STATE OF MICHIGAN

COURT OF APPEALS

PATRINA PICA-KRAS and RICHARD KRAS,

Plaintiffs-Appellants,

V

COSTCO WHOLESALE, INC,

Defendant-Appellee.

UNPUBLISHED
January 15, 2004

No. 242920
Oakland Circuit Court
LC No. 01-029803-NO

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal by right the trial court's grant of defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).[1] We affirm.

I. Facts and Proceedings

On September 21, 2000, plaintiff Patrina Pica-Kras[2] visited defendant's store in Madison Heights around 6:00 p.m. After showing her membership card at the front door, she proceeded to her right to the photo counter to pick up some pictures and then went to the membership desk to request an employment application. One of defendant's employees at the membership desk told plaintiff that she could pick up an application at the front door, so plaintiff walked back to the front door and received an application from another of defendant's employees. Because she had some employment related questions, plaintiff began walking back to the membership desk, following a slightly different path than she had taken to the front door to avoid customer congestion. After taking a few steps toward the membership desk, plaintiff slipped and fell on a substance on the floor, injuring herself.[3] Patrick Mulholland, then assistant manager at

[1] Although the trial court's order does not specify the grounds on which it based its grant of summary disposition, the trial court stated on the record that it granted defendant's motion pursuant to MCR 2.116(C)(10).

[2] Plaintiff Richard Kras filed a derivative claim of loss of consortium. Throughout this opinion, "plaintiff" refers to Patrina Pica-Kras.

[3] The precise nature of plaintiff's injuries is not specified in the record before us, although plaintiff asserts in her brief on appeal that she suffered internal damage to her left knee.

defendant's Madison Heights store, testified at deposition that plaintiff fell ten feet from the entrance/exit and five feet from the membership desk. Some of defendant's employees came to assist plaintiff and called her husband and emergency medical services. Both arrived shortly thereafter, and plaintiff was taken to a hospital. While plaintiff was in the ambulance, she saw what she believed to be mustard on the hem of her skirt, on the employment application, and on the bottom of her shoe. Plaintiff's husband, who later observed the substance, also believed the substance was mustard. Plaintiff testified at deposition that she guessed that she slipped after one of defendant's customers spilled mustard from a hot dog that the customer purchased at the food court located near the membership desk in defendant's store.

Plaintiff filed suit on March 13, 2001, alleging, among other things, that defendant failed to maintain the store in a safe condition, failed to warn of or remove the mustard after it knew or should have known of its presence on the floor, and negligently permitted customers to dispense food in an area where customers walk, creating "the foreseeably inherently dangerous condition of mustard being dropped onto the floor by employees or other patrons." Following discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff could not demonstrate that defendant caused or had notice of the mustard's presence on the floor and that plaintiff's theory concerning the source of the mustard amounted to only conjecture. Plaintiff opposed defendant's motion. Following oral arguments, the trial court decided that having a food court does not create a hazardous condition and that plaintiff had not presented evidence that defendant created or had actual or constructive notice of the condition. Consequently, the trial court granted defendant's motion.[4] This appeal followed.

II. Standard of Review

We review de novo the trial court's decision on a motion for summary disposition. *Willis v Deerfield Twp*, 257 Mich App 541, 550; 669 NW2d 279 (2003). A motion pursuant to MCR 2.116(C)(10) examines the factual support for a party's claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Once the moving party supports its assertion that genuine issues of material fact do not exist, the burden shifts to the nonmoving party to produce substantively admissible evidence that raises a genuine issue of material fact. *Wills, supra.* When reviewing a motion pursuant to MCR 2.116(C)(10), this Court views the evidence in a light most favorable to the nonmoving party. *Dressel, supra.*

III. Analysis

Plaintiff first argues on appeal that the trial court erroneously granted summary disposition to defendant because plaintiff was not required to show that defendant had notice of the presence of the mustard. We disagree. In *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), our Supreme Court restated the duties owed by a storekeeper to his customers:

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[4] The trial court did not address defendant's assertion that plaintiff's theory of causation amounted to no more than conjecture.

> "'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.'" [*Id*., quoting *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968), quoting *Carpenter v Herpolsheimer's Co*, 278 Mich 697; 271 NW 575 (1937) (syllabus).]

Plaintiff contends that defendant created the condition that led to her injuries by permitting customers to use the self-serve mustard dispensers at the food court without confining food consumption to the food court, thus creating a continuing, foreseeable danger that customers would slip and fall on spilled condiments throughout the store. Accordingly, plaintiff asserts that she does not need to prove that defendant had notice of this specific instance of mustard on the floor. We disagree.

Plaintiff derives her argument from the mode-of-operation rule adopted in other jurisdictions. Generally speaking,

> "[t]he 'mode-of-operation' rule looks to a business's choice of a particular mode of operation and not events surrounding the plaintiff's accident. Under the rule, the plaintiff is not required to prove notice if the proprietor could reasonably anticipate that hazardous conditions would regularly arise. [Citations omitted.] In other words, a third person's independent negligence is no longer the source of liability, and the plaintiff is freed from the burden of discovering and proving a third person's actions . . . ." [*Moore v Wal-Mart Stores, Inc*, 111 Cal App 4th 472, 478; 3 Cal Rptr 3d 813 (2003), quoting *Jackson v K-Mart Corp*, 251 Kan 700; 840 P2d 463 (1992).]

Courts have applied this rule in cases involving "self-service" stores,[5] reasoning that a storekeeper operating such a business should anticipate the carelessness of patrons. *Jackson*, *supra* at 709-711; see also Am Jur 2d Premises Liability § 575 at 136-137 (1990).

Contrary to plaintiff's suggestions, Michigan has not adopted this exception to the notice requirement. Rather, the cases that plaintiff claims endorse this exception rely on the principles stated in *Clark*, *supra*. For example, in *Anderson v Merkel*, 393 Mich 603; 227 NW2d 554 (1975), the plaintiff did not have to demonstrate that the defendant had notice of an ice spill because the defendant's employees had spilled ice in the same location on numerous occasions and, significantly, the defendant's employees had created the hazardous condition. *Id.* at 605. Similarly, in *Freedman v Palmer Park Theater Co*, 345 Mich 657, 666-668; 77 NW 2d 108 (1956), where the plaintiff suffered injuries after the heel of her shoe got caught in a gap between the floor sill and the carpet in a restroom doorway, the Court held that the plaintiff did not need to prove that the defendant had notice of the carpet condition in part because the defendant had

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[5] As used here, a "self-service" store is one where customers regularly access products themselves.

caused the condition. *Id.* at 668-669, citing *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 66-67; 299 NW 807 (1941) (where the plaintiff slipped on a floor the defendant had oiled). These cases do not stand for the proposition that if the defendant has created the potential for injury, such as providing a self-service mustard dispenser, then the plaintiff does not need to show that the defendant had notice of the specific condition that caused the plaintiff's injuries. Unlike the plaintiffs in these cases, plaintiff has presented no evidence to demonstrate that one of defendant's employees caused the specific condition at issue, i.e., spilled the mustard on the floor.

In the alternative, plaintiff claims that she is entitled to the benefit of an inference of constructive notice because defendant's employees cleaned up the area where plaintiff fell before taking photographs of the scene.[6] Plaintiff claims that the photographs could have shown that the mustard was on the floor for a sufficient amount of time to give defendant constructive notice of the condition. Because the trial court did not address this issue, it has not been properly preserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, even if the issue had been properly preserved, plaintiff's assertion lacks merit. First, plaintiff has not cited any authority demonstrating that the adverse inference rule applies to consideration of summary disposition motions. This Court will not search for authority to support a party's position on appeal. *Staff v Johnson*, 242 Mich App 521, 529; 619 NW2d 57 (2000). Second, plaintiff has not demonstrated that the evidence would be other than cumulative to other evidence, particularly Patrick Mulholland's testimony that he observed a greenish-brownish or yellowish substance on the floor where plaintiff fell, and that the substance looked fresh and was in a "concentrated spot" on the floor. See *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 147; 640 NW2d 892 (2002) (stating that the adverse inference rule does not apply to merely cumulative evidence). Third, plaintiff has not shown that the inference alone would be sufficient on the basis of the record in this case to create a genuine issue of material fact which would avoid summary disposition. See *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957) (stating that a presumption against one who intentionally destroys evidence "does not relieve the other party from introducing evidence tending affirmatively to prove his case, in so far as he has the burden of proof").

Finally, plaintiff argues that the evidence supports her theory of causation and, therefore, her theory amounts to more than conjecture. The trial court, however, did not grant summary disposition on this basis. Accordingly, it is not necessary for this Court to address this issue.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin

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[6] Plaintiff bases her argument on Model Civil Jury Instruction (previously Standard Jury Instruction 2d) 6.01, which informs jurors that they may infer that when a party fails to produce evidence in its control, the evidence was adverse to that party.