distinguish her vehicle, walk towards it, and she successfully covered some distance before the fall. To overcome summary judgment, Bracken was required to show some specific evidence that potentially could have brought Marine Corp's negligence back in question. In *Barsz*, such specific evidence was a water glass found on the floor near the area where the customer fell. *See id* at 153. There, we reasoned that the water glass raised a number of questions which were reserved for the trier of fact to resolve. Here, on the other hand, Bracken did not identify any of the required specific facts; nor did she designate sufficiently specific evidence.

People slip and fall all the time. However, it does not mean that someone automatically has to be liable for his or her fall. Absent some factual evidence, negligence cannot be inferred from the mere fact of an accident, and causation may not be inferred merely from the existence of an allegedly negligent condition. *Hayden*, 731 N.E.2d at 458. Without any specific evidence on how or why she fell, Bracken is relying on speculation and

conjecture to explain the proximate cause of her injuries. Bracken was required to come forward with specific facts that demonstrate the existence of a negligent condition that caused her fall and, therefore, her injuries. She has failed to meet this burden and Marine Corp is entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing, we hold that the trial did not err in entering summary judgment in favor of Marine Corp because no genuine issues of material facts existed in this case.

Affirmed.

DARDEN, J., and BARNES, J., concur.