IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 2005

JEANNINE GERARD,

Appellant,

v.

ECKERD CORPORATION, a Delaware corporation d/b/a **ECKERD'S,**

Appellee.

CASE NO. 4D03-3795

Opinion filed January 12, 2005

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; David Krathen, Judge; L.T. Case No. 02-014011 (07).

Christine McKenna and Debi F. Chalik of Rosen & Chalik, P.A., Plantation, for appellant.

Russell M. Verona and Asa B. Groves, III of Groves & Verona, P.A., Miami, for appellee.

STONE, J.

Gerard was injured in a slip and fall in an Eckerd drugstore. The trial court granted summary judgment in favor of Eckerd. We reverse.

The record reflects that Gerard was in the detergent aisle when she slipped on a clear liquid in the aisle. The liquid extended approximately two feet out from the shelves. The liquid could have come from detergent found in containers on the shelves. Assistant store manager Bruce McKenzie testified in his deposition that approximately ten minutes prior to the accident, he had been helping a customer locate and remove a product from a shelf in that aisle. At the time, McKenzie looked up and down the aisle, and the floor appeared clean and dry. He stated that company policy provides that when employees are in an aisle for any reason, they are to inspect the aisle for hazardous conditions. The record shows that there was no provision for a maintenance log and there was no other store floor inspection policy. Following the accident, McKenzie directed an employee to clean up the area and filled out an accident report.

Section 768.0710, Florida Statutes, addresses transitory foreign objects or substances on business premises. The statute provides:

> (1) The person or entity in possession or control of business premises owes a duty of reasonable care to maintain the premises in a reasonably safe condition for the safety of business invitees on the premises, which includes reasonable efforts to keep the premises free from transitory foreign objects or substances that might foreseeably give rise to loss, injury, or damage.
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> (2) In any civil action for negligence involving loss, injury, or damage by a business invitee as a result of a transitory foreign object or substance on business premises, the claimant shall have the burden of proving that:
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> (a) The person or entity in possession or control of the business premises owed a duty to the claimant;
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> (b) The person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises. Actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim. However, evidence of notice or lack of notice offered by any party may be considered together with all of the evidence; and
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> (c) The failure to exercise reasonable care was a legal cause of the loss, injury, or

damage.

The trial court's ruling was based on the Third District's holding in Zimmerman v. Eckerd Corporation, 839 So. 2d 835 (Fla. 3d DCA 2003). In Zimmerman, the court concluded that summary judgment must be granted in favor of the business defendant in a slip and fall case where there is unimpeached testimony of a store manager that regular inspections are conducted of the floors. In Zimmerman, as here, the plaintiff fell on a wet spot in an Eckerd drugstore. There, the manager testified that the floor was inspected "every five to ten minutes." Id. The district court affirmed a summary judgment because "the evidence of Eckerd's maintenance of the premises operated . . . conclusively to rebut . . . liability under section 768.0710(2)(b)." Id. We distinguish Zimmerman, as in that case, there was a policy requirement of regular and frequent floor inspections that were followed.

We conclude that, in this case, there are issues of fact as to whether the inspection, and inspection policy, were reasonable. Here, there is no evidence that written and reasonably frequent inspection procedures were in place or followed.

It is undisputed that this accident was subsequent to the effective date of section 768.0710(2), placing the burden of proof on the plaintiff. We do not, however, read that statute as creating a "per se" rule entitling a defendant to summary judgment simply because a store employee testifies that he was in the aisle and looked at the floor. This is particularly of concern where the "inspection" may be perceived as conveniently fortuitous. Therefore, we reverse the summary final judgment and remand for trial.

BRYAN, BEN L., Associate Judge, concurs.
WARNER, J., dissents with opinion.

WARNER, J., dissenting.

The plaintiff offered no evidence other than the fact that she slipped on a clear liquid on the floor. She did not offer any information regarding store procedures or indicate the cause of the liquid on the floor. The store manager testified that he had inspected the aisle just ten minutes earlier when he was helping a customer in the same aisle.

Harvey Building, Inc. v. Haley, 175 So. 2d 780 (Fla. 1965), explains the burden of the movant and opposing party on summary judgment:

> A movant for a summary judgment has the burden of demonstrating that there is no genuine issue on any material fact. Rule 1.36(c), F.R.C.P., 30 F.S.A. All doubts regarding the existence of an issue are resolved against the movant, and the evidence presented at the hearing plus favorable inferences reasonably justified thereby are liberally construed in favor of the opponent. A summary judgment motion will be defeated if the evidence by affidavit or otherwise demonstrates the existence of a material factual issue. To defeat a motion which is supported by evidence which reveals no genuine issue, it is not sufficient for the opposing party merely to assert that an issue does exist. If the moving party presents evidence to support the claimed non-existence of a material issue, he will be entitled to a summary judgment unless the opposing party comes forward with some evidence which will change the result--that is, evidence sufficient to generate an issue on a material fact. *Connolly v. Sebeco, Inc.*, Fla., 89 So.2d 482; Barron and Holtzoff, Federal Practice and Procedure (Wright Edition), Vol. 3, Section 1235. When analyzed in this fashion the summary judgment motion may be categorized as a 'pre-trial motion for a directed verdict.' At least it has most of the attributes of a directed verdict motion. *Locke v. Stuart*, Fla.App., 113 So.2d 402.
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> The initial burden, therefore, is upon the movant. When he tenders evidence sufficient to support his motion, then the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue.

> The movant, however, does not initially carry the burden of exhausting the evidence pro and con, or even examining all of his opponent's witnesses. To fulfill his burden he must offer sufficient admissible evidence to support his claim of the non-existence of a genuine issue. If he fails to do this his motion is lost. If he succeeds, then the opposing party must demonstrate the existence of such an issue either by countervailing facts or justifiable inferences from the facts presented. If he fails in this, he must suffer a summary judgment against him.

175 So. 2d at 782-83 (emphasis added).

Of course, where the inferences that may be drawn from the evidence can be construed against the movant, the opponent does not have to supply additional evidence to suggest that a triable issue of fact appears. *See, e.g., Osceola County v. Goodman*, 276 So. 2d 210, 210 (Fla. 4th DCA 1973). However, factual statements in an affidavit must be accepted as true for purposes of a motion for summary judgment. *Chapman v. Tison*, 137 So. 2d 605, 606 (Fla. 1962). There is no law, nor does the majority cite any, to suggest that an uncontradicted affidavit may be disregarded.

What theory of negligence is supported by the affidavits presented? There is none. The affidavits show that the store was regularly inspected, and this particular aisle was inspected and found to be clear ten minutes prior to the fall. This does not constitute negligence. *Cf. Winn Dixie Stores, Inc. v. Gaines*, 542 So. 2d 432 (Fla. 4th DCA 1989) (finding inspection of store floor within thirty minutes of fall was insufficient to demonstrate management had notice of material subsequently found on floor so as to find store owner liable for slip and fall). It was the plaintiff's duty under *Harvey Building* to present counter-affidavits to suggest contrary facts. If she had information that the store manager was not truthful or his facts were contradicted by other information, she was required to submit it. Otherwise, the court appropriately granted summary judgment. I would affirm.

NOT FINAL UNTIL DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.