STATE OF MICHIGAN

COURT OF APPEALS

ETHEL ASHBAUGH,

Plaintiff-Appellant,

v

L & L SHOP-RITE, INC. d/b/a L & L FOOD CENTER,

Defendant-Appellee.

UNPUBLISHED

No. 180000

Oakland Circuit Court
LC No. 93-462501

Before: Reilly, P.J., and White, and P.D. Schaefer,*JJ.

WHITE, J. (dissenting).

I respectfully dissent. I agree that the trial court erred in granting defendant's motion for directed verdict based on the court's assessment of plaintiff's credibility. I cannot agree, however, with the conclusion that a directed verdict in defendant's favor was nevertheless appropriate because plaintiff failed to prove a prima facie case of negligence. Viewing the evidence presented at trial in a light most favorable to plaintiff, granting plaintiff every reasonable inference, and resolving conflicts in evidence in plaintiff's favor, as the trial court and this Court are obliged to do, *Hatfield v St Mary's Med Cen*, 211 Mich App 321, 325; 535 NW2d 272 (1995), I conclude that plaintiff presented sufficient evidence from which a jury could reasonable find that defendant breached its duty to plaintiff.

Plaintiff presented evidence that she fell in very large puddle of clear, clean water. The jury could infer from this evidence that she suffered injury resulting from an unsafe condition on defendant's premises. Plaintiff was also required to show that the unsafe condition either was caused by the negligence of defendant or its employees or, if otherwise caused, existed for a sufficient length of time that defendant should have had knowledge of it. *Berryman v K mart*, 193 Mich App 88, 92; 483 NW2d 642 (1992). While plaintiff was unable to present direct evidence regarding the source of the water, she presented sufficient circumstantial evidence to support a reasonable inference that the water came from a store fixture, rather than a customer.

* Circuit judge, sitting on the Court of Appeals by assignment.

There was testimony that the substance was clear, clean water, covered an area of about three feet by five feet, and was the equivalent of about five gallons of water. The accident occurred in August and there was no testimony that it was wet outside. There was testimony that there were gallon containers of water for sale in the store, but not larger containers. No empty water containers indicative of a customer mishap were seen. While there was no testimony regarding a freezer leak on the day in question, there was testimony that the freezer cases have a drainage system underneath, that sometimes the drains clog up and water comes out, that the water that comes out is clear, and that "it's happened to probably every case in the store at one time or the other." There was also testimony placing a freezer case nearby. Given the size of the puddle, and the substance being clear water, a jury could reasonably conclude that the puddle was more likely caused by a leak than by some conduct of a customer. Indeed, it is difficult to imagine how a customer could cause a water spill of this size.

While the jury was not obliged to accept plaintiff's witnesses' direct evidence regarding the size of the puddle, it was exclusively within the province of the jury to decide whether to do so and to draw reasonable inferences from the evidence if believed. Further, the jury could have concluded that given the store's knowledge that the drains inevitably clogged at some point, the practice of inspecting and cleaning the drains only once a year and otherwise responding only when leaks actually occurred was negligent. See *Williams v Borman's Foods*, 191 Mich App 320; 477 NW2d 425 (1991).

I would reverse.

/s/ Helene N. White