

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

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NORA WEST,

Plaintiff-Appellant,

v

AUCTION COMPANY OF AMERICA,

Defendant-Appellee.

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UNPUBLISHED

October 20, 2009

No. 287702

Oakland Circuit Court

LC No. 2007-087610-NO

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) in this action involving a fall on steps. Because there was no direct or circumstantial evidence of defendant's actual or constructive notice of the alleged hazardous condition of the stairs, and because defendant's serving of cake did not create an unreasonable risk of harm or cause plaintiff to fall, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff went to a home to attend an auction being conducted by defendant. She came into the kitchen where there were two chocolate cakes with chocolate frosting on a table. She saw people taking pieces of the cake and eating it. She descended a flight of stairs to see the items in the basement. She asserted that she slipped on chocolate frosting and fell. She knew that chocolate caused her to fall because she saw it on her shoes. She did not know how long it had been there or who put it there.

The circuit court correctly reasoned that, to the extent that plaintiff's action was founded on premises liability principles, defendant was entitled to summary disposition because there was no direct or circumstantial evidence of defendant's actual or constructive notice of the alleged hazardous condition of the stairs. Cf., *Clark v Kmart*, 465 Mich 416, 419; 634 NW2d 347 (2001). Plaintiff contends that proof of notice was unnecessary because defendant's active negligence created the condition. Cf., *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991) (water on the floor was the result of the defendant's negligent

maintenance of the drainage system). However, there was no evidence that defendant, rather than a third party, created the dangerous condition, i.e., the frosting on the stairs.

Although plaintiff also asserted that her cause of action was founded on ordinary negligence and, therefore, the absence of notice is not a defense, the trial court reasoned that defendant's serving of the cake did not create an unreasonable risk of harm or cause plaintiff to fall. On appeal, plaintiff contends that the trial court's reasoning that she had not presented evidence of "an unreasonable risk of harm" is inapplicable because the focus is on the defendant's conduct, rather than a condition of the land. Contrary to plaintiff's assertion, the description of negligence as involving an unreasonable risk of harm is not limited to actions based on conditions of land. See, e.g., *Moning v Alfredo*, 400 Mich 425, 433; 254 NW2d 759 (1977) (negligent marketing of slingshots to children). The elements of a prima facie case are that the defendant owed a legal duty to the plaintiff, that the defendant breached that duty, that the plaintiff suffered damages, and that the breach was the proximate cause of the damages suffered. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). The service of refreshments does not afford a basis on which to impose on defendant a duty to protect plaintiff from the spillage of those refreshments by third parties. In addition, all reasonable persons would agree that the risk of harm created by the service of cake in a kitchen is reasonable. *Moning, supra* at 438. Under these circumstances, defendant was entitled to summary disposition.

Affirmed. Costs to defendant.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Pat M. Donofrio