STATE OF MICHIGAN

COURT OF APPEALS

KAREN B. STEPHENS and JOHN STEPHENS,

Plaintiffs-Appellants,

V

KROGER COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
August 27, 2002

No. 232135
St. Joseph Circuit Court
LC No. 99-000532-NO

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

In this slip and fall case, plaintiffs Karen and John Stephens appeal as of right from the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendant Kroger Company. We affirm.

This case arises from injuries allegedly suffered by plaintiff Karen Stephens after she slipped on a piece of broccoli while shopping in the produce department of defendant's Sturgis, Michigan store. On appeal, plaintiffs first argue that summary disposition of its premises liability claim was improperly granted because a genuine issue of material fact existed regarding whether defendant should be charged with constructive notice of the hazardous condition on its produce department floor. We disagree.

In reviewing a trial court's grant of a motion for summary disposition brought under MCR 2.116(C)(10), this Court reviews the exhibits and other documentary evidence presented to the trial court de novo to determine whether a genuine issue of material fact precluding summary disposition exists. *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

A shopkeeper owes a duty to his customers to keep the aisles of his store in a reasonably safe condition and is thus liable for any 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). However, even 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 length of time, that the shopkeeper should have had knowledge of it. *Id*. With respect to this latter theory, where there is no evidence to show that the dangerous condition existed for a considerable amount of time, the plaintiff will be unable to establish a prima facie

case and summary disposition is, therefore, appropriate. See *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979).

In this case, plaintiffs concede a lack of direct evidence that the hazard in question, a piece of broccoli on the floor of defendant's produce department, was created by defendant or its employees. Accordingly, plaintiffs rely on the theory of constructive notice which, as noted above, requires that the hazard existed long enough that defendant should have known of it. Plaintiffs, however, produced no direct evidence showing when the broccoli fell onto the floor. Moreover, although constructive notice of a hazardous condition can be supported by reasonable inferences drawn from the evidence, such inferences must amount to more than mere speculation or conjecture. *Id*. at 9. For instance, in *Clark v Kmart*, 465 Mich 416, 421; 634 NW2d 347 (2001), our Supreme Court recently concluded that evidence showing that the checkout lane in which the plaintiff fell after slipping on several grapes had been closed for at least one hour before the plaintiff's arrival at the store, was sufficient to allow "the jury to find that the dangerous condition that led to the injury existed for a sufficient period of time for defendant to have known of its existence."[1] Here, however, plaintiffs offered no evidence beyond the mere existence of the hazard. Accordingly, how and when the hazard came to be are matters of conjecture and summary disposition was therefore appropriate. *Whitmore*, *supra*.

In reaching this conclusion, we reject plaintiffs' reliance on *Andrews v K Mart 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 defendant's store in wintertime. *Id*. at 667. Noting that a store employee had testified at deposition that the rugs used by the store had a tendency to curl up in the wintertime, and were thus routinely replaced by the store with fresh rugs, this Court held that a reasonable inference of constructive notice of the hazard was presented. *Id*. at 671-672. Citing deposition testimony of several of defendant's produce department employees who indicated that produce would routinely be found on the floor of the department, plaintiffs argue that a similar inference exists in the instant matter. However, whereas *Andrews* involved knowledge of a specific problem with a specific item at a specific location in the defendant's store, the instant matter involves knowledge of only a general problem within an entire department.

Plaintiffs further argue that, because it was undisputed that defendant had no set schedule for inspection of its premises, and plaintiffs presented evidence indicating that the floors of the produce department had not been inspected for up to ninety minutes before plaintiff Karen Stephen's fall, the trial court erred in granting summary disposition of its claim for negligent inspection. Again, we disagree.

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[1] The fact that in so holding the Court reversed this Court's decision in *Clark v Kmart*, 242 Mich App 137; 617 NW2d 729 (2000), which was relied on by the trial court in granting defendant summary disposition, is of no moment. Finding that evidence concerning the time of the lane closure was itself sufficient to permit a proper inference as to constructive knowledge, the Court specifically declined to address whether the panel's conclusion that evidence inferring that the grapes had been stepped on prior to the plaintiff's fall was "too logically attenuated" to support a reasonable inference as to the length of time the grapes had been present on the floor. In any event, even assuming that the panel erred in so concluding, no similar evidence is present on this record.

Plaintiffs are correct that defendant's duty to make the premises safe also required that defendant inspect the premises to discover any possible dangerous conditions of which it was not aware. *James v Alberts*, 464 Mich 12, 19-20; 626 NW2d 158 (2001). However, to establish a prima facie case of negligence, whether it be based on premises liability or simple negligence, a plaintiff must demonstrate that the defendant's breach of its duty of due care was the proximate cause of the plaintiff's injury. See *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). As our Supreme Court recognized in *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), the cause in fact element of proximate cause in a negligence claim generally requires a showing that "but for" the defendant's conduct, the plaintiff's injury would not have occurred. Although a plaintiff may rely on circumstantial evidence to establish this causal link, as with circumstantial evidence concerning constructive knowledge of an alleged hazard, "a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id*. at 164.

Here, although evidence indicating that more than half of the produce that fell to the floor in defendant's store was stepped on before being discovered by store employees may be sufficient to raise a reasonable inference that defendant's inspection procedures were inadequate, this evidence is insufficient to support plaintiff's causation theory with respect to the particular hazard at issue. As noted above, there was nothing in the evidence submitted below from which, without engaging in improper speculation, it could be inferred that the item had been on the floor for a sufficiently lengthy period of time that, but for the lack of a more prudent inspection schedule, the item would have been discovered and removed before Karen Stephen's stepped on it. As such, plaintiffs' failed to show that defendant's failure to adopt or otherwise act in accordance with a more prudent inspection schedule was a proximate cause of the claimed injuries, and summary disposition was, therefore, appropriate.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot