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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHAEL R. NORMAN,

Appellant,

v.

DCI BIOLOGICALS DUNEDIN, LLC, and BPL PLASMA, INC.,

Appellees.

Case No. 2D18-3065

Opinion filed April 29, 2020.

Appeal from the Circuit Court for Pinellas County; Jack R. St. Arnold, Judge.

Adam Richardson of Burlington & Rockenbach, P.A., West Palm Beach; Jessica J. Gonzalez-Monge of Rubenstein Law, Orlando, for Appellant.

Denise L. Dawson of Hall Booth Smith, P.C., Palm Beach Gardens, for Appellees.

ATKINSON, Judge.

Michael R. Norman appeals the final summary judgment entered against him in favor of DCI Biologicals Dunedin, LLC, and BPL Plasma, Inc. (collectively the Plasma Defendants) in the negligence suit for injuries he sustained during a slip-and-fall

accident in the bathroom of one of their plasma-donation centers. Because there were genuine issues of material fact concerning the Plasma Defendants' constructive notice of the water in the donor bathroom, we reverse.

Just before 7:00 p.m. on Friday, May 2, 2014, Michael R. Norman fell in a plasma donation center (the Plasma Center) operated by the Plasma Defendants. After arriving at the Plasma Center to donate plasma, he sat down to complete the paperwork that the receptionist gave him. Approximately forty-five minutes later, Norman pushed the door open and took a couple of steps onto the tile floor of the male donor bathroom, which had two sinks on the left, followed further down by urinals and two stalls. Once inside, he fell. Norman told the receptionist about his fall and asked her to call an ambulance. The receptionist called 911. The Plasma Center's medical supervisor took Norman into an examining room and checked his vitals.

At 6:58 p.m., paramedics received notice of the 911 call placed from the Plasma Center. The ambulance arrived at 7:06 p.m. Paramedics encountered Norman at 7:08 p.m. and were transporting him to the hospital by 7:23 p.m. Some time thereafter, the Plasma Center's medical supervisor created an incident report in which he described Norman's fall:

> New Donor, predonation, asked receptionist Maria to call 911. Donor complains that he went to bathroom and next thing he knows he is waking upon on floor. Donor has abrasion above left eye and contusion below with possible fracture. Donor taken to MS office to lay down and is in obvious pain. Donor given ice pack.

The report also indicated that the medical supervisor "checked the bathroom floor for any liquid and found none anywhere."

Norman filed a negligence suit for damages from the injuries he sustained, including a broken orbital bone. While being deposed, Norman testified that he remembered "slipping and falling forward, like almost being pushed forward, and . . . hitting the sink counter and then laying on the floor." He testified that when he was on the floor, he noticed "like a cup of water" on the floor and saw "a couple of footprints, like dirty footprints." Some of the liquid got onto the left side of his shirt. Although Norman testified that the light was on in the bathroom, he did not see any liquid on the floor until after he fell. He testified that the consistency of the liquid was thicker in the area where he saw the footprints. He "noticed other areas where it was, like, someone slid their foot." When asked whether "it appeared either that somebody else had slipped and fallen on it or at least slipped," he answered, "I'm not sure." Norman stated that there were at least two footprints, which "almost looked like muddy footprints." However, he could not recall if they were complete or merely partial imprints.

During the medical supervisor's deposition, he could not recall how much time had elapsed between the incident and the time that he inspected the bathroom. Nor could he recall specifically what he did when he entered the bathroom to investigate: "I couldn't tell you exactly what happened that day, except for what I wrote in my report."

According to the deposition testimony of other employees, on a normal day, the Plasma Center is "very busy and noisy." It opened at 7 a.m. and would take donors until 7 p.m.; approximately 150–300 donors visited the Plasma Center each day. Separate male and female donor bathrooms were located in the lobby. Employees utilized separate bathrooms. Each night, after 7 p.m., non-employee janitors would

clean the lobby and bathrooms. Typically, they arrived after all of the employees had left, but "sometimes employees would be there when they arrived."

The Plasma Center did not have a set schedule for inspections of the bathrooms. However, it did conduct inspections "[i]f we were informed that the bathroom needed attention, or, like, they needed toilet paper or any other toiletries." According to the Plasma Center manager, the receptionist would also clean the lobby and bathrooms "if there was downtime," meaning that "all of the donors in the reception area . . . had already been screened and were just waiting to go to the donor floor." However, during her deposition the receptionist could not remember being told that she was responsible for inspecting the donor bathroom. And none of the Plasma Center employees, including the receptionist, recalled inspecting the men's donor bathroom on the day of the incident, prior to Mr. Norman's fall.

The Plasma Defendants moved for summary judgment, arguing, in part, that Norman's unsubstantiated contention of seeing footprints in a liquid substance on the bathroom room floor was insufficient as a matter of law to avoid summary judgment. Norman filed a response in opposition to the motion for summary judgment, in which he argued that his deposition testimony regarding the condition and appearance of the substance, along with the testimony of the Plasma Center employees regarding the lack of inspections of the donor bathrooms in the busy Plasma Center created a genuine issue of material fact as to the Plasma Defendants' constructive notice of the liquid. The trial court granted the motion for summary judgment and entered final judgment in favor of the Plasma Defendants.

Appellate courts review orders granting summary judgment de novo. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). A party moving for summary judgment bears "the burden of proving the absence of a genuine issue of material fact." Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966). The proof must be conclusive and sufficient "to overcome all reasonable inferences which may be drawn in favor of the opposing party." Id. (citing Harvey Bldg., Inc. v. Haley, 175 So. 2d 780 (Fla. 1965)). "If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." Competelli v. City of Belleair Bluffs, 113 So. 3d 92, 92–93 (Fla. 2d DCA 2013) (quoting Snyder v. Cheezem Dev. Corp., 373 So. 2d 719, 720 (Fla. 2d DCA 1979)).

The elements of a negligence cause of action consist of a legal duty "requiring the defendant to conform to a certain standard of conduct for the protection of others," a failure to meet that duty, and damages proximately caused by that failure. Kenz v. Miami-Dade County, 116 So. 3d 461, 464 (Fla. 3d DCA 2013). Business owners, like the Plasma Defendants, owe the following duties to an invitee such as Mr. Norman: "(1) to take ordinary and reasonable care to keep its premises reasonably safe for invitees; and (2) to warn of perils that were known or should have been known to the owner and of which the invitee could not discover." Id. (citing Delgado v. Laundromax, Inc., 65 So.3d 1087, 1089 (Fla. 3d DCA 2011)).

Prior to the enactment of section 768.0710, Florida Statues (2002), once a slip-and-fall plaintiff established that the fall resulted from a transitory foreign substance, a rebuttable presumption of negligence arose. See Owens v. Publix Supermarkets,

Inc., 802 So. 2d 315, 331 (Fla. 2001). Section 768.0710(2) eliminated that rebuttable presumption and required the plaintiff to prove the following:

> (a) The person or entity in possession or control of the business premises owed a duty to the claimant;
> (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
> (c) The failure to exercise reasonable care was a legal cause of the loss, injury, or damage.

In 2010, the Legislature enacted section 768.0755, which required a slip-and-fall plaintiff to prove that the defendant had actual or constructive knowledge of the foreign substance. See Pembroke Lakes Mall Ltd. v. McGruder, 137 So. 3d 418, 424 (Fla. 4th DCA 2014) ("The older 2002 statute expressly stated actual or constructive notice was not 'a required element of proof to this claim,' but the new 2010 statute expressly stated the plaintiff 'must prove that the business establishment had actual or constructive knowledge of the dangerous condition.' "); see also Encarnacion v. Lifemark Hosps. of Fla., 211 So. 3d 275, 278 (Fla. 3d DCA 2017) ("[W]here a business invitee slips and falls on a 'transitory substance' in a business establishment as occurred here, proof of the breach element of the claim against an owner of the establishment is statutorily constrained by section 768.0755."). Section 768.0755 sets forth two means by which a plaintiff can establish constructive knowledge of the transitory foreign substance—by proving either: "(a) [t]he 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) [t]he condition occurred with regularity and was therefore foreseeable." § 768.0755(1). In his brief, Norman states that his theory of the case only implicates the former.

Norman contends that the evidence of a cup's worth of dirty water located near the bathroom sink, coupled with the muddy footprints, the skid mark, and the lack of evidence establishing that the bathroom was inspected on the day of the incident, created a genuine issue of material fact about whether the Plasma Center should have known about the water on the floor because it was there for a sufficient length of time.

In cases involving a transitory substance, courts have found constructive notice established by evidence similar to the deposition testimony given by Norman. Sometimes the offending liquid was dirty, scuffed, or had grocery-cart track marks running through it. See, e.g., Zayre Corp. v. Bryant, 528 So. 2d 516, 516 (Fla. 3d DCA 1988) (finding that the facts that there were " 'black darkened' grocery cart tire tracks running through" the substance, which "was otherwise 'relatively clear' but 'slimy,' " and that the store had not inspected the aisle for four hours "constituted adequate circumstantial evidence upon which a jury could have reasonably imputed constructive notice of the hazardous condition to the defendant"); Winn-Dixie Stores, Inc. v. Guenther, 395 So. 2d 244, 246 (Fla. 3d DCA 1981) ("[T]estimony that the liquid was dirty and scuffed and had several tracks running through it was, in our opinion, adequate to impute constructive notice of the hazardous condition to the store manager."). Other evidence such as "footprints, prior track marks, changes in consistency, [or] drying of the liquid" have also "tend[ed] to show that the liquid was on the floor for an amount of time sufficient to impute constructive notice." Palavicini v.

Wal-Mart Stores E., LP, 787 Fed. Appx. 1007, 1012 (11th Cir. 2019); cf. Skipper v. Barnes Supermarket, 573 So. 2d 411, 413 (Fla. 1st DCA 1991) ("Indicia of constructive notice in the context of debris on the floor which subsequently causes a slip and fall injury includes evidence of thawing (when the debris involves frozen materials), cart tracks, footprints, crushing, and so forth."). A dirty puddle of liquid in a restroom at a shopping mall, for example, was sufficient to preclude summary judgment on the issue of constructive notice. See Mashni v. Lasalle Partners Mgmt. Ltd., 842 So. 2d 1035, 1037 (Fla. 4th DCA 2003) ("Even though the dirt could have been created by Mashni's fall, . . . the fact that the water was dirty could also create an inference that it was on the floor for a period of time sufficient to create constructive notice.").[1]

The Plasma Defendants rely on, among other cases, Encarnacion, in which the appellate court analyzed a scenario similar to Norman's description of the bathroom in which he fell. 211 So. 3d at 278. There, the plaintiff slipped in the hallway on a substance that smelled like a cleaning product and was " 'oily,' 'dirty,' and 'dark.' " Id. at 276. The appellate court opined that

> [f]or such testimony to create a jury issue, the testimony must be accompanied by a "plus," namely some additional fact or facts from which a jury can reasonably conclude that the substance was on the floor long enough to have become discolored without assuming other facts, such as the substance, in its original condition, was not "oily," "dirty" and "dark."

[1]This holding in Mashni was not affected by section 768.0755, Florida Statutes (2010), because it applied pre-Owens cases to find that circumstantial evidence can establish constructive knowledge of the dangerous condition. Mashni, 842 So. 2d at 1037. The court merely noted that Owens provided "an additional basis for reversal of the summary judgment." Id. at 1038.

Id. at 278. There, evidence suggested the opposite—that "if Ms. Encarnacion's testimony is believed, the liquid was being deposited on the floor by a non-hospital employee at the same time Ms. Encarnacion fell." Id. (emphasis added).

By contrast, the summary judgment evidence in this case did not foreclose the possibility that the water had been on the floor for a prolonged period of time, including testimony from which it would not be unreasonable to infer that no one had inspected the men's donor bathroom at any point on the day of Norman's fall. See id. at 277 ("A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." (citing Bishop v. R. J. Reynolds Tobacco Co., 96 So. 3d 464, 467 (Fla. 5th DCA 2012))); Jenkins v. Brackin, 171 So. 2d 589, 591 (Fla. 2d DCA 1965) ("[G]iving the most favorable inference to the affidavit of the defendant's helper, as we are required to do, it may be inferred that, since it was his duty to sweep the floor, and he had not performed the duty since 4:00 P.M., the floor had not been inspected subsequent to that time." (internal citations omitted)).

We need not decide whether that alone—the mere absence of evidence of how long the water had been there—would preclude summary judgment in light of a statute that places a burden on the plaintiff to prove constructive knowledge by "showing" the "length of time" was such that the defendant should have known of the condition. See § 768.0755(1). Norman's testimony, which hews very closely to case law concluding summary judgment was inappropriate, provides what was described by the Third District as the "plus"—something to suggest that the water had been there for a duration that allowed it to be transformed from its original condition.

The fact that the liquid, described as a cup's worth of soiled water, was located near a bathroom sink was sufficient to infer that the liquid was not dirty when originally deposited on the floor. Cf. Berbridge v. Sam's East, Inc., 728 Fed. App'x. 929, 933 (11th Cir. 2018) (recognizing that a plaintiff may not have to "prove that the water was originally clean" if "facts g[i]ve some indication of the substance's original condition . . . allow[ing] a jury to draw an inference from its altered condition"); Camina v. Parliament Ins. Co., 417 So. 2d 1093, 1094 (Fla. 3d DCA 1982) (finding evidence that ice cream was thawed, dirty, and splattered equally susceptible to an inference that the condition existed before the plaintiff's fall as it was to the inference that plaintiff's fall created the condition). And the two footprints around which the liquid was thicker than other areas could suggest that the shoes that created those footprints might well have deposited soil sufficiently earlier to allow it to be absorbed by the surrounding water by the time the defendant entered the restroom. This, combined with the fact that there were "other areas" where "someone slid their foot," allowed the inference that the liquid was on the floor long enough for someone other than the defendant, perhaps multiple individuals, to have stepped in it.

And contrary to the Plasma Defendants' contention, the inferences creating a factual issue in this case were not stacked. Cf. Gaidymowicz v. Winn-Dixie Stores, Inc., 371 So. 2d. 212, 214 (Fla. 3d DCA 1979) (rejecting a plaintiff's utilization of direct evidence of a spill on one grocery store aisle to prove that there was also liquid on the cross aisle where the plaintiff was injured). From direct evidence that there was dirty water on the floor with muddy footprints and a separately located skid mark, Norman proposes an inference that the dirt, mud, and marks were deposited onto the

floor sometime sufficiently prior to his fall by one or more other individuals to indicate that the Plasma Defendants should have detected it. He also adduced circumstantial evidence to support an inference that no inspection of the men's donor bathroom was conducted during the entirety of the busy day of Norman's fall. These are two separate inferential premises to support the ultimate conclusion that the liquid in the bathroom "existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition." Neither relies on the other. Because they were not stacked one on top of another, neither of the inferences needs to be proven "to the exclusion of all other reasonable inferences." Wilson-Greene v. City of Miami, 208 So. 3d 1271, 1275 (Fla. 3d DCA 2017) (quoting Cohen v. Arvin, 878 So. 2d 403, 405 (Fla. 4th DCA 2004)).

Because there were genuine issues of material fact, the trial court erred when it entered summary judgment.

Reversed and remanded for further proceedings.

LaROSE and MORRIS, JJ., Concur.