

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DOROTHY HENSCHEL,

Plaintiff-Appellant,

v

UNITED ARTISTS THEATRE CIRCUIT, INC.,

Defendant-Appellee.

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UNPUBLISHED

April 27, 2006

No. 258834

Oakland Circuit Court

LC No. 2003-052299-NO

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Plaintiff Dorothy Henschel appeals as of right the trial court's order granting defendant United Artist Theatre Circuit, Inc's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. Henschel argues that the trial court erred in concluding that she failed to create a genuine issue of material fact regarding the cause of her fall and that she failed to show United Artists had notice of the liquid on the step. While we agree that Henschel established a genuine issue of material fact regarding the cause of her fall, we conclude that she failed to submit evidence to establish that United Artists had actual or constructive notice of the liquid on the step. Therefore, Henschel cannot maintain her premises liability claim.

I. Basic Facts And Procedural History

This case arises from an incident at United Artists' theater located in Walled Lake. On February 28, 2003, Henschel, her son, Mark Ettinger, and Ettinger's daughter, Lauren, went to see a movie at the theater at approximately 4:00 p.m. After purchasing tickets, Henschel, Ettinger, and Lauren entered into a theater through the right-side door. The theater is divided into two sections. The upper section features "stadium-style" seating, and the lower section has "regular seating." A center aisle divides the upper and lower portions of the theater.

The theater was illuminated by two overhead lights located in the upper section and two "exit signs" located on opposite walls over each entryway into the theater. On either side of the lower section of the theater are aisles with carpeted steps leading down to the screen. A small light is located on the front portion of each step. When the group entered through the right-side door of the theater, Ettinger, Lauren, and Henschel conversed briefly and decided to sit in the back row of the lower section. Henschel testified that when the group entered the theater there were previews playing on the screen. Conversely, Ettinger testified that he did not recall that previews were playing. Ettinger and Lauren proceeded down the right-side aisle of the lower

section and took a seat in the middle of the back row. No one else was sitting in the row where Ettinger and Lauren were sitting. Henschel walked through the center aisle and around to the far side of the back row to the top of the left-side aisle. Henschel testified that she was not carrying anything and had not purchased anything from the concession stand.

As Henschel started down the left-side steps of the lower section, she attempted to use the wall to her left as a guide. Henschel testified that she walked down approximately three steps and fell down. Henschel fell forward toward the screen and landed on her right side, impacting her shoulder, hip, and face on the floor. Ettinger testified that he could see Henschel fall but was unsure if she slipped on anything. Henschel landed on the steps and came to rest perpendicular to the back row of seats.

Henschel testified that she was looking down towards the next step just prior to her fall. She said that she felt something “sticky and slippery” under her foot as she placed it down on the third step, but she was looking at the step and did not see anything obstructing her path before she fell. According to Henschel, after she fell she could smell “cheese, popcorn, and butter” on the ground and could feel that her hands were wet and sticky from liquid on the carpet. However, she did not see any popcorn, cheese, cups, or popcorn containers as she lay on the ground.

Henschel called for Ettinger after she fell, and he got up from his seat and came to assist her. As Ettinger approached the end of the aisle, he noticed a “taupe” colored beverage container or “tray” at the end of the aisle. The container was located under the seat in the back row closest to the left-side aisle. Ettinger said that he kicked the container away and that he leaned down on the carpet where Henschel fell and felt something sticky and wet on his hands. Ettinger testified that he could not see the liquid or “greasy substance” on his hands, or popcorn or other debris around the area where Henschel fell. Ettinger testified that Henschel said that she slipped on a “tray.” Conversely, Henschel testified that she did not say anything to about the “tray” nor did she see a “tray.”

The house lights were turned on and United Artists’ employees came to assist Henschel. An ambulance was called, and Henschel was transported to the emergency room at Huron Valley Hospital where she received treatment for injuries to her shoulder, hip, and jaw.

Henschel filed a complaint, alleging that she “slipped and fell due to a box containing pop, popcorn, grease and/or other substance” and that United Artists was negligent in maintaining and creating an unsafe premises and failing to warn invitees of the dangerous condition. Henschel also alleged that United Artists failed to properly illuminate the steps. United Artists filed an answer and affirmative defenses, denying liability and alleging comparative negligence, lack of notice of the condition, and that the condition was open and obvious. United Artists then moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court issued a written order, granting United Artists’ motion for summary disposition. The trial court found that Henschel failed to establish a genuine issue of material fact regarding causation, reasoning that she was unsure if the tray or other substances on the floor caused her fall. Further, the trial court found that Henschel failed to offer evidence that United Artists had actual or constructive notice that a hazardous condition existed.

## II. Genuine Issue Of Material Fact

### A. Standard Of Review

This Court reviews de novo a trial court's grant of a motion for summary disposition.<sup>1</sup> In reviewing a motion under MCR 2.116(C)(10), this Court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party.<sup>2</sup> If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law.<sup>3</sup> "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."<sup>4</sup>

### B. The Elements Of Negligence

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 caused the plaintiff's injuries; and (4) that the plaintiff suffered damages.<sup>5</sup> As the Supreme Court noted in *Skinner v Square D Co*:

"The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."<sup>6</sup>

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."<sup>7</sup> Further, "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material

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<sup>1</sup> *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

<sup>2</sup> *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

<sup>3</sup> *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

<sup>4</sup> *West*, *supra* at 183.

<sup>5</sup> *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004).

<sup>6</sup> *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994), quoting *Mulholland v DEC Int'l*, 432 Mich 395, 416 n 18; 443 NW2d 340 (1989), quoting Prosser & Keeton, Torts (5th ed), § 41, p 269.

<sup>7</sup> *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).

fact.”<sup>8</sup> “A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.”<sup>9</sup> While ordinarily a question of fact is left to the jury, “if reasonable minds could not differ regarding the proximate cause of the plaintiff’s injury, the court should decide the issue as a matter of law.”<sup>10</sup>

### C. The Evidence

Viewing the evidence in a light most favorable to Henschel, we conclude that she presented sufficient evidence to create a genuine issue of material fact regarding what caused her to fall.<sup>11</sup> She was looking to the next step as she walked down the aisle. She safely stepped down the first two steps. But regarding the next step, she testified:

*Q.* Before your foot gave out, did you feel anything on the floor?

*A.* I felt something sticky and slippery.

\* \* \*

*Q.* And when did you feel something sticky and slippery?

*A.* When I was feeling for - I think the third or the second or the third step.

*Q.* So, before your foot went out?

*A.* Right.

Although Henschel could not see what caused her to fall prior to stepping down, her hands were sticky and wet from the floor following her fall. Additionally, as she lay on the ground she could feel that her clothes were wet and sticky. Ettinger, her son, felt the carpet-covered step where she lay and felt that the area was sticky and wet. Although Ettinger opined that Henschel fell on a tray in the area near her fall, he admitted that he did not know what she slipped on. In light of Henschel’s testimony that she felt something sticky and slippery under her foot prior to her foot giving out on the step and that there was a sticky and wet substance on the step where she fell, it is reasonable to infer that she slipped on liquid pooled on the carpet of the step.<sup>12</sup>

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<sup>8</sup> *Libralter Plastics, Inc v Chubb Grp of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

<sup>9</sup> *Id.*

<sup>10</sup> *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

<sup>11</sup> *Libralter Plastics, Inc, supra* at 486.

<sup>12</sup> *Id.*; *Berryman, supra* at 92.

United Artists argues that Henschel may have fallen as a result of losing her balance as she walked down the steps or that she may have slipped on something other than the liquid on the step. “[I]f there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.”<sup>13</sup> United Artists offers no evidence for this Court to conclude that Henschel fell due to her own inadvertence. Additionally, Henschel has provided sufficient evidence to show that liquid on the step caused her foot to give out. Although United Artists offers a separate explanation for Henschel’s fall, her testimony provides a logical sequence of cause and effect regarding why she fell. Thus, we conclude that Henschel created a genuine issue of material fact regarding the cause of her fall.

#### D. Notice

However, to sustain a premises liability action, a plaintiff must show that the defendant or the defendant’s employees created the unsafe condition, or that the defendant knew or should have known of the unsafe condition.<sup>14</sup> Constructive notice can be inferred from evidence that the condition is of such a character or has existed a sufficient length of time that defendant should have discovered it.<sup>15</sup>

Here, there is no evidence that United Artists’ employees had actual knowledge of a liquid on the step or that the employees created the condition. Further, Henschel failed to produce evidence that the liquid existed on the step for a sufficient length of time to place United Artists on notice. Henschel contends that because there were no other theater customers sitting in the immediate vicinity of her fall and that movie theaters normally clean theaters between shows, it should be inferred that United Artists had constructive knowledge of the existence of the liquid on the step. This argument is based on impermissible conjecture and speculation.<sup>16</sup> It cannot be reasonably inferred from the known facts and conditions that United Artists’ employees cleaned the theater prior to each show.<sup>17</sup> Additionally, Henschel has offered no affirmative evidence that customers from the previous showing dropped the liquid on the floor or that United Artists cleaned the area of her fall prior to the movie she was attending. Arguably, the substance on the step could have resulted from another customer attending the same showing dropping popcorn, a beverage, or other concession item on the step immediately prior to Henschel’s fall. Thus, Henschel failed to create a genuine issue of material fact regarding whether United Artists had actual or constructive notice of the liquid on the step.

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<sup>13</sup> *Skinner, supra* at 164, quoting *Kaminski v Grand Trunk WR Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).

<sup>14</sup> *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001).

<sup>15</sup> *Id.*

<sup>16</sup> *Berryman, supra* at 92.

<sup>17</sup> *Libralter, supra* at 486.

### E. Special Aspects

Henschel also argues that the liquid on the step was not an open and obvious condition and that, alternatively, special aspects of the condition removed it from the open and obvious doctrine. However, in light of our conclusion that Henschel failed to create a genuine issue of material fact regarding whether United Artists had notice of the liquid on the step, Henschel cannot maintain her premises liability claim.<sup>18</sup> Thus, analysis of the open and obvious doctrine and whether special aspects exist is unnecessary.

Affirmed.

/s/ William C. Whitbeck

/s/ Alton T. Davis

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<sup>18</sup> *Clark, supra* at 419.