COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DALE EVAN SLAPE,	§	No. 08-21-00166-CV
Appellant,	§	Appeal from the
v.	§	County Court at Law Number #3
WAL-MART STORES TEXAS, LLC AND WAL-MART STORES, INC.,	§	of El Paso County, Texas
Appellees.	§	(TC# 2020DCV1388)

O P I N I O N

BACKGROUND

Appellant, Dale Evan Slape, appeals the grant of summary judgment in favor of Appellees Wal-Mart Stores Texas, LLC and Wal-Mart Stores, Inc. (collectively, Wal-Mart). We affirm.

Factual Background

Appellant was shopping at Wal-Mart when he sustained his alleged injuries. Appellant's foot slid sideways when he stepped on a liquid substance—a spot of spilled hair product; Appellant did not fall. The incident was recorded via Wal-Mart's overhead video surveillance, and the video was submitted and considered as summary judgment evidence.

In the surveillance video, Wal-Mart Associates Annika Garcia and Rosa Ramirez can be seen stocking merchandise in the same aisle before the incident occurred. Neither Garcia nor

Ramirez saw the liquid substance before Appellant slipped. Appellant also did not see the spot of liquid substance before he slipped. Appellant admitted he did not know what the spot looked like before he stepped on it, or whether it would have been visible from his perspective—i.e., someone walking towards it. Garcia described the spot as a "clear substance" that "was barely visible" and testified, "it's hard to spot something that's clear." In her affidavit, Garcia also described the liquid substance as "about the size of a quarter and was somewhere between a clear and white color."

The liquid substance appears to have been dropped by a family of three observable on the video (mother with white hood, father with red hood, and daughter with white bow on head). The mother shopper arrives first and begins sampling/sniffing a hair product from the shelf at 56:45. The daughter arrives at 56:55 and parks a shopping cart against the shelf next to the mother. The father arrives at 57:35. After sampling and sniffing several products, the family departs at 58:55, after which the spot appears on the video. Plaintiff steps on the spot at 1:00:34—97 seconds later.

Procedural Background

Appellant filed suit against Appellees under theories of negligence and premises liability for personal injuries he sustained while on Wal-Mart's premises. Appellees filed a traditional motion for summary judgment alleging they did not have actual or constructive knowledge of the substance on the ground, and denied the occurrence was the result of any contemporaneous negligent activity of Wal-Mart. The trial court granted summary judgment in favor of Wal-Mart. This appeal followed.

DISCUSSION

Standard of Review

We review the grant of a motion for summary judgment de novo. *Williams v. Parker*, 472 S.W.3d 467, 469 (Tex.App.—Waco 2015, no pet.). In a traditional motion for summary judgment,

the movant must state specific grounds, and a defendant who conclusively negates at least one essential element of a cause of action, or conclusively establishes all the elements of an affirmative defense, is entitled to judgment as a matter of law. *Id.* (citing TEX.R.CIV.P. 166a(c)). The movant has the burden of showing there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546, 548 (Tex. 1985)[Citations omitted]. The trial court must grant the motion unless the nonmovant raises a genuine issue of material fact on each challenged element. *KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015).

Applicable Law

A premises owner owes its invitees a duty to exercise reasonable care from dangerous conditions in the store that were known or reasonably discoverable. *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002). However, a premises owner's duty to its invitee does not make the owner an insurer of the invitee's safety. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). To recover damages in a slip-and-fall case, a plaintiff must prove:

(1) Actual or constructive knowledge of some condition on the premises by the owner[];

(2) That the condition posed an unreasonable risk of harm;

(3) That the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and

(4) That the owner/operator's failure to use such care proximately caused the plaintiff's injuries.

Id.

PREMISES LIABILITY

The central issue in this case is whether Wal-Mart had constructive knowledge of the dangerous condition on its premises. Appellant argues the summary judgment evidence showed a

genuine issue of material fact that Wal-Mart had, at minimum, constructive knowledge of the liquid substance.

The so-called "time-notice rule" is based on the principle that temporal evidence best indicates whether the premises owner had a reasonable opportunity to discover and remedy a dangerous condition. *Reece*, 81 S.W.3d at 816. An employee's proximity to a dangerous condition, with no evidence indicating how long the condition was there, merely indicates that it was *possible* for the premises owner to discover the condition, not that the premises owner reasonably *should* have discovered it. *Id*. Thus, constructive notice demands a more extensive inquiry that requires temporal evidence because without it, there is no basis upon which a fact finder can reasonably assess the opportunity the premises owner had to discover the dangerous condition. *Id.* What constitutes a reasonable time for a premises owner to discover a dangerous condition varies depending upon the facts and circumstances presented, and proximity evidence is relevant to the analysis. *Id.*

Accordingly, if the dangerous condition is conspicuous as, for example, a large puddle of dark liquid on a light floor would likely be, then an employee's proximity to the condition might shorten the time a fact finder could find that the premises owner should reasonably have discovered it. *Reece*, 81 S.W.3d at 816. Similarly, if an employee was in close proximity to a less conspicuous dangerous condition for a continuous and significant period of time, that too could affect the fact finder's consideration of whether the premises owner should have been aware of the dangerous condition. *Id*. There must be proof of how long the dangerous condition was present before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition. *Id.* Otherwise, owners would face strict liability for any dangerous condition on their premises, an approach the Texas Supreme Court has rejected. *Id.* In sum, constructive notice

requires proof that an owner had a reasonable opportunity to discover the defect—this question requires analyzing the combination of proximity, conspicuity, and longevity. *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 567 (Tex. 2006)(per curiam).

Analysis

Appellant argues the hazard on Wal-Mart's floor was present for minutes, with Wal-Mart employees in close proximity to the area who had an unobstructed view. According to Appellant, while the spilled liquid substance was present on the floor minutes prior to his slip, the conspicuity and proximity of the substance to Wal-Mart's employees establish a genuine issue of material fact as to whether Wal-Mart had a reasonable opportunity to discover the dangerous condition. We disagree.

In a Texas Supreme Court decision, the Court upheld summary judgment for Walmart based on lack of constructive knowledge, reasoning that thirty to forty-five seconds was too short to establish employee proximity for "a 'continuous and significant period of time.'" *Spates*, 186 S.W.3d at 568. In *Spates*, Spates was shopping at a Wal–Mart when "'her toe and sandal became entangled in an empty plastic six-pack ring,'" causing her to go down on one knee and extend her shoulder upward, injuring the latter. *Id.* at 567. The ring "was directly behind" a Wal–Mart employee, "within 3–5 feet of her." *Id.* [Internal quotations omitted]. Although a Wal–Mart employee was near the clear plastic ring, the only evidence is that it was behind the employee as she worked on the shelves. *Id.* at 568. The Court reasoned, to find constructive knowledge, jurors would have to find that the employee should have noticed the plastic ring behind her. *Id.* "Had there been evidence it had been on the floor for an extended period of time, reasonable jurors might assume that the employee should have seen it unless she sidled into the aisle or never took her eyes off the shelves." *Id.*

Here, although two Wal–Mart employees were near the liquid substance, proximity alone is insufficient to establish constructive notice. *Reece*, 81 S.W.3d at 816 n.1 ("We disapprove the following cases to the extent they suggest proximity alone is enough to establish constructive notice."). For the duration of the ninety-seven seconds, the employees were either facing away from the liquid substance while stocking the shelves, or had an obstructed view of the liquid substance due to the stocking carts positioned in the middle of the aisle. Between 1:00:17 and 1:00:21, a period of 4-5 seconds, Garcia walks around the stocking carts, approaching the liquid substance. However, she hesitates and stops for less than a second at 1:00:18, shifting her weight while her attention is directed up the aisle, and she appears to be speaking with a person out of view, then turns and walks away from the spot.

Appellant argues the conspicuity and proximity of the substance to Wal-Mart's employees establish a genuine issue of material fact as to whether Wal-Mart had a reasonable opportunity to discover the "white substance" on the "dark brown floor." However, in the video, the spot appears to be between a clear and white color, and the floor appears grey. Appellant also contends it is Wal-Mart's policy that employees keep a lookout "at all times" for spills and other items on the floor, and as such, the failure of its employees renders Wal-Mart liable. However, the Court has rejected this standard. *Reece*, 81 S.W.3d at 817. In *Reece*, the Court discussed "Wal–Mart's store policy that required employees to keep their assigned areas free from hazards and to intervene if 'they walk[ed] past . . . a known hazard' anywhere in the store." *Id.* [Internal quotation marks omitted]. This evidence, however, was deemed immaterial to the constructive-notice issue. *Id.* The Court found because the employee did not notice the hazard he purportedly walked past, the hazard was not known, and the store's policy was thus not implicated. *Id.* Simply put, Appellant cannot use Wal-Mart's policies to expand its duties under the law.

We find the clear/white color of the liquid substance, and it being the size of a quarter, does not render the condition conspicuous. Additionally, as explained above, the mere fact that two Wal-Mart employees were near the liquid substance at the time of the slip, does not sway the proximity factor in favor of Appellant. We further find the duration of ninety-seven seconds of the clear/white, quarter-sized liquid substance being present on the floor, does not establish the employee's longevity for "a continuous and significant period of time." *Spates*, 186 S.W.3d at 568. Based on the combination of proximity, conspicuity, and longevity of the facts and circumstances presented, we hold Wal-Mart did not have a reasonable opportunity to discover and remedy the spilled liquid substance. The trial court did not err in granting summary judgment. Issue One is overruled.

CONTEMPORANEOUS NEGLIGENT ACTIVITY

In Issue Two, Appellant maintains the summary judgment evidence established negligent contemporaneous activity of Wal-Mart at the time of his slip—Wal-Mart's stocking activities. However, as a threshold matter, we must first consider the nature of Appellant's negligence claim.

The Tort Claims Act's scheme of a limited waiver of immunity from suit does not allow plaintiffs to evade the heightened standards of a premises defect claim by re-casting the same acts as a claim relating to the negligent condition or use of tangible property. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 386 (Tex. 2016). The Texas Supreme Court has consistently treated slip-and-fall cases as presenting claims for premises defects. *Id*. at 391 ("Just as at common law, where slip/trip-and-fall cases have consistently been treated as premises defect causes of action, under the Tort Claims Act, when an item of tangible personal property creates a condition of real property that results in a slip/trip-and-fall injury, it is properly characterized as a premises defect cause of action.").

Appellant was shopping at Wal-Mart when he sustained his alleged injuries. Appellant's foot slid sideways when he stepped on a spot of hair product someone spilled on the floor. Recovery on a negligent activity theory requires the plaintiff to have been injured by, or as a contemporaneous result of, the activity itself, rather than by a condition created by the activity. *Keetch v. Kroger Co*., 845 S.W.2d 262, 264 (Tex. 1992). Appellant was not injured by the negligent activity he alleges—Wal-Mart's stocking activities at the time of his slip. Accordingly, Appellant's claim is properly characterized as a premises defect, not a negligent activity. *See id.* at 263–64 (concluding a slippery substance on a grocery store floor, which caused the customer to slip and sustain injuries, was a premises defect and not a negligent activity).

Thus, we need not reach whether there is a genuine issue of material fact as to whether Wal-Mart's stocking activities were a contemporaneous negligent activity. Issue Two is overruled.

CONCLUSION

For these reasons, we affirm.

YVONNE T. RODRIGUEZ, Chief Justice

November 18, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.