

STATE OF MICHIGAN
COURT OF APPEALS

JOYCELYN SANFORD,

Plaintiff-Appellant,

v

SEARS ROEBUCK & COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 24, 2004

No. 243684
Wayne Circuit Court
LC No. 01-113612-NO

Before: Cooper, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order granting defendant’s motion for summary disposition of her premises liability claim. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was shopping on defendant’s premises when she stepped onto a tiled area and fell to the floor, sustaining injuries. She filed suit alleging that defendant breached its duty to maintain its premises in a reasonably safe condition by overly waxing or polishing the floor, and that defendant’s breach of duty proximately caused her injuries.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff’s allegations were based solely on speculation. In response, plaintiff asserted that defendant had consistently refused to turn over its Customer Accident Report (CAR) and any other document related to the incident. Therefore, at trial, she would be entitled to have the jury instructed that it could infer that the information in those documents would be harmful to defendant. SJI2d 6.01(c). She argued that there was a genuine issue of fact concerning the cause of her fall. The trial court granted defendant’s motion, concluding that plaintiff’s allegation that the floor was overly waxed and therefore caused her to fall, was based on speculation.

We review a trial court’s decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant’s breach of duty proximately caused the plaintiff’s injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence

is produced to take the inferences “out of the realm of conjecture.” *Berryman v K-Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), quoting *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

A storekeeper must provide reasonably safe aisles for customers. In a premises liability action, the plaintiff must show either that the defendant caused the unsafe condition, or that the defendant knew or should have known of the unsafe condition. Such knowledge may be inferred from evidence that the condition existed for a sufficient length of time for the storekeeper to have discovered it. *Berryman, supra*.

A party’s failure to produce material evidence under its control where there is no reasonable excuse for its nonproduction permits an inference that the evidence would have been adverse to that party. *Botsford General Hosp v Citizens Ins Co*, 195 Mich App 127, 144-145; 489 NW2d 137 (1992). The inference is permissive and not mandatory, and the factfinder is not required to draw it. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997).

Defendant has acknowledged that it cannot locate a CAR prepared in conjunction with plaintiff’s fall. Plaintiff has presented no evidence that defendant acted fraudulently in an effort to suppress the CAR. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 520; 592 NW2d 786 (1999). Furthermore, plaintiff’s assertion that other evidence, such as photographs, must have been produced is unsubstantiated. At most, plaintiff would be entitled to an instruction at trial that the factfinder was entitled to infer that the CAR would have contained information adverse to defendant. SJI2d 6.01(c); *Brenner, supra*. However, plaintiff would still be required to make out a prima facie case of negligence. For the reasons stated below, we hold that the trial court correctly concluded that plaintiff was unable to do so.

Plaintiff’s complaint alleged that an overly waxed floor proximately caused her fall. In her deposition plaintiff acknowledged that she was looking at the area of the floor on which she stepped, and that she saw nothing unusual about its condition. She maintained that after she fell she discerned that the floor was overly waxed; however, she found no residue on her hands or clothing. No evidence supported her conclusion that the floor was overly waxed. Plaintiff’s allegation that defendant breached a duty by creating a defective condition on its premises was based on speculation. *Berryman, supra*. Moreover, plaintiff did not present evidence of causation necessary to make out a prima facie case of negligence. *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977). To establish causation, a plaintiff must prove that it is more likely than not that but for the defendant’s breach of duty, the injury would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994). The possibility that a breach of duty by defendant caused plaintiff to sustain injuries is not sufficient to establish causation. *Berryman, supra*. Summary disposition was proper. *Reeves v K-Mart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998).

Affirmed.

/s/ Peter D. O’Connell
/s/ Karen M. Fort Hood