

STATE OF MICHIGAN
COURT OF APPEALS

TASHA WASH,

Plaintiff-Appellant,

v

K-MART CORPORATION,

Defendant-Appellee.

UNPUBLISHED
October 13, 2000

No. 214289
Wayne Circuit Court
LC No. 97-709859-NO

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

In this premises liability action, plaintiff was injured after she tripped on a piece of a clothes hanger that was on the floor of defendant's store. The trial court granted defendant's motion for directed verdict and entered a judgment of no cause of action. Plaintiff appeals as of right. We affirm.

This Court reviews a trial court's decision to grant a directed verdict de novo. *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000). In reviewing the trial court's ruling this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Id.* at 643-644. A directed verdict is appropriate only when no factual question exists regarding which reasonable minds may differ. *Id.* at 644.

To establish a prima facie case of negligence, plaintiff was required to prove four elements: (1) defendant owed her a duty; (2) defendant breached that duty; (3) proximate cause; and (4) damages. *Swan v Wedgwood Christian Youth & Family Services, Inc*, 230 Mich App 190, 195; 583 NW2d 719 (1998). Duty refers to any obligation the defendant had to avoid negligent conduct. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Questions regarding duty are for the court to decide as a matter of law. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997). However, if there are factual circumstances that give rise to the duty, the existence of those facts must be determined by a jury. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996), affirmed 457 Mich 871; 586 NW2d 85 (1998).

As this Court observed in *Berryman v K Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992), a storekeeper's liability for injuries caused on its premises is well established:

“It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it.” [*Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968), quoting *Carpenter v Herpolsheimer's Co*, 278 Mich 697; 271 NW 575 (1937).]

In order to recover from a defendant storekeeper, the plaintiff must show either that an employee of the defendant caused the unsafe condition or that an employee of the defendant knew or should have known that the unsafe condition existed. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). “Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it” *Id.* (citation omitted). However, when there is no evidence to show that the condition had existed for a considerable time, directed verdict in favor of the storekeeper is proper. *Id.*

The trial court granted defendant directed verdict on the basis of its determination that there was no evidence that the hanger that caused plaintiff's fall was on the floor for any sufficient length of time to give defendant actual or constructive notice of its presence.

Plaintiff argues on appeal that she was not required to show that defendant had notice of the unsafe condition because defendant created the condition through its chosen method of doing business. Plaintiff contends that *Anderson v Merkel*, 393 Mich 603, 605; 227 NW2d 554 (1975), is directly on point. In *Anderson*, the plaintiff slipped and fell while walking through a passageway in the defendant's restaurant. An ice-making machine was located close to the passageway. There was evidence that ice had spilled from the machine on previous occasions, but there was conflicting testimony regarding whether there was ice on the walkway when the plaintiff fell. *Id.* at 604. The trial court found for the defendant, noting that the plaintiff had failed to show that the condition existed for a sufficient length of time to attribute constructive knowledge to the defendant, and this Court affirmed. The Supreme Court reversed, stating that if there was ice on the floor at the time of the fall, the plaintiff did not have to show that the defendant had actual or constructive knowledge of the condition because the defendant had ample notice that ice had been spilled by his employees on prior occasions. The defendant was not entitled to separate notice on each subsequent occurrence for a condition created by his employees. *Id.* at 604-605.

“It was not necessary for plaintiff to prove defendant had actual or constructive knowledge of the hazardous condition of its floor, as the alleged negligence was the act of defendant in creating this condition. Defendant could not by its own act create a hazardous condition and then demand that plaintiff, who was injured as a result thereof, prove it had knowledge of such condition. Knowledge of the alleged hazardous

condition created by defendant itself is inferred.” [*Id.* at 605, quoting *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59; 299 NW 807 (1941).]

We believe that the cases on which plaintiff relies, including *Anderson*, are distinguishable from the facts of this case. In *Anderson*, the ice was actually spilled by the defendant’s employees and because the dangerous condition was caused by the defendant, the plaintiff did not have to prove actual or constructive notice. In the case at hand, however, there was no evidence that defendant’s employees caused the hanger to be on the floor. The speculative testimony of both parties was that a customer had dropped the hanger on the floor. Moreover, Michigan courts have not recognized a “mode of operation” duty for storekeepers as advanced by plaintiff. Instead, the law in Michigan is that a storekeeper is liable for an injury caused by a hazardous condition in the aisles of its store if the store or its employees created the condition, had actual notice of the condition, or could be charged with constructive notice of the condition. *Berryman, supra*. Thus, we reject plaintiff’s argument that she should be excused from establishing that defendant had actual or constructive notice because the injury was caused by its “mode of operation.”

Alternatively, plaintiff argues that defendant had constructive notice of the hanger’s presence on the floor. The trial testimony demonstrated that the hanger was made of heavy duty plastic that was not expected to break easily. Plaintiff did not handle or break the hanger; it was already broken when she encountered it. The apparel manager testified that it was possible that the hanger had been broken by shopping carts repeatedly running over it. Plaintiff contends that in light of this evidence she was entitled to an inference that the hanger had been on the floor long enough to charge defendant with constructive notice of its presence.

Plaintiff avers that the facts of *Ritter v Meijer, Inc*, 128 Mich App 783; 341 NW2d 220 (1983), are directly analogous to her case. In *Ritter*, the plaintiff slipped on a grape after paying for her groceries and sustained serious injuries. The plaintiff testified that it felt to her as if the grape had previously been stepped on. The trial court denied defendant’s motion for directed verdict, noting that there had been some evidence that someone else had previously stepped on the grape, which indicated that the grape had been on the floor for some time. This Court affirmed, noting that the fact that defendant’s employee quickly wiped the area and discarded the grape allowed a presumption that the grape, if produced for trial, would work against the defendant. *Id.* at 785-786. This Court also viewed defendant’s argument that it was possible that the grape had been dropped on the floor immediately before the plaintiff’s fall as “pure conjecture,” because no evidence was brought forward to rebut the inference created by the fact that the grape had previously been stepped on. *Id.* at 786-787.

The present case is factually distinguishable from *Ritter* in that there was no testimony that tended to show how long the hanger fragment had been on the floor. Defendant’s loss control associate testified that she did not know how the hanger broke or how long the hanger piece had been on the floor. While plaintiff testified that the store was dirty, she did not see the hanger on which she tripped. Plaintiff’s husband testified that he had seen other plastic hangers on the floor of the store either individually or in boxes during previous shopping trips and saw the hanger piece after plaintiff fell. However, nothing in his testimony indicated how long the hanger piece had been on the floor.

Plaintiff's theory was that the hanger had been repeatedly run over by shopping carts, thereby indicating that it had been on the floor for some time. However, plaintiff presented no evidence to support her theory that the hanger had been run over by a number of carts and that sufficient time had therefore passed to charge defendant with constructive notice. Because "plaintiff did not establish circumstances 'such as to take the case out of the realm of conjecture' and into 'the field of legitimate inferences from established facts,'" *Whitmore, supra* at 9, quoting *Gadde v Michigan Consolidated Gas Co*, 377 Mich 117, 121; 139 NW2d 722 (1966), she is not entitled to an inference that defendant had constructive notice of the condition. See also *Clark v K-Mart Corp*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 212749, issued 8/4/00).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Patrick M. Meter