STATE OF MICHIGAN

COURT OF APPEALS

WANETTA STEPHENSON, Plaintiff-Appellant, v B.I.G. ENTERPRISES, INC., d/b/a RICHFIELD BOWL, Defendant-Appellee.	UNPUBLISHED November 4, 2008 No. 280778 Genesee Circuit Court LC No. 06-084951-NO

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

In this premises liability suit, plaintiff Wanetta Stephenson appeals as of right the trial court's grant of summary disposition in favor of defendant B.I.G. Enterprises, Inc., which does business under the name of Richfield Bowl (Richfield). On appeal, the issues are whether the trial court correctly concluded that Richfield had to have actual or constructive notice of the defect before it could be held liable and, if it had to have notice, whether there was a question of fact about Richfield's actual or constructive knowledge of the hazard. We conclude that Richfield had to have notice before it could be held liable and, because there was no evidence that Richfield had actual or constructive notice of the hazard, the trial court properly granted summary disposition in favor of Richfield. For these reasons, we affirm. This case has been decided without oral argument under MCR 7.214(E).

I. Facts and Procedural History

In March 2006, Stephenson was bowling at one of Richfield's bowling alleys. As she was sliding to release her ball in the approach area of the bowling lane, a sliver of wood impaled Stephenson's shoe and caused her to trip and fall.

At the time of her fall, the bowling alley was 34 years old. Discovery revealed that Richfield's employees were aware that the floor could splinter. The splintering could be caused by patrons dropping bowling balls in the approach area or by drying out during the winter months when the furnace is running. Richfield's employees maintain the lanes by oiling the wood and dust mopping. Because the splinters are not normally visible, Richfield's employees primarily discover the splinters when a dust mop becomes snagged on the splinter.

In October 2006, Stephenson sued Richfield for failing to properly maintain the bowling alley. In June 2007, Richfield moved for summary disposition on the ground that there was no evidence that it was on notice of the defective condition. The trial court agreed and granted summary disposition in favor of Richfield in July 2007. After the trial court denied Stephenson's motion for reconsideration, Stephenson appealed.

II. Notice

On appeal, Stephenson argues that the trial court erred when it determined that Richfield had to have notice of the defect because proof of notice is not necessary when a land proprietor or its agents created the dangerous condition that led to the injuries. Alternatively, Stephenson argues that the trial court erred when it determined that there was no question of fact as to whether Richfield knew or should have known about the dangerous condition.

A. Standard of Review

This Court reviews summary disposition decisions de novo. *Derbabian v S&C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). In reviewing summary disposition motions under MCR 2.116(C)(10), this Court will consider "'the pleadings, affidavits, depositions, admissions, and any other documentary evidence in a light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists that would preclude judgment for the moving party as a matter of law.'" *Id*. (citation omitted).

B. Notice and Active Negligence

As our Supreme Court has explained, it is typically not necessary for a plaintiff to prove that the defendant had actual or constructive notice of a hazardous condition where the defendant or its agents actively created the hazardous condition. *Hulett v Great Atlantic & Pacific Tea Co.*, 299 Mich 59, 66; 299 NW 807 (1941). This is because "[k]nowledge of the alleged hazardous condition created by [the] defendant itself is *inferred*." *Id.* at 67 (emphasis added). However, "where the alleged hazardous condition was caused by the acts of third parties or weather conditions or other conditions over which the storekeeper had no control," the plaintiff must prove that the defendant had notice of the condition and time to correct it. *Id.* at 68.

In the present case, Stephenson contends that Richfield's employees actively caused the splinter. She bases this contention on the evidence that Richfield's employees generally understood that the flooring would dry out during the winter months when the furnace was running and, as a result, occasionally would crack and splinter. We do not agree that general knowledge of the potential for splintering under these conditions amounts to actively causing the splinters. A premises proprietor who remains open during a Michigan winter has no option but to run a furnace. Further, although the potential for splintering exists as a result, there is no guarantee that the flooring will actually splinter. Likewise, even if the floor does dry out and splinter, the premises proprietor has no way of knowing where the splintering will occur. Because the act of running the furnace does not result in an identifiable hazardous condition, which can be readily remedied, notice of a particular splinter hazard cannot be inferred. See *id.* at 67 (noting that notice is not normally required where the proprietor created the hazard because it can be inferred that the proprietor knows about it). For these reasons, we conclude that the creation of splinters through operating a furnace in winter—even with knowledge that operating

it may cause splintering—is more akin to a hazardous condition that was created by "weather conditions or other conditions over which the storekeeper had no control." *Id.* at 68. As such, the trial court correctly determined that Stephenson had to prove that Richfield had notice of the condition and sufficient time to remedy it. *Id.*

C. Constructive Notice

Notice may be premised on actual knowledge, which is not at issue in this case, or on constructive knowledge. *Hampton v Waste Mgt of Michigan, Inc.*, 236 Mich App 598, 603-604; 601 NW2d 172 (1999). Constructive knowledge arises when "[the condition] is of such a character or has existed a sufficient length of time that [the defendant] should have had knowledge of it." *Id.* (citations omitted).

In this case, there is no evidence that the splinter was of such a character that it would be readily observable. Stephenson stated that she did not notice anything out of the ordinary when she looked at the approach area. Additionally, Richfield's employees stated in their depositions that these splinters of wood are not usually visible to the eye, and that dust mopping is the primary means by which splinters are detected. Hence, the question is whether there was evidence that the splinter had been present for a sufficient amount of time that Richfield should have noticed its existence and remedied the condition.

We conclude that there was insufficient evidence to support this theory. Prior to Stephenson's game, a women's league bowled on the same lanes with no complaints about the condition of the approach. Additionally, Stephenson bowled for at least one frame before the incident. There is simply no evidence that supports the theory that the splinter existed for a sufficient amount of time to place Richfield on notice. A jury would have to speculate to conclude that the dangerous condition was present for a sufficient amount of time to impose constructive notice. Such speculation is insufficient to defeat a motion for summary disposition. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher