# STATE OF MICHIGAN

# COURT OF APPEALS

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PATRICIA FISHER,

Plaintiff-Appellant,

v

K MART CORPORATION,

Defendant-Appellee.

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UNPUBLISHED
November 20, 1998

No. 202386
Oakland Circuit Court
LC No. 96-522784 NO

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff filed a complaint against defendant, seeking damages for injuries she sustained in a slip and fall at defendant's store. Defendant moved for summary disposition under MCR 2.116(C)(10) on the ground there was no genuine issue of material fact that it did not have notice of, nor did it create, the allegedly dangerous condition that caused plaintiff's fall. The trial court granted the motion. Plaintiff appeals as of right. We affirm.

This Court reviews a trial court's decision on summary disposition de novo. *Baker v Arbor Drugs, Inc,* 215 Mich App 198, 202; 544 NW2d 727 (1996). Defendant's motion was brought under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id*. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. *Id.* The court must view the evidence and all reasonable inferences drawn from the evidence in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists to allow the case to proceed to trial. *Id.* Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

A shopkeeper owes a duty to his customers to keep the aisles in a reasonably safe condition and he is liable for injury caused by his active negligence or that of his employees. *Serinto v Borman Food Stores,* 380 Mich 637, 640-641; 158 NW2d 485 (1968). Additionally, if the shopkeeper or his employees did not cause an unsafe condition, a shopkeeper may still be liable for injury to his customer if the hazard was of such a character or existed for such a sufficient length of time that the shopkeeper should have had knowledge of it. *Id*. Where there is no evidence to show that the dangerous condition

existed for a considerable amount of time, the plaintiff has failed to establish a prima facie case. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979).

Plaintiff alleged that she fell because some water spilled onto the floor from a jug of water that had been placed on a shelf. However, plaintiff produced no direct evidence showing when the water jug fell onto the floor. Instead, she relies upon inferences drawn from the evidence. A plaintiff may support a claim of negligence based upon reasonable inferences drawn from the evidence so long as the inferences take the case out of the realm of conjecture. *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

Plaintiff first argues that the evidence shows that defendant's employee may have caused the water jug to fall, thereby creating the water puddle. If defendant's employee created the condition that caused plaintiff's fall, then plaintiff was not required to show that defendant had notice of the spilled water. *Berryman v K Mart Corp*, 193 Mich App 88, 93; 483 NW2d 642 (1992). To support this argument, plaintiff relies on evidence that defendant's employee had straightened up the shelf where the water jug was located within a fifteen-minute period immediately preceding the fall. From this evidence, plaintiff asks this Court to infer that the water jug was knocked down in the course of straightening up the shelf. We find this inference too unreasonable to create a genuine issue of material fact. Fifteen minutes is a substantial period of time and there is no evidence that an employee caused the jug to fall. It is equally likely that someone else, like a customer, may have caused the jug to fall, particularly since the testimony showed that the store was busy at the time. Thus, absent other evidence, it is pure conjecture to conclude that defendant or its employees were responsible for creating the hazardous condition.

Plaintiff also contends that, even if the jug was knocked off the shelf by someone other than one of defendant's employees, the water was present on the floor for a sufficient period of time to provide notice of the hazardous condition. From the deposition testimony of defendant's employee, the water could have been on the floor for no more than ten minutes. However, whether the water was on the floor for as much as ten minutes is also a matter of pure conjecture. From the submitted evidence, it is just as likely that the water was on the floor for a shorter period time, for instance, only a few minutes, which would not be sufficient to provide notice of the hazardous condition. See *Whitmore, supra* at 10. Thus, it would be pure speculation to conclude that the water was on the floor for a sufficient period of time to impose liability.

Plaintiff places some reliance on *Sparks v Luplow*, 372 Mich 198; 125 NW2d 304 (1963); however, we find that the decision in *Sparks* is distinguishable from this case. In *Sparks*, the plaintiff was injured when he slipped on a banana on the floor of an aisle in one of the defendant's store. *Id*. at 199. However, unlike the case at bar, the plaintiff in *Sparks* presented evidence that would give rise to an inference that the defendant was negligent in failing to notice the presence of the banana on the floor. Specifically, in *Sparks*, the store manager testified that he had walked down the relevant aisle on several occasions on the day of the accident, including on one occasion approximately five minutes before the accident, and did not see the banana on the floor. *Id*. at 201. Another store employee, defendant Luplow, also testified to being in the aisle approximately twenty minutes before the fall and not seeing the banana. *Id*. Further, the store manager also testified that had the store janitor performed his duties

in the usual manner, the aisle floor would have been cleaned sometime within thirty minutes before the accident. *Id*. Moreover, no evidence was presented to show that anyone other than the plaintiff was in the aisle for at least twenty minutes before the accident. *Id*. Based on this evidence, our Supreme Court concluded that reasonable minds might infer that "the failure to sweep, together with the failure on the part of the store manager and defendant Luplow to see the banana, which was admittedly there and may have been there long enough for them to have found it in the exercise of ordinary care, constituted negligence." *Id*. at 203.

In this case, however, plaintiff presented no evidence that would give rise to an inference that defendant was negligent in failing to learn of the presence of the water. As indicated above, plaintiff failed to present any evidence, other than pure conjecture, which would establish that the water was on the floor for a sufficient period of time for defendant, in the exercise of reasonable care, to have discovered its presence. Accordingly, the trial court properly granted summary disposition for defendant.

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition because her deposition testimony created a genuine issue of material fact with respect to whether the lighting conditions in the store were adequate. Although we acknowledge that plaintiff testified that inadequate lighting was responsible for her inability to see the water on the floor, plaintiff did not make this claim in her complaint. Rather, the gravamen of plaintiff's complaint was that defendant had either actual or constructive notice of the presence of the water on the floor. Although plaintiff alleged in her complaint, generally, that defendant breached its duty to maintain "reasonably safe premises free of unreasonably dangerous conditions," plaintiff did not claim with any specificity that inadequate lighting caused her to fall. In fact, plaintiff's complaint makes no mention at all of inadequate lighting. MCR 2.111(B)(1) requires that a complaint contain a "statement of facts . . . with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called upon to defend." We conclude that plaintiff's complaint failed to reasonably apprise defendant that it would have to defend a claim of inadequate lighting.[1]

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage

[1] Although MCR 2.116(I)(5) requires a trial court hearing a motion for summary disposition under MCR 2.116(C)(10) to "give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that the amendment would not be justified," plaintiff never moved in this case to amend her complaint to add an allegation of inadequate lighting.