MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

Donald Hauser,
Appellant-Plaintiff,

v.

Centaur Acquisition, LLC d/b/a Indiana Grand Racing & Casino,
Appellee-Defendant.

March 5, 2021

Court of Appeals Case No. 20A-CT-1420

Appeal from the Shelby Circuit Court

The Honorable Trent E. Meltzer, Judge

Trial Court Cause No. 73C01-1902-CT-8

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff, Donald Hauser (Hauser), appeals the trial court's summary judgment in favor of Appellee-Defendant, Centaur Acquisition, LLC d/b/a Indiana Grand Racing & Casino (Indiana Grand), concluding, as a matter of law, that Indiana Grand was not negligent with respect to Hauser's fall on Indiana Grand's premises.

[2] We affirm.

ISSUE

[3] Hauser presents us with one issue on appeal, which we restate as: Whether a genuine issue of material fact existed that Indiana Grand breached its duty of reasonable care to Hauser.

FACTS AND PROCEDURAL HISTORY

[4] The uncontested facts reflect that on August 6, 2018, Hauser was a business invitee at Indiana Grand. He arrived with his wife sometime between 2:00 p.m. and 3:00 p.m. At approximately 4:45 p.m. and after playing the slot machines, Hauser proceeded to the exit. When walking into one of the main carpeted walkways of Indiana Grand, Hauser fell after "his foot was caught by a defect in the floor and/or loose carpeting." (Appellant's App. Vol. II, p. 40). Shortly after the accident, Kirk Shorter (Shorter), an Indiana Grand EMT, inspected the area of the floor where Hauser had fallen. Shorter's medical report stated that "upon arrival to the area, I did not notice any visible trip hazards."

(Appellant's App. Vol. II, p. 56). Hauser was transported to the hospital where he was diagnosed with a spine fracture.

[5] On February 8, 2019, Hauser filed a Complaint against Indiana Grand sounding in negligence. During his deposition on December 10, 2019, Hauser testified as follows:

> Q. What is your memory of the accident? What happened?
>
> A: I was walking out and I – all I remember is something – I caught my foot on something, and the next thing I was down.
>
> ****
>
> Q: Do you have any recollection, as you were walking down the kind of walkway there, of seeing something on the floor before the accident?
>
> A: No, I was just walking.
>
> Q: You didn't see any liquids or debris or anything like that?
>
> A: No.
>
> Q: Did you see anything wrong with the floor at all?
>
> A: Only thing I seen of the floor is when I was heading for it, I guess, when I was falling. I just caught my foot and fell and that was it.
>
> Q: Your interrogatory answers say that there was loose carpet. What do you mean by that? How was the carpet loose?
>
> A: Well, I just caught my heel on it.
>
> Q: Did you see a ripple or something like that in the carpet?
>
> A: No. I just felt it.
>
> Q: So, it's something you felt on your heel?

A: Yeah.

****

Q: So would it be accurate to say that you didn't—you haven't actually seen—or you didn't see anything wrong with the carpet that day?

A: No. But, I felt it when I caught my foot.

****

Q: Do you know—as you sit here today, do you know whether the carpet was loose?

A: I caught my foot on something.

Q: Okay. You can't say what it was, correct?

A: No.

(Appellant's App. Vol. II, pp. 31, 32, 36-37). On February 19, 2020, Indiana Grand filed its motion for summary judgment, to which Hauser responded on April 20, 2020. On June 19, 2020, the trial court conducted a hearing on Indiana Grand's motion. Approximately one month later, on July 13, 2020, the trial court issued its Order, concluding, as a matter of law, that Indiana Grand was not negligent as "[i]n the present case there is no indication of what defect may have been present outside of speculation." (Appellant's App. Vol. II, p. 16).

[6] Hauser now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

[7] In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *First Farmers Bank & Trust Co. v. Whorley*, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008), *trans. denied*. Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id*. at 607-08. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id*. at 608. A fact is 'material' for summary judgment purposes if it helps to prove or disprove an essential element of the plaintiff's cause of action; a factual issue is 'genuine' if the trier of fact is required to resolve an opposing party's different version of the underlying facts. *Ind. Farmers Mut. Ins. Group v. Blaskie*, 727 N.E.2d 13, 15 (Ind. 2000). The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *First Farmers Bank & Trust Co.*, 891 N.E.2d at 607. When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff's claim. *Id*. Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *Id*.

[8] We observe that, in the present case, the trial court entered findings of fact and conclusions of law in support of its judgment. Special findings are not required in summary judgment proceedings and are not binding on appeal.

AutoXchange.com. Inc. v. Dreyer and Reinbold, Inc., 816 N.E.2d 40, 48 (Ind. Ct. App. 2004). However, such findings offer this court valuable insight into the trial court's rationale for its review and facilitate appellate review. *Id*.

[9] However, it must be remembered that the summary judgment process is not a summary trial. *Hughley v. State*, 15 N.E.3d 1000, 1003-04 (Ind. 2014). Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims. *Id*. at 1004. Further, summary judgment is rarely appropriate in negligence cases because such cases are particularly fact-sensitive and governed by a standard of the objective reasonable person, which is best applied by a jury after hearing all the evidence. *Kramer v. Catholic Charities of Diocese of Fort Wayne-South Bend, Inc.*, 32 N.E.3d 227, 231 (Ind. 2015). Nevertheless, a grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the trial court erred. *Id*.

II. *Negligence*

[10] Hauser's premises liability claim against Indiana Grand is grounded in negligence. To recover on a negligence claim, a plaintiff must establish: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff resulting from the defendant's breach. *Miller v. Rosehill Hotels, LLC*, 45 N.E.3d 15, 19 (Ind. Ct. App. 2015). A defendant is entitled to summary judgment as a matter of law when the undisputed material facts negate at least one element of the plaintiff's claim. *Id.*

[11] As the moving party, Indiana Grand designated evidence reflecting that it did not breach its duty in providing safe premises and that the floor was not defective. EMT Shorter, who was called to the scene, inspected the area of the floor where Hauser had fallen and included in his medical report that "upon arrival to the area, I did not notice any visible trip hazards." (Appellant's App. Vol. II, pp. 53-56). As such, the burden shifted to Hauser, as the non-movant, to raise a "genuine issue of material fact." *First Farmers Bank & Trust Co.*, 891 N.E.2d at 607. To do so, his response "must set forth specific facts showing that there is a genuine issue for trial." *Hughley*, 15 N.E.3d at 1004. Here, Hauser points to his deposition testimony, which had been designated by Indiana Grand, in which he asserted that he caught his foot on the carpet.

[12] In *Scott Co. Family YMCA, Inc. v. Hobbs*, 817 N.E.2d 603, 604 (Ind. Ct. App. 2004), Hobbs fell near a shower stall that was adjacent to the YMCA's men's locker room. The YMCA designated evidence in the form of an affidavit by YMCA employee Lisa Green who averred that when she was alerted that Hobbs had fallen, she went to the locker room to check on him, and she examined the floor area where he fell. *Id.* Green stated that "[t]he floor surface was flat and dry and contained no moisture, debris, foreign substances, puddles or standing water." *Id.* She further noted that "[t]he floor surface did not have any visible physical defects." *Id.* The YMCA also designated portions of Hobbs' deposition, in which he testified that he did not see any water or any type of foreign substance on the floor. *Id.* He also stated that he did not observe any defects in the floor and clarified that "[I] just felt like I hit

something wet and it just, it just slipped... like you slip on ice or something." *Id*. Reversing the trial court's grant of summary judgment to Hobbs, this court noted that Hobbs' designated evidence showed that months before his fall, flooring that may or may not have been around the area of his fall was in need of repair and that it was patched by a local contractor. *Id*. at 605. "From this evidence, a trier of fact could find negligence only by engaging in prohibited inferential speculation." *Id*. Considering this evidence in conjunction with Hobbs' deposition testimony and the affidavit of the YMCA employee that there was nothing wrong with the floor at the time of the injury, we concluded that it became even clearer that "a finding of negligence could only occur if the jury jumped the gap from reason to speculation." *Id*. at 605-06.

[13] We reached the opposite result in *Barsz v. Max Shapiro, Inc.*, 600 N.E.2d 151 (Ind. Ct. App. 1992), which is relied upon by Hauser in support of his argument. While walking to the restroom after having breakfast, Barsz "slipped on something that was like [she] was outside on ice or maybe it was grease, and [her] right foot went out from under [her], leaving all of [her] weight on [her] left knee when [she] went down." *Id*. at 152. Reversing the trial court's grant of summary judgment for the restaurant, we focused on Barsz' deposition in which she testified that she "slipped on something that was like I was outside on ice or maybe it was grease...." *Id*. at 153. Although Barsz did not specifically identify the object or defect that caused her fall, she did testify that she slipped on "something." *Id*. Therefore, we concluded that a finding of negligence would not require "inferential speculation," because Barsz'

testimony, if believed, established the presence of a foreign object on the floor. *Id.* Moreover, the record further revealed a water glass was found on the floor in the area where Barsz fell. *Id*. As a result, we noted that "a court could reasonably infer that Barsz slipped on the glass itself, pieces of the broken glass, or liquid that spilled from the glass." *Id*.

[14] Here, however, Hauser's sole testimony amounts to his statement that he "caught [his] foot on something, and the next thing [he] was down." (Appellant's App. Vol. II, p. 31). Despite extensive questioning, Hauser could not identify what caught his foot, nor did he notice any defect or liquids on the floor or carpet. Unlike *Barsz*, there is no additional designated evidence from which the trier of fact could make a reasonable inference as to the presence of a possible defect. This court has long held that negligence cannot be inferred from the mere fact of an accident, absent special circumstances. *Brown v. Buchmeier*, 994, N.E.2d 291, 294 (Ind. Ct. App. 2013); *Hayden v. Paragon Steakhouse*, 731 N.E.2d 456, 458 (Ind. Ct. App. 2000). Moreover, negligence cannot be established through inferential speculation alone. *Brown*, 994 N.E.2d 294. The mere allegation of a fall is insufficient to establish negligence, and negligence cannot be inferred from the mere fact of a fall. *Id*.

[15] Hauser also points to his Interrogatory Answer in which he stated that "his foot was caught by a defect in the floor and/or loose carpeting." (Appellant's App. Vol. II, p. 40). Like his deposition, Hauser's Interrogatory failed to identify any actual defect, especially in light of the "and/or," and contradicts his later

deposition testimony in which he denied any knowledge of what caught his foot and caused his fall.[1]

[16] As Hauser "can't say what" his foot got caught on, and has provided no basis in fact or reasonable inference to establish that a condition existed such that Indiana Grand breached its duty of reasonable care to him, we must reach the same conclusion as the trial court that no genuine issue of material fact existed and affirm the trial court's grant of summary judgment to Indiana Grand. (Appellant's App. Vol. II, p. 37).

CONCLUSION

[17] Based on the foregoing, we conclude no genuine issue of material fact exists that Indiana Grand breached its duty of reasonable care to Hauser.

[18] Affirmed.

[19] Najam, J. and Crone, J. concur

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[1] Hauser's contention that when he returned to Indiana Grand, approximately six to eight months after the accident, he noticed people working on the carpet in the area where he had fallen—if credited—amounts to a subsequent remedial measure which is not admissible to establish negligence pursuant to Indiana Evidence Rule 407.