STATE OF MICHIGAN

COURT OF APPEALS

BURL C. ROLLER, Plaintiff-Appellant,	UNPUBLISHED April 20, 2004
v	No. 244527 Lenawee Circuit Court
KENCO, INC., d/b/a COUNTRY MARKET, Defendant-Appellee.	LC No. 01-000337-NO

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

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this slip and fall case. We reverse.

On appeal, plaintiff argues that the trial court erred in determining that the evidence he produced regarding the negligence of defendant or his employees was purely speculative. He argues that a jury could infer that defendant created the hazard that injured plaintiff, or, alternatively, had notice of it and failed to remedy the condition. We agree with the first part of his contention.

A grant of summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76-77; 597 NW2d 517 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to prove that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages." *Berryman v K Mart Corp,* 193 Mich App 88, 91-92; 483

NW2d 642 (1992). In *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001) (citing *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968)), our Supreme Court stated: "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." When the evidence leads to an inference that defendant created the condition that caused an injury, proof of notice is unnecessary. *Berryman, supra* at 93. "Whether defendant's actions were reasonable is a question for the jury. The question whether a defendant has breached a duty of care is ordinarily a question of fact for the jury and not appropriate for summary disposition." *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

Plaintiff and defendant are in agreement that plaintiff was an invitee of defendant and that, consequently, defendant owed plaintiff a duty of care. The dispute centers on whether plaintiff adduced evidence sufficient to create a genuine issue of material fact regarding whether defendant breached the duty it owed plaintiff as an invitee. As explained above, plaintiff could establish such a breach by showing either that (1) defendant or his agents were actively negligent in causing the condition that led to plaintiff's injury, or (2) that if it were otherwise caused, that defendant knew of the condition or it was of such a character or had existed a sufficient length of time that defendant should have had knowledge of it. *Clark, supra* at 419.

The evidence plaintiff produced consists of: (1) plaintiff's assertion that besides plaintiff and another customer, defendant's employees were the only people in the grocery store at the time of plaintiff's fall; (2) the characteristics of the puddle on the grocery store floor; and, (3) words spoken by defendant's employee to another employee upon discovering plaintiff on the floor. From this evidence, plaintiff argues that a jury could conclude that either (1) an employee or employees of defendant caused the water puddle, or (2) defendant's employee(s) had notice of the puddle's existence and breached their duty to take reasonable measures to prevent plaintiff from being harmed by it. The trial judge characterized plaintiff's evidence of defendant's negligence as "purely speculative."

In *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001) (internal citations omitted), this Court stated: "Circumstantial evidence may be sufficient to establish a case. Nonetheless, parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." "[W]hen an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994). The *Skinner* Court, in the context of determining the requisite causal proof in negligence cases, made the following observations regarding the basic legal distinction between a reasonable inference and impermissible conjecture:

> [A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then

> there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [*Id.* at 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417,422; 79 NW2d 899 (1956).]

"The crucial factor is that if the evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established. In other words, we cannot permit the jury to guess." *Karbel, supra* at 98 (citations omitted).

We hold that plaintiff's evidence that defendant or his employees negligently caused the puddle is more than mere conjecture. Plaintiff's fall happened inside defendant's premises. Plaintiff stated that at the time he fell, only he, a young girl, and defendant's employees were in the store. He produced evidence that there was a jug of water lying on the floor and there was a stack of such jugs on a shelf nearby. The substance on the floor where he slipped was water. One of defendant's employees stated to another, after observing plaintiff lying in a puddle of water, something along the lines of: "[G]et a mop. You can't stack those jugs that close to the edge." The other employee did not respond, in plaintiff's presence, to the reprimand that he had improperly stacked the water jugs. In addition, defendant did not submit affidavits of its employees to rebut the inference that the water spill was caused by defendant's negligent placement of the water jugs too close to the edge of the shelf.

The limited evidence contained in the record supports a logical reasonable inference that defendant's employee or employees did not use reasonable care in stacking the water jugs and that such negligence was a proximate cause of plaintiff's injuries. While there may be another plausible explanation regarding how the water spilled onto the floor, the evidence plaintiff produced creates by a logical sequence of cause and effect an unrebutted reasonable inference that defendant's negligence was a proximate cause of the condition. The employee's statement, taken in context, is not equally consistent with the inference that something besides the other employee's actions caused the puddle. *Karbel, supra*.

The evidence is not sufficient to support plaintiff's alternate theory - that defendant had notice of the condition. Contrary to plaintiff's contention, the size of the puddle alone is insufficient evidence to allow the jury to reasonably infer that it had been on the floor long enough that defendant should have noticed it. A large puddle would be equally consistent with two explanations: (1) that a jug had fallen to the floor, burst open and formed the puddle over a short period of time, or (2) that a jug had fallen to the floor, the fall had opened a small puncture in it, and the puddle had formed over a long period of time. The evidence produced by plaintiff "lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses," and is therefore conjecture insufficient to establish a genuine issue of material fact regarding negligence. *Karbel, supra* at 98.

Summary disposition under MCR 2.116(C)(10) was inappropriate based on the existing record[1] because the evidence plaintiff adduced, considered in the light most favorable to him,

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[1] Our ruling is without prejudice to the renewal of a motion for summary disposition supported
(continued…)

was sufficient to establish a genuine issue of material fact regarding whether defendant negligently created the risk that caused plaintiff's injury.

Reversed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borello

(…continued)

by additional documentary evidence.