STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER HAWTHORNE and JAMES HAWTHORNE,

Plaintiffs-Appellants,

v

K-MART CORPORATION,

Defendant-Appellee.

UNPUBLISHED
July 10, 1998

No. 199878
Oakland Circuit Court
LC No. 95-510080-NO

Before: Holbrook, Jr., P.J., and Young, Jr. and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

This premises liability cause of action arose out of a slip and fall in defendant's store. Plaintiff testified that she slipped on a soap-like substance on the floor. The trial court ruled that plaintiff was unable to prove that defendant had actual or constructive notice of the condition and granted defendant's motion for summary disposition.

When reviewing a motion for summary disposition based on MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997). The moving party has the burden of establishing -- through affidavits, depositions, admissions, or documentary evidence -- either that an essential element of the nonmoving party's case is missing, or that the nonmoving party's evidence is insufficient to establish an element of its claim. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). Summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party to prevail at trial because of a deficiency which cannot be overcome. *Paul*, 455 Mich at 210. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn

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* Circuit judge, sitting on the Court of Appeals by assignment.

from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992); see also *Quinto*, 451 Mich at 367, 371-372.

With respect to a dangerous condition on the land, a possessor must have notice that a dangerous condition exists before he has a duty to exercise reasonable care to protect an invitee. *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965). Notice may be actual, but is usually constructive. Constructive notice varies with the facts and circumstances involved and with the basis of liability. *Id* at 371. However, if the alleged negligence was the act of defendant in creating this condition, it is not necessary for plaintiff to prove defendant had actual or constructive knowledge; rather, defendant's knowledge will be presumed. *Hulett v Great A & P Tea Co*, 299 Mich 59, 66; 299 NW 807 (1941).

Plaintiff claims that a genuine issue of material fact existed as to whether defendant created the dangerous condition on the floor and therefore the trial court erred in granting summary disposition. We agree.

Conflicting affidavits were offered by the parties regarding whether defendant's employees or cleaning crew may have created the dangerous condition. Defendant filed an affidavit by Rick Dickens, owner of the cleaning service hired to clean defendant's store, who stated that on the day of the accident, cleaning of the store did not begin until after the store closed at 10:00 p.m. Dickens also stated that no wet substances were placed on the sales floor before 2:00 a.m. Finally, he stated that when water was placed on the floor it was simultaneously picked up by a scrubber machine.

On the other hand, plaintiff's affidavit stated that after she fell, but before she got up, she noticed a "Squeegie machine" at the end of the aisle. The machine was then used to clean up the spill. Plaintiff also offered a customer accident report prepared on the day of the accident by defendant's loss control officer, John Allen. It states that the accident occurred at about 9:35 p.m. In the "signed statement of witness section," Allen states that the plaintiff told him that there were no cones warning that the area was wet, but that he had a closed circuit videotape which showed:

> . . . myself at the Service Desk talking to a customer who was informing myself and KMART manager Michelle Neal about the spill. When I looked down the midway, I observed two stockpersons cleaning up a mess. I also saw them place two cones on the Floor. About 5-10 minutes later [plaintiff] came up to the Service Desk. She also told me that she had knee surgery on her right knee and that this fall has reinjured it.[1]

Allen also stated that, upon inspection, he saw a "Wet Floor/Just mopped" and observed "some liquid on [plaintiff's] rear end." The videotape was never produced.

Plaintiff argues that this Court should give no weight to defendant's affidavit because Mr. Dickens lacked personal knowledge. We agree. When a motion for summary disposition is filed pursuant to MCR 2.116(C)(10), the moving party must properly support their motion with documentary evidence. *Richardson v Humane Society*, 221 Mich App 526, 527; 561 NW2d 873

(1997). That documentary evidence must be the type which would be admissible at trial. *Cox v Dearborn Heights*, 210 Mich App 389, 398; 534 NW2d 135 (1995). The affiant claimed that cleaning of the store did not begin until 10:00 p.m., and that no wet substance was placed on the floor until after 2:00 a.m. However, defendant's affiant never stated that he was present in the store that night, let alone that he was present at 9:35 p.m. when the accident occurred. He therefore cannot contradict plaintiff's statement that she saw a squeegee machine at the end of the aisle while she was still on the floor.

Defendant argues that plaintiff's affidavit contradicts her own deposition testimony and thus may not be considered. We disagree. It is true that a party may not create a genuine issue of material fact by offering contradictory statements from the same witness. *Schultz v Auto Owners Ins Co*, 212 Mich App 199, 202; 536 NW2d 784 (1995). However, the affidavit does not directly contradict plaintiff's deposition testimony. Rather, it merely states that plaintiff saw a squeegee machine at the end of the aisle while she was on the floor, whereas she testified at her deposition that the manager asked two employees to bring it and clean the spill. She was apparently not asked where the machine came from.

In sum, although there is no direct proof that defendant's employees or cleaning crew were responsible for the spill, plaintiff has presented evidence from which it may reasonably be inferred that they were. Thus, we find that a genuine issue of material fact exists as to whether defendant created the dangerous situation, and therefore had constructive notice of the spill and a duty to exercise reasonable care to prevent harm to its invitees. This Court is not satisfied that it is impossible for the nonmoving party to prevail at trial because of a deficiency which cannot be overcome.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr
/s/ Robert P. Young, Jr.
/s/ James M. Batzer

[1] We strongly disapprove of defendant filing with this Court a copy of this document which does not contain the statement of witnesses page.