STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE MUKRDECIAN and DARYL MUKRDECIAN, Plaintiffs-Appellants, V DRS C3 & AVIATION COMPANY, Defendant-Appellee.	UNPUBLISHED December 19, 2013 No. 312443 Oakland Circuit Court LC No. 2011-122394-NO

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition in this premises liability action. Because plaintiffs failed to present evidence showing that defendant had constructive notice of the ice on which plaintiff Christine Mukrdecian fell[1], we affirm.

Plaintiffs first argue that the trial court erred when it determined that there existed no genuine issue of material fact regarding whether defendant had notice of the ice on which Christine fell. We review de novo a trial court's decision on a motion for summary disposition. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

[1] Plaintiff Daryl Mukrdecian's loss of consortium claim is derivative of Christine's claim.

Possessors of land owe their invitees a legal duty to exercise reasonable care to protect them from unreasonable risks of harm caused by dangerous conditions on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). A premises possessor may be liable for breaching this duty of ordinary care only if the possessor "knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). Thus,

> [a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).]

Accordingly, in order to overcome defendant's motion for summary disposition, plaintiffs were required to show that defendant had either actual or constructive notice of the icy condition on its premises. Plaintiffs do not argue, and no evidence indicates, that defendant caused or was actually aware of the ice patch in the parking lot. Thus, defendant may be liable only if it had constructive notice of the ice patch.

Plaintiffs failed to present evidence that demonstrated how long the ice patch had existed on the premises before Christine's fall. Plaintiffs theorize that the ice patch must have existed for more than three days because weather reports indicated that there was no precipitation during the three days that preceded Christine's fall. Plaintiffs assert that, therefore, the ice patch must have resulted from precipitation that occurred four or more days before Christine's fall. Plaintiffs, however, failed to present evidence of any precipitation in the area at any point in time before Christine fell. The absence of precipitation for three days prior does not lead to a reasonable inference that precipitation occurred on the fourth day prior. Thus, plaintiffs rely on mere speculation regarding how and when the ice developed. "A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995).

Plaintiff's reliance on *Clark v Kmart Corp*, 465 Mich 416; 634 NW2d 347 (2001), is misplaced. In that case, the plaintiff visited a Kmart store at approximately 3:30 a.m. and slipped on several grapes scattered on the floor in a closed check-out lane. *Id*. at 417. While there was no direct evidence regarding when or how the grapes ended up on the floor, an employee testified that the lane would have been closed no later than 2:30 a.m. *Id.* at 420. The Court held that, based on the evidence, a jury could reasonably infer that the grapes were dropped when the check-out lane was still open and had therefore been on the floor for at least one hour. The Court further concluded that that length of time was sufficient for a jury to infer that the defendant should have discovered and remedied the condition and thus had constructive notice of the condition. *Id.*

Clark is distinguishable from the instant case because the nature of the hazard in *Clark* was such that a jury could infer how the hazard was created. Unlike *Clark*, the ice patch in the instant case does not create such an inference. The ice could have formed from any of a number of sources, including precipitation, spillage, or melting snow. Plaintiffs have provided no evidence to support their theory that the ice resulted from precipitation that occurred at least four days before Christine's fall. This case is similar to *Serinto v Borman Food Stores*, 380 Mich 637, 640; 158 NW2d 485 (1968), in which the plaintiff fell on a broken mayonnaise jar on the floor of the defendant's store. The only evidence regarding the defendant's notice of the condition was the plaintiff's testimony that she had been in the store for 45 to 50 minutes and had not heard the sound of a glass jar breaking during that time. *Id*. at 641. The Court noted that there was no evidence regarding how or to what extent the jar was broken before the plaintiff's fall. *Id.* at 642. The Court held that the plaintiff's "negative evidence," or evidence that a fact was not perceived, was insufficient to show that the defendant had notice of the condition. *Id*. at 642-644.

Similarly, plaintiffs' theory in the instant case relies on an unsupported assumption, i.e., that the ice patch was the result of precipitation that occurred at least four days before Christine's fall. While plaintiffs assert that the weather report is "positive evidence" of their claims, the weather report is similar to the testimony in *Serinto*, which our Supreme Court determined was insufficient to establish constructive notice. Plaintiffs cannot establish the length of time that the ice patch existed because they cannot show how or when the ice patch was created. Without such evidence, they cannot establish that defendant had constructive notice of it because they cannot show that it existed for a sufficient length of time that defendant should have known of its existence. See *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706; 644 NW2d 779 (2002). ("[D]efendant would be liable for plaintiff's injuries only if the condition of the parking lot was caused by defendant's active negligence or the condition had existed a sufficient length of time that defendant should have had knowledge of it." (Quotation marks, brackets, and citation omitted)). In any event, this Court has recognized that circumstantial evidence that ice may have developed because of weather conditions is insufficient to create a reasonable inference that a defendant had constructive notice of an icy condition. *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999). Accordingly, the trial court properly granted summary disposition for defendant.

We need not accept plaintiff's invitation to decide the open and obvious question in light of our determination on the issue of notice.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark T. Boonstra
/s/Pat M. Donofrio
/s/Jane M. Beckering