

STATE OF MICHIGAN
COURT OF APPEALS

JESSIE BURSEY,

Plaintiff-Appellant,

v

AUTOZONE (MICHIGAN), INC.,

Defendant-Appellee.

UNPUBLISHED

March 16, 2006

No. 257383

Genesee Circuit Court

LC No. 03-076809-NO

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant in this slip and fall case. We affirm.

A decision granting a motion for summary disposition under MCR 2.116(C)(10) is subject to de novo review. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion under MCR 2.116(C)(10), a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Where the burden of proof at trial rests on the nonmoving party, as is the case here, the nonmoving party may not rely on mere allegations or denials in the pleading, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Assuming for purposes of this appeal that the condition was not open and obvious, we still must affirm the trial court's dismissal because there was no genuine issue of material fact regarding whether defendant had actual or constructive notice of the oil in the parking lot. Although this issue was not decided below, it was raised by the parties in the trial court and has been fully briefed to this Court. As such, we can decide this issue because it is a question of law, and the facts necessary for the resolution of the issue have been presented. *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 324; 651 NW2d 811 (2002).

An invitor's liability must arise from (1) the invitor's active negligence, or (2) from a condition of which the invitor knew of, or (3) a condition of such character or duration that the

invitor should have known of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). There is nothing in the record to indicate that defendant had actual notice of the defect, i.e., the fresh oil in the parking lot on which plaintiff slipped. Deposition testimony did establish that defendant's employees sometimes placed Oil Dry on the parking lot in order to take care of oil on the parking lot surface, but there was no evidence that any employee of defendant knew that there was oil on the parking lot prior to plaintiff's fall (which occurred at 8:00 a.m., just when the store was opening).

The material facts also do not establish that defendant had constructive notice of the oil. This Court looks to the character of the condition and its duration in order to determine whether defendant should have known that the condition existed. *Clark, supra* at 419. As for its character, this condition was oil on the pavement of a parking lot. Defendant had been aware for years that its customers would put oil in their cars in the parking lot. Defendant was also aware that oil sometimes leaks out of its customers' cars while they are parked. Plaintiff argues that those recurring circumstances should be enough to place defendant on constructive notice of the oil in the parking lot in this case. For that proposition, plaintiff relies on *Andrews v Kmart Corp*, 181 Mich App 666; 450 NW2d 27 (1989). In *Andrews*, the plaintiff allegedly slipped and fell on a rug as she was leaving the defendant's store in the wintertime. *Id.* at 667. Noting that a store employee had testified that the rugs used by the store had a tendency to curl up in the wintertime, and were thus routinely replaced by the store with fresh rugs, this Court held that a reasonable inference of constructive notice was presented. *Id.* at 671-672.

This case is distinguishable from *Andrews*. In *Andrews*, the defendant was aware of a specific problem with a specific item that occurred at a specific time and at a specific location. In this case, defendant certainly knew that oil was sometimes on the parking lot, but nothing in the record indicates how frequently the Oil Dry was applied or needed to be applied. The deposition testimony merely indicates that the Oil Dry was supposed to be put on the parking lot in the morning or in the evening on an "as needed" basis. Defendant's manager also stated that customers normally do not spill oil when putting it in their cars. Without a showing that the parking lot tended to have oil on it and that defendant routinely or regularly applied Oil Dry to it, we must conclude that, even viewing the evidence in a light most favorable to the plaintiff, defendant did not have constructive notice based on the character of the condition.

In addition to the condition's character, this Court must also look at its duration in determining whether defendant had constructive notice of the condition. Defendant will be deemed to have constructive notice of a condition if it has existed for a sufficient length of time that he should have had knowledge of it. *Clark, supra* at 419. In this case, the oil was fresh. The store had also just opened. Plaintiff's own deposition suggests that another customer who had purchased it that morning spilled the oil. Based on that evidence, we conclude as a matter of law that defendant had no constructive notice of the condition based on its duration.

As noted above, the trial court did not grant summary disposition in favor of defendant on the ground that defendant had no notice of the condition. A trial court's ruling, however, may be upheld on appeal where the right result issued, albeit for the wrong reason. *Gleason v Michigan Dept of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Affirmed.

/s/ Bill Schuette

/s/ Christopher M. Murray

/s/ Pat M. Donofrio