

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1195

CA 15-00532

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ.

JANICE A. MCDONELL AND WILLIAM J. MCDONELL, JR.,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

WAL-MART STORES, INC., WAL-MART STORES EAST, LP,
WAL-MART REAL ESTATE BUSINESS TRUST AND WALMART
REALTY COMPANY, DEFENDANTS-APPELLANTS.

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY J. CAMPBELL OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

MURPHY MEYERS, LLP, ORCHARD PARK, LAW OFFICE OF LAURIE A. BAKER
(LAURIE A. BAKER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County
(Christopher J. Burns, J.), entered May 20, 2014. The order, insofar
as appealed from, denied the motion of defendants for summary
judgment.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for
injuries allegedly sustained by Janice A. McDonell (plaintiff) when
she slipped and fell on water near the junction of the indoor and
outdoor sections of the garden department in defendants' store.
Supreme Court, inter alia, denied defendants' motion for summary
judgment dismissing the complaint. As limited by their brief, the
only issue before us on appeal is whether defendants met their initial
burden on their motion of establishing that they did not have actual
or constructive notice of the allegedly dangerous condition. We
conclude that defendants failed to meet their burden with respect to
actual notice inasmuch as they failed to establish that they were
unaware of the water in the location of plaintiff's accident prior to
her fall (*see Hilsman v Sarwil Assoc., L.P.*, 13 AD3d 692, 695;
Atkinson v Golub Corp. Co., 278 AD2d 905, 906; *cf. Navetta v Onondaga
Galleries LLC*, 106 AD3d 1468, 1469). We further conclude that
defendants failed to meet their burden with respect to constructive
notice inasmuch as their submissions raise issues of fact whether the
wet floor "was visible and apparent and existed for a sufficient
length of time prior to plaintiff's fall to permit [defendants']
employees to discover and remedy it" (*King v Sam's E., Inc.*, 81 AD3d

1414, 1415; see *Navetta*, 106 AD3d at 1469-1470).

Entered: November 20, 2015

Frances E. Cafarell
Clerk of the Court