FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2437

TALLAHASSEE MEDICAL CENTER,
INC. d/b/a Capital Regional
Medical Center,

Appellant,

v.

STEPHANIE KEMP,

Appellee.

On appeal from the Circuit Court for Leon County.
Charles W. Dodson, Judge.

June 1, 2021

PER CURIAM.

In this slip and fall case, Capital Regional Medical Center appeals the trial court's denial of its motion for directed verdict. We reverse because Stephanie Kemp did not present sufficient evidence that a foreign substance was on the floor where she fell, or that the Medical Center knew about it if such a substance existed.

Background

On a stormy day in 2016, Stephanie Kemp went to the Medical Center with her then-boyfriend to visit one of his relatives. She

brought bags of food and a drink and was wearing rubber thong flip flops. After riding the elevator to the fourth floor, she exited and proceeded towards the relative's room. Rounding past the nurses' station, Kemp suddenly slipped and fell in front of a utility-room door and fractured her kneecap. Kemp later sued the Medical Center claiming that its negligence caused her injury because the floor was wet.

The case ultimately went to trial where the Medical Center moved for a directed verdict. It argued that Kemp had not presented sufficient evidence of a wet floor, or that the Medical Center knew of such a substance on the floor for the case to go to the jury. The trial court denied the motion. Later, the jury found for Kemp and awarded her over a million dollars for past and future medical expenses and noneconomic damages. The trial court denied the Medical Center's motions for a new trial and remittitur and the Medical Center appealed.

Analysis

The denial of a motion for directed verdict is reviewed de novo. *DZE Corp. v. Vickers*, 299 So. 3d 538, 540 (Fla. 1st DCA 2020). "The 'appellate court must view the evidence and all inferences in a light most favorable to the non-movant, and should reverse if no proper view of the evidence could sustain a verdict in favor of the non-movant.'" *State Farm Mut. Auto. Ins. Co. v. Hanania*, 261 So. 3d 684, 687 (Fla. 1st DCA 2018) (quoting *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 997 (Fla. 4th DCA 2004)).

Florida law addresses premises liability and injuries caused by transitory foreign substances by requiring a business invitee to prove "that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it." § 768.0755(1), Fla. Stat. Plaintiffs can prove constructive knowledge with circumstantial evidence showing that:

> (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or

(b) The condition occurred with regularity and was therefore foreseeable.

Id.

This is a constructive knowledge case involving circumstantial evidence. Kemp felt like something wet was there, but she did not see a wet substance on the floor before or after her fall (except that the drink she was carrying spilled when she fell). Indeed, no one saw the wet substance that Kemp faults for her fall. Kemp's boyfriend believed that she had slipped on a wet floor because of the way Kemp fell. But he also did not see a wet substance on the floor. Medical Center employees working near where Kemp fell also testified of not seeing anything wet on the floor. And even though Kemp testified of having wetness on the back of her clothes after the fall, she did not know what caused the wetness.

Kemp mainly relies on video evidence from a fourth-floor, Medical Center camera showing moment-by-moment action in the hallway where she fell. The video does not show a substance on the floor. But it does detail the comings-and-goings of hospital employees and others during the time leading up to Kemp's fall. This video shows, for instance, employees moving trash bags, linen bags, and trays into the utility room next to where she fell. And there was also a housekeeping cart that was wheeled over the spot that she fell. In fact, this spot saw repeated action in the time leading up to Kemp's fall as employees accessed the utility room.

Kemp asserts that something delivered to the utility room by a Medical Center employee could have caused a wet substance to be deposited on the floor causing her to fall. She argues that such a spill could have resulted from a leaking bag that was dragged to the utility room, from a spilled tray, or from something dropping onto the floor from the housekeeping cart. The video itself, however, shows no such leaks, spills, drops, or other deposits of a liquid substance onto the floor. And Kemp saw nothing drop from the tray being carried by the employee she saw immediately before her fall.

Kemp may use circumstantial evidence—like the video evidence here—to prove her case. But there are limits to the

inferences that can be drawn from such evidence. Plaintiffs may not stack inferences upon a debatable inference drawn from circumstantial evidence. *See Hanania*, 261 So. 3d at 687. Instead, a directed verdict should issue for a defendant "if a plaintiff relies upon circumstantial evidence to establish a fact, fails to do so to the 'exclusion of all other reasonable inferences,' but then stacks further inferences upon it to establish causation." *Id.* (quoting *Broward Exec. Builders, Inc. v. Zota*, 192 So. 3d 534, 537 (Fla. 4th DCA 2016)). This rule against stacking inferences "protect[s] litigants from verdicts based on conjecture and speculation." *Id.* (quoting *Zota*, 192 So. 3d at 537; *see also Publix Super Markets, Inc. v. Bellaiche*, 245 So. 3d 873, 876 (Fla. 3d DCA 2018) (foreclosing a jury from stacking inferences from circumstantial evidence to arrive at a verdict).

Based on the evidence in this case, the jury would have had to rely on improperly stacked inferences to find the Medical Center negligent. We understand Kemp's argument that the video evidence shows employees dragging bags of used linens and trash into the utility room. Kemp argues that if one of those bags had contained wet contents and the bag had split, leaked, or seeped through, then a liquid substance could have been deposited on the hallway floor where Kemp fell. The liquid could also have been imperceptible such that hospital staff would not have seen it to clean it up and that Kemp and her boyfriend would not have seen it. Trial testimony indicated that dragged bags had the potential to leak and create a safety hazard, and that the hospital had a policy against dragging bags. Alternatively, Kemp argues that the housekeeping cart or one of the meal trays carried to the utility room by Medical Center employees could have spilled liquid on to the floor. If a cart or one of the trays had contained a liquid, Kemp argues that employee mishandling could have caused a liquid substance to spill on to the floor.

This is not an instance where the main inference underlying the plaintiff's case—that plaintiff slipped on an employee-caused wet spot—can be established to the exclusion of other reasonable inferences. Indeed, it is just as plausible and reasonable to infer that no liquid was on the floor and that the wetness Kemp perceived came from her own flip-flops and clothes after walking into the hospital out of a rainstorm. Nor can additional inferences,

that are questionable in their own right, be rightfully stacked here; speculations such as: that the bags, trays, and cart shown on the video contained liquids; that liquids leaked, spilled, or seeped onto the floor from one of these items due to employee negligence; and that hospital employees failed to wipe up the liquid on the floor in the busy hallway before Kemp slipped, even though they were trained to look for and immediately wipe up liquids found on the floor. In fact, there is no evidence here that the bags, carts, and trays from the video carried any liquids. Nor is there evidence, even if the bags had carried wet stuff, that they leaked, seeped through, or otherwise deposited wet stuff on the floor. Nor does the evidence show that any of the carts or trays were mishandled and spilled liquids onto the floor. In fact, no substance was seen on the floor before Kemp's fall. This is not a case like *Hanania* where the plaintiff's negligence theory is "inescapable" and the defendant's alternative theory is "simply not plausible." 261 So. 3d at 688. Rather, Kemp's primary inference cannot be established to the exclusion of other reasonable inferences and it cannot support additional inferences to establish her case.

Other cases support our conclusion. In *Publix Super Markets, Inc. v. Schmidt*, 509 So. 2d 977, 978 (Fla. 4th DCA 1987), the plaintiff did not know what caused her to slip at the grocery store. But she thought grease was the culprit because of the way she fell and because of a grease stain on her skirt. *Id.* Other witnesses, including her husband, did not see anything on the floor prior to the fall. *Id.* A former Publix employee testified that he had seen spilled gravy on the floor on multiple occasions in the past, but there was no evidence of a recent spill. *Id.* The Fourth District found the evidence insufficient to go to the jury and reversed the trial court's decision denying the defendant's motion for a directed verdict. *Id.*

This Court also affirmed the final summary judgment entered in *Evens v. E. Air Lines, Inc.*, 468 So. 2d 1111 (Fla. 1st DCA 1985). There, a plaintiff claimed to have fallen on a slippery substance but did not see anything on the floor before or after the fall. *Id.* at 1111. As in this case, the plaintiff could not explain what caused her fall, only that she thought it was something wet. *Id.* The opinion in *Evens* concluded that because there was no direct or circumstantial evidence of a spill, and no actual or constructive

notice of a spill, that summary judgment was proper. *Id.* at 1112. Here, as in *Schmidt* and *Evens*, the circumstantial evidence cited by Kemp did not present legally sufficient evidence that the Medical Center breached its duty of reasonable care to maintain its premises in a safe condition. *See Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315, 320 (Fla. 2001). The Medical Center was therefore entitled to a directed verdict.

Finally, we recognize that in *Feris v. Club Country of Fort Walton Beach, Inc.*, 138 So. 3d 531, 535–36 (Fla. 1st DCA 2014), we reversed in a slip-and-fall case that was underpinned by stronger circumstantial evidence. There, multiple witnesses testified that bar patrons regularly spilled drinks on the dance floor; that drinks were on the dance floor the night the plaintiff fell; that the plaintiff fell in a place where spills regularly occurred; that the substance on the plaintiff's jeans smelled like alcohol; and that defendant's employee wiped the area immediately after plaintiff fell. *Id.* at 532–33; s*ee also Torrence v. Sacred Heart Hosp.*, 251 So. 2d 899, 901–02 (Fla. 1st DCA 1971) (ruling for plaintiff where the hospital had waxed the floors just hours before the plaintiff's fall, which left a wax-like substance on the plaintiff's pants). Unlike *Feris*, the evidence here does not show that a wet substance was spilled on the floor; that spills regularly occurred where Kemp fell; or that an employee wiped up a pre-existing substance from the floor after Kemp's fall. Nor was Kemp's claim of a wet spot on her clothes matched to something coming from the hospital; indeed, she had just walked into the hospital out of the rain.

For these reasons, we REVERSE.

OSTERHAUS and M.K. THOMAS, JJ., concur; MAKAR, J. dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting.

On her way to visit a patient, Stephanie Kemp slipped and shattered her left knee on the hallway floor directly next to the "soiled utility room" on the fourth floor of Capital Regional Medical Center (Hospital). A soiled utility room is where waste/rubbish from cleaning/trash/linen carts, including wet items, are put temporarily before removal. At the trial on Kemp's one-count negligence lawsuit, testimony established that spills had occurred before where Kemp fell and surveillance video shortly before Kemp's pratfall shows multiple violations of the Hospital's policy against dragging trash bags into the room to prevent a slip hazard. The jury ruled for Kemp, concluding that the Hospital was negligent and assigning total fault to the Hospital.

On appeal, the Hospital says the jury verdict in Kemp's favor should be reversed for a lack of evidence that it knew (actual knowledge) or should have known (constructive knowledge) of the hazardous condition that the jury determined caused Kemp's slip and fall. To do so, our appellate panel—viewing all of the evidence and all inferences in a light most favorable to Kemp—would have to find that "no proper view of the evidence could sustain a verdict in favor of" Kemp. *State Farm Mut. Auto. Ins. Co. v. Hanania*, 261 So. 3d 684, 687 (Fla. 1st DCA 2018) (quoting *Weinstein Design Grp., Inc. v. Fielder*, 884 So.2d 990, 997 (Fla. 4th DCA 2004)).

Based on the evidence presented, Kemp met her burden to show that the Hospital was negligent. Viewing the evidence and all inferences in Kemp's favor, the direct and circumstantial evidence provided as follows:

- Testimony of hospital staff that spills had occurred previously at the exact location where Kemp slipped and fell;
- Testimony of the hospital maintenance administrator explaining its safety policy to not overfill or drag trash bags across the floor to the soiled utility room to avoid slip and fall risks;
- Surveillance video showing Kemp slipping and falling precisely at the point by the soiled utility room where

multiple violations of the no-dragging-trash-bags policy occurred in the hour beforehand;[1]

- Testimony of the administrator, who reviewed the surveillance video, admitting to the violations of the safety policy; and
- Kemp's testimony that she slipped on a wet substance by the soiled utility room and that it caused wetness on her clothes (confirmed by her companion).

The entirety of the testimony and surveillance video formed a proper basis upon which the jury held that the Hospital was negligent and Kemp was not (the jury rejected that she had contributed to her injury).

The jury verdict form did not specify what form of negligence was proven (failure to maintain the premises, failure to correct a dangerous condition, or failure to warn).[2] The focus on appeal, however, is the "slip and fall" statute, which states in relevant part:

> (1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or *constructive knowledge* of the dangerous condition and should have taken action to remedy it. *Constructive knowledge may be proven by circumstantial evidence showing that*:
> (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or

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[1] The portions of the surveillance video shown to the jury are available at https://edca.1dca.org/DCADocs/2019/2437/19-2437.mp4.

[2] The jury was instructed that it could find the Hospital liable if it "negligently failed to maintain the premises in a reasonably safe condition," or "negligently failed to correct a dangerous condition" or "negligently failed to warn" Kemp of such condition of which it "had actual or constructive knowledge."

> (b) *The condition occurred with regularity and was therefore foreseeable.*
> (2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

§ 768.0755(1), Fla. Stat. (2020) (emphasis added). To show constructive knowledge, Kemp need only have put on circumstantial evidence of the dangerous condition. She did more than that, putting on both direct and circumstantial evidence that was legally sufficient to create a jury issue as to whether the hospital had constructive knowledge of the dangerous condition where Kemp slipped and fell.

The Hospital's primary argument at trial was the lack of direct evidence that anyone saw an identifiable substance on the floor *before* Kemp's fall. That no one testified to seeing something on the floor beforehand doesn't mean it wasn't there. It is understandable that the witnesses present at the time of the fall (or soon thereafter) didn't see something on the floor because they were focused on other matters, such as looking for a patient's room number (Kemp's companion) or tending to Kemp post-accident (the charge nurse and unit supervisor). What's important, and what the jury apparently believed, is the testimony of both Kemp and her companion that her clothes were wet from whatever was on the floor that caused her to slip and fall. The jury was instructed to determine whose version of events had the most persuasive and convincing force, and it sided with Kemp based on the greater weight of the evidence presented.

Kemp also met her burden to establish a reasonable basis for the jury to conclude that negligence occurred due to lax enforcement of the Hospital's safety policy. Having a safety policy to prevent slip and falls is commendable, but not if it goes unheeded. Consistent with section 768.0755(1), Florida Statutes, the jury was instructed that the Hospital's "[c]onstructive knowledge may be proven by circumstantial evidence showing that: (a) [t]he dangerous condition existed for such a length of time that, in the exercise of ordinary care, [the Hospital] should have known of the condition; or (b) [t]he condition occurred with regularity and was therefore foreseeable." Showing a surveillance

video of trash bags repeatedly being dragged on the floor precisely where Kemp fell is sufficient to establish a reasonable probability that a dangerous condition existed, particularly because the safety policy's raison d'être is to avoid slip and falls like what occurred. During the one hour of surveillance video preceding the fall, almost every trash trip to the soiled utility room violated the safety policy, allowing the jury to infer that compliance was the exception and not the rule.

This Court and others have held that violations of a safety policy can be circumstantial evidence of negligence. A company's internal safety policy does not set the standard of care in a negligence case, but it is admissible and relevant to show an employee's conduct or lack thereof. *Dominguez v. Publix Super Mkts., Inc.*, 187 So. 3d 892, 894–95 (Fla. 3d DCA 2016).

For example, in *Feris v. Club Country of Fort Walton Beach, Inc.*, 138 So. 3d 531, 534–35 (Fla. 1st DCA 2014), a patron slipped and fell on a bar's dance floor. This Court reversed a summary judgment in favor of the bar, which had a policy against drinks on the dance floor that it allegedly failed to enforce. Deposition testimony established that "it was normal for patrons to take and spill drinks on the dance floor in the room where the fall occurred" such that "it could logically be inferred that such was done with either [the bar's] allowance or actual knowledge." *Id.* at 535. Likewise, "if drinks were typically taken and spilled on the dance floor, one could reasonably deduce that [the bar] would have discovered the presence of drinks and the attendant spills through the exercise of ordinary care in inspecting the premises." *Id.* This circumstantial evidence—that the bar's no-drinks-on-dance-floor policy was routinely ignored—formed the basis for a jury to potentially "infer that [the bar] or its agents allowed or caused a dangerous condition to exist, or that this condition existed with such regularity that [the bar] knew or reasonably should have known of its existence." *Id.*

Based on this evidence, the injured patron "met his burden of pleading and offering sufficient evidence" of a breached duty to present a jury issue in a "substance/premises liability claim." *Id.* In like manner, Kemp's evidence of an unenforced safety policy—one designed specifically to avoid slips and falls—supports the

jury's finding of negligence; an unenforced policy to prevent spills on a bar's dance floor differs little from an unenforced safety policy to prevent wet hospital hallways.

This Court, in *Feris*, made three additional observations that apply in this case. First, this Court stated that:

> While none of the deposition testimony offered by Feris establishes *how* the substance that caused Feris' accident came to be on the dance floor, each deponent testified that patrons in the dance room where the fall occurred routinely took drinks onto the dance floor, which commonly resulted in spills on the dance floor.

Id. at 534. (emphasis added). As in *Feris*, while no direct evidence here shows *how* the Hospital's floor became slippery, the evidence established a reasonable basis for concluding that safety policy violations were the likely cause. Second, buttressing how the substance came to be on the dance floor, this Court highlighted testimony establishing that the injured patron's "fall took place near a speaker, and that patrons customarily put their drinks on the speakers." *Id.* at 535. Here, Kemp's fall took place directly next to the soiled utility room where employees customarily put trash (including wet items) and, in this case, repeatedly violated the safety policy against dragging trash bags into the room in the preceding hour. Third, this Court noted that both the injured patron and another patron "each stated that the spot where [the injured patron] fell was wet, and [the injured patron] testified that after the fall his jeans were wet with a substance that smelled like alcohol." *Id.* Similarly, Kemp and her companion each testified that although neither saw a wet spot before Kemp fell (her companion was looking for the patient's room number), they both saw wetness on the bottom of Kemp's jeans from the floor where she fell.

This much is clear: Kemp slipped on something slick that caused her sudden, awkward freefall; an epic collapse of this type tends not to happen on a dry/rough surface. The Hospital's explanation is that water from either Kemp's flip flops or her drink (a Zaxby's® beverage for the patient she was going to visit) made

its way to the floor just before Kemp slipped on it; each possibility presumes that something watery was on the floor.

The Hospital bore the burden of proving its flip flop/drink theory, but it failed to persuade the jury. *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1096 (Fla. 2010) ("The defendant has the burden of proving an affirmative defense."). The jury was specifically instructed that it could assign a percentage of fault to Kemp for her own negligence, but it assigned the full fault (100%) for the incident to the Hospital and none (0%) to Kemp, thereby rejecting that Kemp's flip flop/drink played any role. The surveillance video makes it improbable to believe that a spilled drink caused the fall; instead, the drink spilled due to her fall. That's what Kemp told the jury ("Q: Had you spilled your drink before the fall or after the fall? A: After the fall. . . . Q: Any chance that what was in your cup that you were carrying is what caused you to fall? A: Absolutely not.") and apparently they believed her.

The jury was also entitled to reject the Hospital's argument that residual wetness on Kemp's flip flops just happened by chance to cause her slip and fall at the moment she walked past the soiled utility room. Surveillance video shows Kemp walking into the Hospital's first floor entry with a wet umbrella (that she promptly put in a plastic bag), walking over various mats and carpeted surfaces, taking the elevator to the fourth floor, and then walking down the hallway towards the soiled utility room; at no point in this lengthy trek did Kemp lose traction, doing so only at the precise point where the soiled utility room is located and the multiple safety policy violations occurred. The Hospital told the jurors in closing argument that it is "up to you to decide whether [wearing flip flops] was a reasonable choice of footwear in the rain," and they concluded it was. In summary, the jury was entitled to conclude that a slick floor—and not a spilled drink or Kemp's choice of footwear—caused her injury. *See also Bongiorno v. Americorp, Inc.*, 159 So. 3d 1027, 1030 (Fla. 5th DCA 2015) (wearing high-heeled shoes to work not a basis for comparative negligence in restroom pratfall).

Finally, it bears noting that the purpose of section 768.0755, Florida Statutes, is to give businesses some leeway in policing their passageways for slip and fall risks without incurring

potential liability. As a general matter, tort liability does not attach for the infrequent or random spillage/leakage that goes undetected despite reasonable and timely efforts to keep watch over the safety of a floor or passageway. *Glaze v. Worley*, 157 So. 3d 552, 558 (Fla. 1st DCA 2015) ("The mere presence of a transitory foreign substance is insufficient to establish liability.") (Makar, J., concurring). Frequent or recurring risks, however, may support liability if they are not remedied. The Hospital knew of the slip and fall risk and had a safety policy to reduce it, which was repeatedly violated precisely where Kemp's injury occurred. Although not a feature of this appeal, section 768.0755(1) notes that a business is deemed negligent if it knew or should have known of the dangerous condition and "should have taken action to remedy it." This language envisions remedial measures to lessen or curtail potential liability, such as more vigilant enforcement of the policy against dragging bags with spill risks across hallways and into soiled utility rooms; putting up warning signs; placing slip-proof or absorbent mats next to soiled utility rooms; marking off the floor to prevent visitor foot traffic in areas where spillage is most likely; and so on.

Because the evidence presented—viewed in a light most favorable to Kemp—supports the jury verdict, it should be sustained. *Hanania*, 261 So. 3d at 687.

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