STATE OF MICHIGAN

COURT OF APPEALS

RAMON HERNANDEZ,

Plaintiff-Appellee,

v

K MART CORP.,

Defendant-Appellant.

UNPUBLISHED
July 20, 2004

No. 235818
Wayne Circuit Court
LC No. 98-835314-NO

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

In this premises liability action, defendant appeals from the trial court's May 1, 2001, entry of a judgment in favor of plaintiff. We reverse.

Plaintiff brought suit after sustaining injuries as a result of a fall in defendant's store. Plaintiff apparently stepped on a slippery soapy substance on the store's floor.

Defendant first argues that the trial court erred as a matter of law in denying its motion for a directed verdict, as well as its motion for a judgment notwithstanding the verdict. We review the trial court's rulings on these motions de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Our Supreme Court, in *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), reiterated:

> The duties of a storekeeper to customers regarding dangerous conditions are well established and were set forth in *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968):
>
> > "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*." (emphasis added by the *Serinto* Court), citations omitted.

In *Clark, supra*, the defendant appealed from a jury verdict in favor of the plaintiff, who slipped and fell on grapes while shopping in the defendant's store. The issue there, as here, was whether the plaintiff had offered sufficient evidence that the defendant should have known that the grapes on the floor presented a hazard. In affirming the verdict for plaintiff, the *Clark* Court, 465 Mich at 419-420, observed:

> [T]his case . . . presents evidence independent of the condition of the grapes, indicating that the grapes had been on the floor for a substantial period of time, making it unnecessary to determine whether *Ritter* [*v Meijer, Inc*, 128 Mich App 783; 341 NW2d 220 (1983),] was correctly decided.
>
> In this case, there was no direct evidence of when or how the grapes came to be on the floor of the check-out lane. There was testimony from [the defendants'] witnesses about the responsibilities of employees for observing and either reporting or remedying dangerous conditions. However, there was no evidence that any employee was actually aware of the grapes in the check-out lane.
>
> However, a KMart employee testified that the check-out lane would have been closed no later than 2:30 a.m., about an hour before plaintiff arrived. Given that evidence, a jury could reasonably infer that the loose grapes were, more likely than not, dropped when a customer brought grapes to the check-out lane to buy them while it was still open. From this, the jury could infer that an employee of defendant should have noticed the grapes at some point before or during the closing of the lane and either cleaned them up, or asked another employee to do so. Further, the fact that the check-out lane had been closed for about an hour before plaintiff fell establishes a sufficient length of time that the jury could infer that defendant should have discovered and rectified the condition.

Although the *Clark* Court revived a jury award for the plaintiff, the reasoning in *Clark* compels reversal here. Here, the only evidence offered by plaintiff to demonstrate that defendant should have been aware of the soapy substance on the floor was the testimony of plaintiff and his family that there were "dirty," "brownish mushy" footprints in the puddle heading in the opposite direction; this suggested that at least one other person had walked in the puddle before plaintiff and his family did. However, there is nothing more to suggest that the puddle had been on the floor for any significant length of time, or that defendant should have known about it. No one except plaintiff and his family testified that they observed the footprints. It was just as likely that the spill happened seconds before plaintiff slipped as it was that the spill happened hours before plaintiff's accident. In contrast to *Clark, id.* at 421, where our Supreme Court recognized that the evidence relating to the closing of an aisle led to "the availability of the inference that the grapes had been on the floor for at least an hour," there is no such evidence here. Rather, the jury was left to speculate as to when the spill occurred to determine whether defendant's employees had constructive notice. Such speculation is impermissible, and cannot serve as the basis of a jury award. *Skinner v Square D Co*, 445 Mich 153, 164-166; 516 NW2d 475 (1994).

Because there was no evidence from which the jury could conclude when the spill occurred, plaintiff failed to establish a prima facie case of negligence. We reverse.[1]

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

[1] Because of our reversal, we need not consider defendant's other issues on appeal.