

STATE OF MICHIGAN
COURT OF APPEALS

PATRINA PICA-KRAS and RICHARD KRAS,

Plaintiffs-Appellants,

v

COSTCO WHOLESALE, INC.,

Defendant-Appellee.

UNPUBLISHED

January 15, 2004

No. 242920

Oakland Circuit Court

LC No. 01-029803-NO

Before: Wilder, P.J., and Griffin and Cooper, JJ.

COOPER, J. (*dissenting*).

I respectfully dissent from the majority in that I believe plaintiff is entitled to the benefit of an inference of constructive notice because contrary to store policy, the mustard was removed from the floor prior to any investigation or photograph of the accident scene. When considering a motion based on MCR 2.116(C)(10), the trial court is required to take into account the “pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties” to the extent that the content or substance of that evidence would be admissible at trial.¹

I believe that such an inference would be sufficient to defeat the MCR 2.116(C)(10) motion and allow the case to proceed to the jury as there is a genuine issue of material fact as to the length of time the mustard was on the floor and whether there was a sufficient amount of time to give the defendant constructive notice of the existing condition.

I would reverse.

/s/ Jessica R. Cooper

¹ MCR 2.116(G)(5)-(6).