STATE OF MICHIGAN

COURT OF APPEALS

GERALD HALLAHAN, Plaintiff-Appellant,	UNPUBLISHED October 17, 2017
v	No. 334790 Oakland Circuit Court
SEARS ROEBUCK AND CO, Defendant-Appellee.	LC No. 2015-150461-NO

Before: SHAPIRO, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff, Gerald Hallahan, appeals by right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendant, Sears Roebuck and Company (Sears). Because there is a genuine issue of material fact, we reverse and remand for further proceedings.

I. BASIC FACTS

On September 2, 2014, Hallahan went to a Sears store in Waterford, Michigan to purchase an air compressor. Hallahan explained that the store was closing, so it was having a close-out sale and was operating with a "skeleton crew." He testified that the air compressor he wanted had been discontinued but was still available at the Waterford store. When he arrived at the store, he went straight to the tool department and, almost immediately, saw the air compressor that he wanted.

Hallahan explained that the compressor was on sale and had been "marked down."[1] He stated that it was being sold as a "new" product, not as a used or rebuilt one. He added that it was dirty, dusty, and "looked like it had been on the floor from the time it arrived years earlier." As a result, he "wanted to be sure that it was in good shape," so he walked up to it and "rotated it backwards" toward himself so he could "move it off of the carpet [and] onto the tile floor." In

[1] Hallahan stated that the air compressor was almost as tall as he was and that he would say it weighed about 250 pounds. He added that he was 5'9" but that he might currently be 5'5" because of his age. He stated that he was 80 years old.

doing so, he grabbed the air compressor's handlebars. He stated that when he first grabbed the handlebars they were not loose. However, as he "dropped it back" a number of things happened simultaneously. He explained that because the tires on the air compressor were half flat[2] the air compressor resisted rolling and he gave it a little tug. Hallahan stated that when he tugged on the handlebars, he was surprised that they came off in his hands and the air compressor started to fall. He added that the handlebars "[s]lipped right out of the tubes" they had been "snugged into."

Hallahan stated that when the air compressor started falling, he tried to get back so that he would not break a leg. As part of that process, he grabbed the air compressor. The air compressor fell to the floor, but Hallahan did not. He testified, however, that he sustained injuries as the air compressor fell. After the accident, Hallahan noted that the fastening screws for the handlebars were missing.

In December 2015, Hallahan filed a premises liability claim against Sears. In July 2016, Sears filed a motion for summary disposition under MCR 2.116(C)(10), asserting that Hallahan had failed to present any evidence that Sears had notice of the defective condition of the air compressor before the accident. In response, Hallahan asserted that he did not have to prove notice because Sears's negligence in assembling the air compressor caused the accident. He also asserted that if someone else had assembled it, a Sears employee would have had to have moved the air compressor, so Sears would have had constructive notice of the defect. After oral argument, the trial court concluded that there was no genuine issue of material fact with regard to whether Sears had actual or constructive notice of the defect. The court added that Hallahan had failed to produce any evidence to negate the need for actual or constructive notice—such as evidence that Sears created the defective conditions. Accordingly, the court granted Sears's motion and dismissed the case.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Hallahan argues that the trial court erred by granting Sears's motion because Sears created the defective condition, thereby negating the requirement that he establish Sears had notice of the defect. Alternatively, he asserts that the trial court erred by granting the motion because the record shows that there was a genuine issue of material fact with regard to whether Sears had notice of the defective condition. We review de novo a challenge to a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

[2] Hallahan learned that the tires were half-flat after the accident.

B. ANALYSIS

Hallahan asserts that Sears is negligent because it created the dangerous condition so notice of the dangerous condition is unnecessary. In *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 66-67; 299 NW 807 (1941), our Supreme Court explained:

> It was not necessary for plaintiff to prove defendant had actual or constructive knowledge of the hazardous condition of its floor, as the alleged negligence was the act of defendant in creating this condition. Defendant could not by its own act create a hazardous condition and then demand that plaintiff, who was injured as a result thereof, prove it had knowledge of such condition. Knowledge of the alleged hazardous condition created by a defendant itself is inferred.

See also *Berryman v K mart*, 193 Mich App 88, 93; 483 NW2d 642 (1992) ("Because the evidence leads to an inference that defendant created the condition that caused [plaintiff's] fall, proof of notice is unnecessary and the parties' arguments regarding that issue will not be addressed.").

Hallahan theorizes that in this case there is a finite "universe of possibilities," i.e., either the unit was sent to Sears to be assembled by Sears and it was assembled improperly or the unit was pre-assembled when Sears received it and Sears failed in its duty to inspect it to ensure that it was properly assembled. Because Sears is "objectively negligent" under either theory, Hallahan asserts that his claim is supported by more than mere speculation or conjecture. In support, he directs this Court's attention to the following evidence, which he claims allows for a reasonable inference that Sears is liable under one of the two theories he advanced. First, the air compressor was in Sears's store and under its control. Second, Sears set up the display, not a vendor.[3] Third, Sears did not file a notice of non-party fault, which Hallahan asserts shows that Sears assembled the compressor and the display.[4] Fourth, there were no signs on the air

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[3] In support of this factual assertion, Hallahan directs us to an incident report prepared by Sears. The report, however, was never presented to the trial court in conjunction with the motion or response to the motion for summary disposition. As such, we will not consider it on appeal. See *Barnard Mfg*, 285 Mich App at 380 ("When reviewing a motion for summary disposition, this Court's review is limited to review of the evidence properly presented to the trial court.").

[4] It is axiomatic that a lawyer's decision to file or not file a motion is based on many considerations. In this case, the fact that Sears did not file a notice of non-party fault does not lead to a reasonable inference that Sears assembled the air compressor and the display; instead, such a conclusion is mere speculation or conjecture. See *Kaminski v Grand Trunk Western R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (stating that "a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them they remain conjectures only.").

compressor stating that it was used, rebuilt, or unassembled. And fifth, the unscrewed handlebars caused Hallahan's injury. He contends those five facts, viewed in the light most favorable to him, allow for an inference that Sears created the hazardous condition. We disagree.

The hazardous condition was the unscrewed handlebars. There is no direct evidence of who created the condition, nor is there any circumstantial evidence suggesting that Sears created the condition. Hallahan's evidence allows that the product was new, that it was in Sears's possession and control, and that the handlebars were unscrewed. It does not, however, provide any evidence as to why the handlebars were unscrewed. It is possible that Sears's employees assembled the unit when it first arrived at the store. It is possible that the manufacturer assembled the unit before shipping it to Sears. It is possible that a customer purchased the unit, assembled it in his or her home and then, for some reason, returned it to Sears without using it. It is possible that Sears properly assembled the unit but some unknown third party removed the screws for unknown reasons. It is even possible that the unit did not come with screws in the first place and a potential customer would have to purchase such parts separately. Accordingly, because the evidence in this case is "without selective application" to any of Hallahan's theories—or the other possible theories—"they remain conjectures only." *Kaminski v Grand Trunk Western R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) (citation and quotation marks omitted). Hallahan failed to come forward with evidence that Sears created the dangerous condition.

If that were Hallahan's only theory, then the trial court would not have erred in granting summary disposition. However, Hallahan alternatively argues that there was a genuine issue of material fact with regard to whether Sears had constructive notice of the defective condition of the air compressor. "When a premises possessor fails to inspect his or her property, or conducts an inadequate inspection, the law will impute knowledge of the dangerous condition to the premises possessor if the dangerous condition is of such a character or has existed for a sufficient time that a reasonable premises possessor would have discovered it." *Grandberry-Lovette v Garascia*, 303 Mich App 566, 575; 844 NW2d 178 (2014), abrogated on other grounds in *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10 n 1; 890 NW2d 344 (2016). In other words, "the law will impute knowledge of the dangerous condition to the premises possessor if the premises possessor should have discovered the dangerous condition in the exercise of reasonable care." *Id*. at 573. Constructive notice can arise from both the passage of time, from the type of condition involved, or from a combination of both. *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1965).

No record evidence suggests that Sears had actual notice of the defective condition of the air compressor. Hallahan, however, presented testimony suggesting that the defect had existed for a sufficient period of time so that constructive knowledge should be imputed to Sears. Hallahan testified that the type of air compressor he wanted to purchase had been discontinued, that when he arrived the compressor was dirty and dusty, that the tires were half flat, and that the screws that were supposed to fasten the handlebars to the air compressor were missing. He further testified that the product was on sale, which coupled with his other testimony, indicates that the product had been in the store for some time. Moreover, given that the compressor was being used as a display—and was a display of a discontinued model of air compressor—it is also reasonable to infer that it had been in the store for some time. Although there is no testimony that the air compressor was assembled by Sears's employees or that it had been inspected, on this

record, there is sufficient evidence that the condition had existed for a sufficient period of time so as to impute knowledge to Sears. Because there is a genuine issue of material fact on this issue, the trial court erred in granting summary disposition.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Hallahan, as the prevailing party, may tax costs. MCR 7.219(A).

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ Michael J. Kelly