

STATE OF MICHIGAN  
COURT OF APPEALS

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DONALD W. MESSNER and CYNTHIA  
MESSNER,

UNPUBLISHED  
June 8, 2004

Plaintiffs-Appellants,

v

No. 245202  
Washtenaw Circuit Court  
LC No. 00-000399-NO

SEARS ROEBUCK & COMPANY,

Defendant-Appellee,

and

TAUBMAN COMPANY LIMITED  
PARTNERSHIP, d/b/a BRIARWOOD MALL,

Defendant.

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Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Donald W. Messner (hereinafter Messner) stepped off a mat onto a tiled area in defendant's store and fell to the floor, sustaining injuries. Plaintiffs filed suit, alleging that defendant breached its duty to maintain the premises in a reasonably safe condition by allowing a slippery foreign substance to remain on the floor and also breached its duty to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs could not make out a prima facie case of causation, that no evidence showed that it had notice of the presence of any substance on the floor, and that the condition was open and obvious. The trial court granted the motion, finding that plaintiffs' allegation that the presence of a foreign substance on the floor caused Messner to fall was based on speculation. The trial court did not reach defendant's arguments regarding notice or the open and obvious nature of the condition.

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. *Berryman, supra* at 92. In a premises liability action, a plaintiff must show either that the defendant caused the unsafe condition, or that the defendant knew or should have known of the unsafe condition. See *id.* at 92-93. Such knowledge may be inferred from evidence that the condition existed for a sufficient length of time for the storekeeper to have discovered it. *Id.* at 92.

Plaintiffs' complaint alleged that a defective condition, i.e., the presence of a foreign substance on the floor, proximately caused Messner's fall. Messner acknowledged that he was looking at the area of the floor on which he stepped and that he saw nothing unusual about its condition other than the fact that it was dirty. Messner contended that after he fell he noticed that the floor had a sheen to it; however, he found no foreign substance on his clothing and did not touch the floor to attempt to ascertain the source of the sheen. No evidence created a question of fact regarding whether a foreign substance was present on the floor. In his deposition Messner did not state that a foreign substance was present on the floor or that the floor was slippery, despite being asked if there were foreign substances on the floor. We note that Messner cannot create a question of fact by submitting an affidavit that contradicts prior testimony. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). Plaintiffs' allegation that defendant breached a duty by creating a defective condition on its premises was based on impermissible speculation. *Berryman, supra* at 92. Plaintiffs did not present evidence to establish 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. See *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994). The possibility that a breach of duty by defendant caused Messner to sustain injuries is not sufficient to establish causation. *Berryman, supra* at 92. Summary disposition was proper. *Reeves v K-Mart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998).

Affirmed.

/s/ Jane E. Markey  
/s/ Kurtis T. Wilder  
/s/ Patrick M. Meter