

STATE OF MICHIGAN
COURT OF APPEALS

CONSTANCE JAKUBIEC and RONALD
JAKUBIEC,

UNPUBLISHED
July 8, 2008

Plaintiffs-Appellees,

v

No. 273579
Wayne Circuit Court
LC No. 05-520486-NO

VEI FRIENDLY, L.L.C., d/b/a MERRI-BOWL
LANES,

Defendant-Appellant.

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by leave granted a circuit court order denying its motion for summary disposition in this premises liability action. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Constance Jakubiec was bowling at defendant's bowling alley when something caught her shoe as she was sliding or about to slide and release her bowling ball. She lost her balance and fell. A teammate found a crack in one of the floorboards of the approach. The trial court ruled that the evidence was sufficient to create an issue of fact that the cracked board was causally related to plaintiff's fall and that defendant should have known about the cracked board.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

"A premises owner owes, in general, a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105; 689 NW2d 737 (2004), rev'd on other grounds 472 Mich 929 (2005). The invitor's duty to exercise reasonable care arises

when the defendant knows or should have known of the condition, i.e., the defendant has actual or constructive notice of the condition. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995); *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 603-604; 601 NW2d 172 (1999). Actual notice may be found where the defendant's active negligence caused the unsafe condition. *Hampton, supra* at 604. The defendant may have constructive knowledge of a condition if evidence shows that it "was present long enough that the defendant should have known of it." *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Constructive notice may arise from the passage of time, from the type of condition involved, or from a combination of the two. *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1965).

The evidence did not show that defendant had actual knowledge of the cracked floorboard, that one of defendant's employees caused the condition, or that another customer discovered it and alerted defendant to its existence. Therefore, the only issue is constructive notice.

Plaintiff contends that the evidence was sufficient to create an issue of fact that defendant had constructive notice from the passage of time. She argues that defendant's head mechanic, James Zickler, agreed that it takes an extraordinary event to crack a board and that he would know if such an event occurred. Because he admitted that he was not aware of any such event occurring the day of the accident or the day before, the event must have occurred two or more days before the accident.

However, notwithstanding Zickler's testimony, plaintiff's argument makes no logical sense. The gist of it is that the crack could not have formed without defendant hearing or seeing an extraordinary event like the dropping of a bowling ball. However, there was no evidence whatsoever to suggest that such an extraordinary event was observed and, accordingly, there could not have been a crack. Obviously, that conclusion is incorrect. The most that can be logically said of Zickler's testimony is that he himself did not have knowledge of such an event occurring on the day of the accident or the day before; it cannot logically be inferred that such an event in fact occurred and must have occurred at least two days before plaintiff bowled.

Plaintiff also contends that the evidence was sufficient to create an issue of fact that defendant had constructive notice from the nature of the defect. She argues that, if Zickler or his employee had mopped properly, either man would have felt the mop fibers snag on the cracked board and that would have alerted him to the existence of the defect, which thus could have been discovered in the exercise of reasonable care. This argument overlooks the fact that the questions put to Zickler started with the assumptions that the crack existed in the same condition observed after plaintiff's shoe caught on it, when he and/or his employee mopped the floor earlier. However, there was no evidence supporting that assumption; to the contrary, the force illustrated by the tearing of plaintiff's shoe and her fall suggest that the incident probably exacerbated the crack. Had the crack been as bad before the accident as it was after it, Zickler's testimony could lead to only one conclusion – that the regular mopping of the floorboards that the uncontroverted evidence established was the regular procedure would have brought it to defendant's attention. Thus, again, Zickler's testimony does not support plaintiff's argument.

In sum, the evidence plaintiff brought forward in response to defendant's motion for summary disposition could only support a speculative conclusion by the fact finder that defendant had constructive knowledge of the crack before the accident occurred. Because the

evidence was insufficient to create a genuine issue of fact with respect to defendant's notice of the condition that allegedly caused plaintiff's fall, the trial court erred in denying defendant's motion for summary disposition.

We reverse.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot