STATE OF MICHIGAN

COURT OF APPEALS

FRANKLIN E. DEMING, Personal Representative
ESTATE OF MARIE DEMING, Deceased,

Plaintiff-Appellant,

v

MARIOS LA BELLE'S RESTAURANT, INC.,

Defendant-Appellee.

UNPUBLISHED
June 11, 1999

No. 204844
Saginaw Circuit Court
LC No. 96-015219 NO

Before: White, P.J., and Markman and Young, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition, on defendant's motion for reconsideration,[1] in this slip and fall case. We affirm.

I

We review the circuit court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(10) tests the factual support for a claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Donajkowsi v Alpena Power Co,* 219 Mich App 441, 446; 556 NW2d 876 (1996). The circuit court must determine whether the record that might be developed will leave open an issue upon which reasonable minds might differ. *SSC Assoc Ltd Partnership v General Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Plaintiff argues that the circuit court erred when, on defendant's motion for reconsideration, it vacated its earlier ruling denying defendant's motion for summary disposition and granted defendant's motion on the basis that plaintiff failed to establish that defendant had actual or constructive notice of the alleged unsafe condition.

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

> "(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves unreasonable risk of harm to such invitees, and
>
> "(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> "(c) fails to exercise reasonable care to protect them against the danger." [*Quinlivan v A & P*, 395 Mich 244, 258-259, 260; 235 NW2d 732 (1975), quoting 2 Restatement Torts, 2d, § 343, pp 215-216; see also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995).]

In cases where the liability of a storekeeper is at issue, the law is well settled. *Andrews v KMart Corp*, 181 Mich App 666, 670-671; 450 NW2d 27 (1989):

> 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. [*Id.*, quoting *Serinto v Borman Food Stores, Inc*, 380 Mich 637, 640-641; 158 NW2d 485 (1968).]

The mere occurrence of a fall is not enough to raise a legitimate inference of negligence. *Andrews, supra* at 669. Plaintiff must show either that an employee of defendant caused the unsafe condition that resulted in her fall, or that a servant of defendant knew or should have known that the unsafe condition existed. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979); *Berryman v K Mart Corp*, 193 Mich App 88, 93; 483 NW2d 642 (1992).

Plaintiff asserts that she presented sufficient evidence to create a question of fact whether defendant had constructive notice that the mat presented an unsafe condition. We disagree.

Although plaintiff asserts that she established that there was testimony that the employees constantly checked the mat, presumably because it repeatedly became buckled up, the testimony does not support that inference. The employees testified only that they walked by and looked at the area frequently. Additionally, there was no testimony that the mat buckled up frequently, only that the door got stuck on the mat occasionally, (less than once a week). There was no testimony that this resulted in bunching or curling of the mat. Further, there was no testimony regarding the height of the mat in relation to the space beneath the door, or any testimony regarding what happened to the mat when the door got stuck.

Thus, plaintiff did not present evidence that defendant knew or should have known of the curled or bunched mat, or that defendant created the dangerous condition.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman

Judge Robert P. Young, Jr. not participating.

[1] The circuit court initially denied defendant's motion for summary disposition. However, on defendant's motion for reconsideration, it vacated its earlier order and granted defendant's motion for summary disposition.