STATE OF MICHIGAN

COURT OF APPEALS

RITA TAYLOR,

Plaintiff-Appellant,

v

KROGER COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

RFK REALTY CORPORATION,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
May 9, 2000

No. 211235
Wayne Circuit Court
LC No. 95-533488-NO

Before: Hood, P.J., and Gage and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises out of a slip and fall accident outside a store owned, at that time, by RFK Realty Corporation and leased by Kroger Company. Plaintiff alleged that she injured her ankle when her foot slipped after she stepped onto an asphalt ramp located outside the doors of the grocery store. Defendants moved for summary disposition. The trial court held that there was no design defect, an average person would have been aware of the ramp, pebbles on the sidewalk did not give rise to a dangerous condition, and defendants had no notice of the creation of a dangerous condition.

Plaintiff argues that the trial court erred in granting summary disposition where questions of fact existed regarding defendants' failure to maintain the property.[1] We disagree. A motion for summary disposition pursuant to MCR 2116(C)(10) tests the factual support for a claim. *Hughes v PMG Building, Inc*, 227 Mich App 1, 4; 574 NW2d 691 (1997). The court must consider the pleadings, affidavits, depositions and other documentary evidence submitted by the parties and grant the motion if

there is no genuine issue regarding any material fact. *Id.* We review summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Id.*

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Hamptom v Waste Management of Michigan, Inc*, 236 Mich App 598, 602 NW2d 172 (1999). "Negligence may consist of the failure of a defendant to discover a dangerous condition created by a third party." *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991). To impose liability based on the acts of a third party, "the defendant must have actual or constructive notice of the existence of the condition." *Id.* For example, the condition of the property may have existed for a sufficient length of time such that the defendant should have had notice of it. *McCune v Meijer, Inc*, 156 Mich App 561, 562, 563; 402 NW2d 6 (1986). In the present case, plaintiff has failed to come forward with any evidence to demonstrate that either defendant had actual or constructive notice of the accumulation of sand and pebbles on the asphalt ramp.[2] The Kroger store manager testified that there had been no prior incidents or complaints involving the condition of the ramp. Indeed, plaintiff testified that she had visited the Kroger store at *least* twice a week for thirteen years. During that time period, she had never encountered a problem with the ramp.

Plaintiff argues that a question of fact has been presented regarding constructive notice based on *Andrews v Kmart Corp*, 181 Mich App 666; 450 NW2d 27 (1989). In *Andrews*, the plaintiff allegedly slipped and fell on a rug as she was leaving the store. *Id* at 667. A store employee had testified that the rugs used by the store had a tendency to curl up in the wintertime. *Id* at 669. This Court held that an inference of constructive notice on the part of the defendant was presented based on the deposition testimony of the defendant's employees. *Id.* at 671-672. Unlike the factual scenario presented in *Andrews*, there was no testimony from either defendant, or anyone else, to establish that prior incidents had occurred due to the condition of the ramp itself or accumulations thereon. Accordingly, the trial court did not err in granting defendants' motions for summary disposition.

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck

[1] At oral argument, plaintiff conceded that there was no issue regarding defective design or failure to warn. Accordingly, we limit our discussion to this issue based on the representations of counsel at oral argument.

[2] Defendants contend that Kroger store manager, Robert Cieslak, inspected the area immediately following the incident and could not locate any sand or pebbles in the area. Plaintiff disputes that testimony. We will assume for purposes of resolving the notice issue that sand and pebbles were present on the asphalt ramp.