NO. COA03-1304

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

DAVID L. PAGE and wife,
CAROLYN A. PAGE,
Plaintiffs-Appellants,

v. Guilford County
No. 01 CVS 12017

HARRIS TEETER, INC.,
Defendant-Appellee.

Appeal by plaintiffs from orders entered 24 February 2003 and 6 May 2003 by Judge John O. Craig, III, in Superior Court, Guilford County. Heard in the Court of Appeals 16 June 2004.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by L.P. McLendon, Jr., Derek J. Allen and Katherine A. Murphy, for plaintiffs-appellants.

Carruthers & Bailey, P.A., by J. Dennis Bailey and Joseph T. Carruthers, for defendant-appellee.

McGEE, Judge.

David L. Page and Carolyn A. Page (Page) (collectively plaintiffs) filed a complaint on 14 November 2001 against Harris Teeter, Inc. (defendant) alleging injuries from a fall at defendant's grocery store. The trial court granted summary judgment in favor of defendant on 24 February 2003.

Page testified in a deposition that she entered the Harris Teeter grocery store in Greensboro, North Carolina at 9:30 p.m. on 25 June 2001. Page completed her shopping and before checking out,

she went to the women's restroom near the front of the store. Upon exiting the restroom, Page reached for her shopping cart. In doing so, Page alleged she slipped and fell when she stepped on applesauce that had been spilled on the floor in the area of the restrooms. As a result of her fall, Page broke her left wrist in two places, fractured her tailbone, and injured her knee. Her knee injury later required surgery.

Prior to Page's fall, a jar of applesauce had dropped and shattered on the floor near the cash registers at the front of the store. Christopher Nall (Nall), who was employed by defendant as a grocery bagger and cashier, testified in his deposition that he was instructed to clean up the spill. Nall went first to a broom closet near the front of the store where he found a broom and a dustpan, which he used to clean up most of the applesauce and broken glass. He threw out the waste and returned the broom and dustpan to the broom closet in the front of the store. He then looked around the front of the store to see if he could find a mop and bucket. When he could not, he walked to the back of the store where he did find a mop and bucket. He finished cleaning up the spill and put down a warning cone to caution customers. Nall claimed that he "didn't even go near" the area where Page fell. He further stated that he had "[a]bsolutely no idea" how applesauce ended up on the floor near the area of the restrooms, far away from the site of the initial spill.

Approximately five to ten minutes after Nall cleaned up the spill, Page slipped near the area of the restrooms. A store

customer heard Page's scream and went to help her. At Page's request, the customer went to find Page's husband, who was waiting outside of the store in their truck.

Plaintiffs argue that the trial court erred in granting summary judgment because there were genuine issues of material fact which should have been decided by a jury. For the reasons stated below, we disagree.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The movant has the burden of "establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). This burden may be met by "proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). "Once a moving party meets its burden, then the nonmovant must 'produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.'" *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (quoting *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427). "When a motion for summary judgment is made and supported as provided in

[Rule 56], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2003). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342.

Under North Carolina case law, a store owner does not insure its patrons against slipping and falling. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 738, 157 S.E.2d 537, 538 (1967). A store owner's duty is to use "ordinary care to keep its store in reasonably safe condition and to warn of hidden dangers or unsafe conditions of which the store owner knows or should know." *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 653, 547 S.E.2d 48, 50 (2000). Thus, to hold a defendant liable, an injured plaintiff must show either that the defendant (1) "negligently created the condition causing the injury" or (2) "negligently failed to correct the condition after actual or constructive notice of its existence." *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 238, 488 S.E.2d 608, 611 (1997), *aff'd*, 347 N.C. 666, 496 S.E.2d 379 (1998).

In the case before us, plaintiffs presented no evidence indicating that defendant or any of its employees possessed actual knowledge of a dangerous condition, being the spilled applesauce on the floor near the restrooms. No evidence has been presented that anyone, including Page herself, saw the spilled applesauce on the floor prior to her fall. Page admitted that she had no reason to

believe that any employee of defendant knew that there was an applesauce spill on the floor near the restroom area.

As there is no evidence that any employee of defendant had actual knowledge of the spill by the restrooms, the inquiry must turn to whether defendant "was negligent because it had constructive knowledge of the spill." *See Thompson*, 138 N.C. App. at 654, 547 S.E.2d at 50. The burden is on a plaintiff to show that a dangerous condition existed for such a length of time that the defendant should have known of its existence through the exercise of reasonable care. *Id.* "Evidence that the condition (causing the fall) on the premises existed for some period of time prior to the fall can support a finding of constructive notice." *Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 275, 488 S.E.2d 617, 620, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997). A plaintiff may establish constructive knowledge in one of two ways. *Thompson*, 138 N.C. App. at 654, 547 S.E.2d at 50. A plaintiff can either "present direct evidence of the duration of the dangerous condition" or "present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time." *Id.* An inference "must be based on established facts, not upon other inferences." *Id.*

Plaintiffs set forth three theories by which an inference is raised that would allow the jury to conclude that defendant "negligently failed to correct the condition after notice . . . of its existence." *Nourse*, 127 N.C. App. at 238, 488 S.E.2d at 611. First, Nall, the employee who cleaned up the original applesauce

spill, could have unwittingly tracked the applesauce to the restroom area as he was searching for a wastebasket to dispose of the applesauce and glass. Secondly, Nall could have tracked the applesauce to the restroom area while he was searching for a mop and bucket. Thirdly, an unidentified customer could have tracked the applesauce from the area of the cash registers to the restroom area by walking through the spill, either before Nall swept it up, or while Nall was searching for a mop and bucket.

Plaintiffs' theories one and three are no more than "mere speculation or conjecture." *See Williamson v. Food Lion, Inc.*, 131 N.C. App. 365, 369, 507 S.E.2d 313, 316 (1998), *aff'd*, 350 N.C. 305, 513 S.E.2d 561 (1999). Plaintiffs offer no evidence that Nall tracked the applesauce while looking for a waste receptacle. Similarly, plaintiffs offer no evidence that an unidentified customer tracked the applesauce to the restroom area. These inferences must therefore be disregarded.

The crux of plaintiffs' argument lies with the second asserted theory that Nall tracked the applesauce while searching for a mop and bucket. Though plaintiffs contend that Nall walked over to the restroom area, Nall's testimony indicates that he never entered the restroom area where Page fell. Nall denied going near the restroom area several times during his deposition:

> Q. Okay. Did you go near or into the ladies' room while you were cleaning up that spill?
>
> A. No.
>
> . . . .

> Q. . . . So it wasn't necessary for you to go near the ladies' room?
>
> A. No.
>
> . . . .
>
> Q. . . . So you have no idea how applesauce could have been left near the ladies' room?
>
> A. Right. . . . I thought that was crazy, how someone could fall way over there.

Thus, throughout his deposition, Nall specifically and repeatedly denied that he went near the restroom area. However, plaintiffs rely on one specific statement by Nall, "[s]o I went over there[,]" to argue that Nall tracked the applesauce to the restroom area. This statement is embedded in the following portion of Nall's deposition testimony:

> Q. Okay. What was stored there near the ladies' restroom in the way of cleaning materials?
>
> A. Usually a mop bucket. That's for, like, cleaning the bathrooms. They get pretty dirty sometimes, I guess. Maybe a broom sometimes but mostly--it's usually just a mop bucket.
>
> Q. Okay. And was that the mop bucket that was employed in cleaning up the applesauce?
>
> A. Huh-uh. No.
>
> Q. It was not?
>
> A. No, because I remember--I remember--like, I mean, you see something spilled. You don't want to--you want to look for a mop bucket. You don't want to go all the way to the back of the store and get a mop bucket, but I didn't--I didn't see one. I looked all around. I looked over--I didn't go in the bathroom to look, but I just glanced over there. I didn't see one, so I went to the

back of the store to get it.

Q. Yeah. But you did look in there at the ladies' room to see if there was a mop bucket available to clean up the applesauce?

MR. BAILEY: Object to form.

A. Well, I glanced over there. The bathrooms are kind of--like, in a sense, there's like a invisible door.

Q. (By Mr. McLendon) Yeah.

A. And then the bathrooms are back behind there.

Q. Right.

A. Where I was at, I looked over there, and I didn't see one.

Q. Right.

A. So I went over there.

Q. But you did notice that--you did look to see if there was a bucket available there at the bathroom or near the bathroom?

A. Uh-huh.

Q. And you didn't see one?

A. I didn't see one, but there could have been one there. Like, there's a--there's like--it's like a wall behind there, and, like, if somebody is standing there, you wouldn't be able to see them. So there might have been a mop bucket there and I just didn't--.

Plaintiffs argue that the statement, "[s]o I went over there[,]" supports a reasonable inference that Nall tracked the applesauce to the restroom area. However, this testimony does not amount to an assertion that Nall, in fact, walked into the restroom area where Page fell. Rather, read in context with the rest of the deposition

testimony where Nall unambiguously rejected the assertion that he walked into the restroom area, this statement more likely means that he looked in the general direction of the restroom area from some unspecified distance. Nall was not asked during his deposition how close he walked to the restroom area.

Plaintiffs cite *Long v. Food Stores*, 262 N.C. 57, 136 S.E.2d 275 (1964) to support their argument that the failure to prove exactly how the applesauce was tracked to the restroom area is not fatal to their claim. In *Long*, the plaintiff testified that she slipped on mashed and dusty grapes on the floor. *Id.* at 58, 136 S.E.2d at 277. Alongside the mashed grapes, there was "dust and lint on the floor. The grapes that were not mashed were dirty and juicy, full of lint and dirt." *Id.* at 59, 136 S.E.2d at 277. Our Supreme Court held that two reasonable inferences were permitted to be drawn. Either a store employee had swept the grapes and dirt into that location or the grapes had been there for a sufficient length of time to become dirty and dusty, thereby placing the defendant on constructive notice of their existence. *Id.* at 61, 136 S.E.2d at 278-79. *Long*, however, is distinguishable from the present case. Here, plaintiffs' argument relies wholly upon complete speculation regarding how applesauce ended up on the floor by the restroom area. Plaintiffs are unable to put forth evidence upon which to rest a reasonable inference. According to plaintiffs' argument, Nall, or any one of numerous unidentified customers, could have tracked the applesauce. Thus, this argument lacks evidence that would lend credence to this speculation.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).