STATE OF MICHIGAN

COURT OF APPEALS

HUGH SPENCER,

Plaintiff-Appellee,

v

KESSEL FOOD MARKETS,

Defendant-Appellant.

UNPUBLISHED
May 28, 2002

No. 227382
Genesee Circuit Court
LC No. 98-063752-NO

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

In this case, which represents another in the long line of food on the floor cases, plaintiff slipped and fell on a piece of banana in one of defendant's supermarkets, and claimed that the fall aggravated preexisting conditions in his left wrist and lower back. Plaintiff filed suit against defendant on a premises liability theory, alleging defendant's failure to warn, failure to maintain the business premises in a reasonably safe condition, and failure to inspect. Following a jury trial, the court entered a judgment for plaintiff in the amount of $320,077.31. Defendant appeals as of right. We reverse and remand for entry of judgment in favor of defendant.

Defendant first contends that the trial court should have granted its motions for summary disposition, directed verdict, or judgment notwithstanding the verdict (JNOV). With the exception of one citation regarding plaintiff's age, defendant's entire argument relies on the evidence produced at trial and not on evidence presented in support of the motion for summary disposition. Accordingly, this Court will not consider the summary disposition issue. *Phinney v Perlmutter*, 222 Mich App 513, 553; 564 NW2d 532 (1997). This Court reviews de novo a trial court's denial of a motion for a directed verdict or a motion for judgment notwithstanding the verdict. When examining either motion, we view the evidence in the light most favorable to the nonmoving party and decide whether a factual question exists about which reasonable minds could differ. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000).

Defendant argues that because it had no actual or constructive notice of the dangerous condition, which consisted of a piece of banana on the floor of a supermarket aisle, it could not be liable as a matter of law. Plaintiff counters that defendant's manager knew of the hazards associated with eating food, especially slippery food, inside a store and saw two boys eating or about to eat bananas shortly before plaintiff's fall. The manager did not follow the boys to ensure that they did not drop food, did not instruct another employee to watch them, and did not immediately inspect the areas where they were. The manager instead walked away to find a

security guard because of theft concerns associated with the eating of the bananas. Plaintiff argues that whether the manager's response to the situation was reasonable constituted a question of fact for the jury.

The case presented to the jury was a standard premises liability action involving an invitor and invitee.[1] It is well-established that a possessor of land is not an absolute insurer of the safety of an invitee. *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). A landowner nevertheless owes a duty of care to warn of known dangers and to make his premises safe. *James v Alberts*, 464 Mich 12, 19-20; 626 NW2d 158 (2001). In *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000), the Supreme Court elaborated regarding the landowner's duty as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger.

More specifically, with respect to a store owner's duty to his customers,

> [i]t 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) (quotation omitted) (emphasis in original).]

See also *Hampton v Waste Mgmt of MI, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). The duty to make the premises safe also requires the invitor to inspect the premises to discover any possible dangerous conditions of which he is not aware and to take reasonable precautions to protect the invitees from any foreseeable dangers. *James*, *supra* at 19-20; *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

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[1] On appeal, defendant-appellant does not raise any issue with regard to the jury instructions. Without filing a cross appeal, plaintiff-appellee suggests, however, that because both parties agreed to the use of SJI2d 10.05, which describes the general standard of ordinary care, the general standard governed the cause of action. Plaintiff's argument lacks merit. While the trial court early in its instructions to the jury described the ordinary care standard within SJI2d 10.05, the court later properly instructed the jury on the applicable, correct, and much more specific premises liability standard of care, SJI2d 19.03. MCR 2.516(D)(2). Regardless, the focus of our inquiry here involves whether sufficient evidence warranted submission of the case to a properly instructed jury.

Because in this case no evidence existed that defendant or its employees caused the unsafe condition at issue or had actual knowledge of it, plaintiff had to show that defendant should have known that the unsafe condition existed. Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it. When no evidence shows that the condition had existed for a considerable time, a directed verdict in favor of the storekeeper is proper. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979).

Plaintiff argues that the evidence supported an inference that the banana was present for a long enough period to invoke the rule of constructive notice. Plaintiff points to (1) his own testimony that he believed the banana had been stepped on by someone else because he could not have pulverized it, (2) the manager's testimony that he found a white liquid like substance, which also supported that the banana had been pulverized, and (3) his belief that the manager lacked credibility. Plaintiff ignores, however, that no testimony contradicted the manager's recollection that he saw the boys with bananas shortly before the accident, looked down the aisle and observed nothing on the floor although he did not specifically direct his vision to the floor, immediately went to locate a security guard, and was walking to the security guard area when he learned of the accident. Plaintiff also ignores that his own testimony reflected that the banana was fresh. Plaintiff observed after falling on it that the banana was a very light color, was moist, smelled like banana, and had not begun to discolor or dry out. Plaintiff candidly admitted at trial that he had no idea how long the banana had been there. Even viewing the evidence and all reasonable inferences arising therefrom in the light most favorable to plaintiff, we find no support for the proposition that the banana had been on the floor for an amount of time sufficient to put defendant on constructive notice of its presence. On the contrary, the evidence indicated that the banana was dropped on the floor only moments before the accident.

While plaintiff relies on *Ritter v Meijer, Inc*, 128 Mich App 783; 341 NW2d 220 (1983), that case is distinguishable from the instant case. In *Ritter*, the plaintiff slipped and fell on a grape located five or six feet away from the checkout counter. *Id*. at 785. The plaintiff testified that it felt as if the grape had been stepped on previously and that the grape was flat, white and juicy. *Id*. at 785-786. The trial court found, and this Court agreed, that the evidence that the grape had been previously stepped on was sufficient to give the defendant constructive notice of its existence. *Id*. at 786-787. This Court rejected as pure conjecture the defendant's mere suggestion that it was possible for the grape to be dropped on the floor and stepped on immediately prior to the plaintiff's fall. *Id*.

In *Clark*, *supra* at 419-420, the Supreme Court recently faced the issue whether *Ritter* was decided correctly. The Court ultimately found it unnecessary to determine whether *Ritter* was correctly decided, however, because it found in *Clark* evidence independent of the condition of the grapes themselves to establish the time frame that the grapes spent on the floor. *Id*. Similarly in this case, evidence existed besides the condition of the banana that established the amount of time the banana spent on the floor. The store manager testified that he inspected the aisle ten minutes before seeing the boys with the bananas. On spotting the boys, the manager did not see anything in the aisleway and did not see the boys drop their bananas or engage in any conduct that led him to suspect that they were going to discard or drop the bananas. After seeing the boys, the manager immediately left the area to get a security guard. Before the manager reached the security area, however, the slip and fall had occurred. Unlike the defendant in *Ritter*,

supra, the instant defendant offered more than mere conjecture that the banana had been recently dropped.

Plaintiff further argues that constructive notice existed, and that the manager acted unreasonably in failing to follow the boys, because the manager admitted that he did not like anyone eating inside the store, knew that when people eat in the store they can drop items, which causes accidents, and knew that banana posed a danger when on the floor because it is a light color and is slippery. According to plaintiff, it necessarily follows that if the manager had awareness of the dangers created by food on the floor and saw the two boys eating, he should be charged with having constructive notice of the attendant risk of unreasonable harm.

In *Winfrey v S S Kresge Co*, 6 Mich App 504, 509; 149 NW2d 470 (1967), the plaintiff accused the defendant of creating a hazardous condition by operating a popcorn stand within five feet of an escalator entrance. The plaintiff argued that it was foreseeable that popcorn would be dropped on the floor by customers, thereby creating a dangerous condition. *Id*. The record showed only that children were eating popcorn and that popcorn was found on the floor near the escalator entrance. *Id*. at 509, n. This Court rejected the plaintiff's claim as follows:

> In the absence of a showing that defendant's employees were responsible for the popcorn and other debris being on the floor, plaintiff must show that the condition existed for a sufficient length of time to charge the defendant with knowledge of it.
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> In *Sparks v Luplow*, 372 Mich 198; 125 NW2d 304 (1963), cited by plaintiff, there was evidence that no customer (other than an individual accompanying plaintiff) had used the aisleway where plaintiff slipped on the banana for at least 20 minutes before the fall; and that during that period a store employee had been arranging merchandise within 2 or 3 feet of the spot of the fall and the store manager had been down the aisleway approximately five minutes before the accident; and that if the janitor had performed his sweeping duties in the usual manner the floor would have been swept some time within a half hour before the accident. The Court concluded that under the circumstances reasonable minds could differ as to whether the defendant was guilty of negligence in not seeing and removing the banana – which plaintiff admittedly slipped on – prior to plaintiff's fall.
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> In this case the evidence was that the porter cleaned the floor "periodically." There is no evidence from which one could infer that the popcorn or other debris had been on the spot where she fell for more than moments before the fall. There was no evidence here as to the likelihood of defendant's employee having knowledge of and failing to remove the popcorn or other debris before Mrs. Winfrey's fall. [*Winfrey*, *supra* at 509-510.]

This Court tacitly rejected the plaintiff's suggestion that the defendant's general knowledge that children ate popcorn by the popcorn stand near the escalator was sufficient to create constructive knowledge of the condition of the floor at the time of the plaintiff's accident. *Id*. at 509-510.

In *Hampton*, *supra* at 604, this Court explained that when the premises possessor or his employee engage in reasonable acts or omissions that ultimately are found to play a role in the creation of a dangerous condition, liability does not arise. The *Hampton* Court reiterated that land possessors do not insure the safety of invitees. *Id*. Where there was no evidence reasonably supporting that the defendant or its employees should have anticipated the creation of a risk of harm and where they did not know or have reason to know of the existence of the harmful condition, they were not liable. *Id*. at 605-606. The defendants were entitled to summary disposition because there was no evidence of an unreasonable act or omission by the defendant or its employees. *Id*. at 606.

The Supreme Court recently explained that premises owners have a duty to *respond reasonably* to situations occurring on their premises that would cause a person to recognize a risk of imminent and foreseeable harm. *MacDonald v PKT, Inc*, 464 Mich 322, 334-335; 628 NW2d 33 (2001). While the Court was addressing the responsibilities of a premises owner with respect to the criminal acts of third parties, the general rule that premises owners need only respond reasonably to arising situations appears to apply in this case. The crux of plaintiff's argument is that the manager did not respond reasonably when he saw the boys preparing to eat or eating the bananas. Plaintiff claims that the manager should have recognized the imminent risk of unreasonable harm and affirmatively acted instead of walking away to get a security guard. In *MacDonald*, *supra*, the Supreme Court indicated that while the question of reasonableness is normally one for the factfinder, the question of reasonable care constitutes a matter of law when overriding public policy concerns exist. *Id*. at 336.

We find that under the circumstances of this case we may determine as a matter of law that defendant engaged in no unreasonable conduct. Defendant's manager did not have actual notice of the dangerous condition because the banana was not present on the floor long enough to permit the storekeeper to discover it. The manager inspected the premises shortly before the accident. No evidence indicated that the manager had reason to anticipate that the particular boys he saw would drop food or that he had reason to believe that another inspection was immediately warranted because of some imminent risk of harm. No evidence supported a finding that the manager should have recognized a risk of imminent and foreseeable harm simply because he saw two teenagers eating or about to eat bananas in the grocery store, when they were not throwing food or otherwise acting inappropriately. Under these circumstances, we conclude that the manager's action of going to find a security guard instead of following the customers around the store qualifies as reasonable as a matter of law.

Defendant's general knowledge that two teenagers were eating bananas, like the children eating popcorn in *Winfrey*, and evidence that banana subsequently was found on the floor, like the popcorn in *Winfrey*, is insufficient to demonstrate that defendant breached its duties as an invitor. We note that contrary to plaintiff's suggestion, an unreasonable risk of harm cannot be anticipated every time a customer eats or handles food inside a store, otherwise store employees would act unreasonably for failing to follow every customer who eats or drinks while in the store. No authority supports the proposition that a premises owner breaches his duties where he fails to follow his invitees around to ensure they do not create potentially hazardous conditions. Under the instant circumstances, we cannot conclude that the manager engaged in unreasonable

acts or omissions simply because he observed customers eating and walked away to find a security guard. Accordingly, we must reverse the trial court's entry of judgment for plaintiff.[2]

We reverse the trial court's entry of judgment for plaintiff and remand for entry of a judgment of no cause of action in favor of defendant. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ Christopher M. Murray

[2] With respect to defendant's next argument that a premises possessor has no duty to stop customers from eating in the store, we note that plaintiff never argued for the imposition of such a duty and the trial court did not impose such a duty. Furthermore, in light of our decision to reverse and remand for entry of judgment in defendant's favor, we find it unnecessary to consider defendant's remaining arguments on appeal. *Allstate Ins Co v Goldwater*, 163 Mich App 646, 649; 415 NW2d 2 (1987).