STATE OF MICHIGAN

COURT OF APPEALS

ANA DJUROVIC,

Plaintiff-Appellant,

v

MEIJER, INC.,

Defendant-Appellee.

UNPUBLISHED
January 14, 2021

No. 351743
Macomb Circuit Court
LC No. 2018-002723-NO

Before: LETICA, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

Plaintiff Ana Djurovic slipped and fell on a wet floor near the entrance of defendant Meijer Inc.'s store in Warren. The issue presented is whether Meijer had constructive notice of the dangerous condition on its premises. Djurovic presented no evidence regarding the length of time the water had been present on the floor. This deficiency dooms her claim, and so we affirm the circuit court's grant of summary disposition in favor of Meijer under MCR 2.116(C)(10).

I. BACKGROUND FACTS

After having a pedicure at a nail salon located within the Meijer premises, Djurovic embarked on a short journey to the produce section of the store. While wearing salon-issue flip-flops, Djurovic slipped and fell near the store's south entrance. A store "greeter," Anthony Nepal, witnessed her fall.

Djurovic testified at deposition that after her fall she noticed that her clothing was wet. She concluded that she slipped on water that had collected on the tile floor. An incident report noted the existence of a "few drops of clear liquid" on the floor near the location of the fall.

Nepal testified that he had been standing in the area for a few hours before Djurovic's fall and had not noticed any water on the floor. Nepal also revealed that he wrote a statement after the event in which he expressed that Djurovic had tripped over her own feet. Meijer failed to produce Nepal's statement but did provide an email he wrote to his "team leader" opining that Djurovic had "stumbled or tripped." Meijer also presented high-quality security video footage of the scene before, during, and after the incident.

Meijer moved for summary disposition under MCL 2.116(C)(10), arguing that Djurovic could not establish that a hazardous condition existed or that Meijer had notice of water on the floor. Djurovic responded that her own testimony and the incident report supported that there was a hazardous condition. The "unique" character of the water on the floor created a fact question regarding constructive notice, Djurovic urged; as there was enough water to soak her clothes, the water should have been readily visible to Meijer personnel. Djurovic further asserted that Meijer's spoliation of evidence precluded summary disposition. The circuit court ruled that Djurovic failed to present any evidence that Meijer had notice of the water and dismissed the action. This appeal followed.

II. CONSTRUCTIVE NOTICE

Djurovic contends that Meijer had constructive notice of the liquid based on Nepal's proximity to the scene, the large volume of the water, and because several water-filled buckets of cut flowers and a soda machine were located near the scene. These claims amount to speculation and not evidence, however.

To determine whether a genuine issue of material fact exists regarding constructive notice we have reviewed de novo the evidence presented in the light most favorable to Djurovic. And we have drawn all reasonable inferences in Djurovic's favor, resolving any reasonable doubts about the evidence in a manner benefitting her claim. See *Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).

The surveillance video displays the area of Djurovic's fall in considerable detail and for a *lengthy* period of time before the fall. We are unable to discern the presence of any water on the floor in the area of Djurovic's fall (or anywhere else). Nevertheless, we assume that there was water on the floor because Djurovic testified to that effect, and because water is a colorless liquid that may not have been visible on the video.

Djurovic's testimony that the floor was wet does not allow her to survive summary disposition, however, unless she can also point to evidence that Meijer had actual notice of the water's presence or "should have known" that the water was there "because of its character or the duration of its presence." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 11; 890 NW2d 344 (2016). Djurovic admits that no evidence supports that Meijer actually knew that the floor was wet. We focus instead on constructive notice.

"Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007), citing *Kroll v Katz*, 374 Mich 364, 371; 132 NW2d 27 (1965). But every fact question must rest on evidence; speculation and conjecture are not enough to create a jury question. *Southfield Ed Ass'n v Bd of Ed of Southfield Pub Schs*, 320 Mich App 353, 369; 909 NW2d 1 (2017), quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Djurovic's counsel conceded at the motion hearing that "nothing . . . in this record" pointed directly to *when* the liquid ended up on the floor. Yet proof of constructive notice requires that the plaintiff come forward with *some* evidence supporting at least a reasonable inference that the

dangerous condition was around long enough for the landowner to notice and remedy it. As counsel conceded and our independent review confirms, no such evidence exists here.

Djurovic maintains that the volume of water must have been significant and therefore visible, because it soaked her clothing. But that fact tells us nothing about *timing*, and timing is a critical element of constructive notice. The video shows multiple people traversing the precise area of Djurovic's fall without difficulty during the hour before Djurovic's accident, which tends to support that the water was not there for very long. We accept that Djurovic fell due to the presence of enough water to make her clothes feel wet, but are unable to infer from that fact that the water was present long enough for a reasonable shopkeeper to have noticed and remedied it. See *Lowrey*, 500 Mich at 11-12. Because Djurovic has not supplied any proof creating a genuine factual dispute as to whether Meijer had constructive notice of the water, summary disposition was properly granted.

III. SPOLIATION OF EVIDENCE

Djurovic next contends that the circuit court abused its discretion by declining to impose a sanction against Meijer based on its failure to produce Nepal's written statement. Assuming that such a statement existed and was destroyed or lost by Meijer, Djurovic has not explained how a sanction would salvage her case.

The parties do not dispute that Meijer failed to produce Nepal's written statement.[1] Djurovic insists that "[b]y allowing defendant to destroy or withhold evidence on the crucial issue and still prevail on the motion, the trial court abused its discretion and did not take all evidence in the light most positive to the nonmoving party, as required." She alleges that Meijer's actions are "sanctionable" and should have factored into the court's summary disposition analysis. But Djurovic neglects to propose a specific, reasonable sanction short of the denial of summary disposition, and the circuit court did not abuse its discretion by denying that relief.

An adverse inference sanction would allow the fact-finder to "infer that the evidence would have been adverse to" the culpable party. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997) (quotation marks and citation omitted). Nepal testified at deposition that he remembered the fall, and that Djurovic had tripped over her own feet. An adverse inference sanction would allow Djurovic to argue at trial that Nepal should not be believed, and to encourage the jury to infer that his written statement contradicted his testimony. The inference is permissive, not mandatory. But that such an inference could be drawn at trial does not necessarily relieve Djurovic of the obligation to come forward at the summary disposition stage with *some* evidence supporting constructive notice.

"[A] trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Bloemendaal v Town & Country Sports Ctr, Inc*, 255

[1] Meijer claims that the only "statement" Nepal authored was an email that had, in fact, been produced. We assume that there was another statement, as Nepal referred to a written statement during his deposition.

Mich App 207, 212; 659 NW2d 684 (2002). Permitting Djurovic to prevail on the issue of constructive notice without producing actual evidence supporting that element of her claim would be a drastic remedy. The circuit court did not abuse its discretion by declining to impose that sanction.

We affirm.

/s/ Anica Letica
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien