NO. COA03-98

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

MARGARET N. WORTHINGTON,
Plaintiff,

v.

Pitt County
No. 01 CVS 2814

FOOD LION, L.L.C.,
Defendant.

Appeal by plaintiff from judgment entered 19 November 2002 by Judge W. Russell Duke in Pitt County Superior Court. Heard in the Court of Appeals 29 October 2003.

McLawhorn & Associates, by Donald S. Higley, II and Charles L. McLawhorn, Jr., for plaintiff-appellant.

Poyner & Spruill, L.L.P., by Timothy W. Wilson, for defendant-appellee.

MARTIN, Judge.

Plaintiff brought this action seeking money damages for personal injuries allegedly sustained on 6 August 2001 when she slipped on a piece of ground beef while shopping at defendant's grocery store in Winterville, North Carolina. Plaintiff alleged that defendant was negligent in the maintenance of its premises. Defendant filed an answer in which it denied any negligence on its part. Defendant subsequently moved for summary judgment.

Briefly summarized, the materials before the trial court upon its consideration of the motion for summary judgment tended to show

that on 6 August 2001, plaintiff was a customer at defendant's store and, while walking in the dairy section of the store, slipped and fell when she stepped on a piece of ground beef. The dairy section of the store is far removed from the location where ground beef is displayed, and trays of ground beef are not normally taken through the dairy section of the store when they are stocked in the meat department.

After the fall occurred, defendant's store manager, Ed Hobby, came to the dairy section to determine what caused the fall. In his deposition, Hobby testified that he found a piece of ground beef approximately the size of a dime on the floor beside plaintiff. Hobby picked up the piece of meat and rolled it through his fingers. He testified that the meat was grayish in color on the outside but soft and red on the inside. Hobby showed the piece of ground beef to plaintiff and her husband, Burt Worthington. In her discovery responses, Mrs. Worthington described the piece of meat as being approximately the size of a quarter and discolored; her husband stated in an affidavit that the piece of ground beef he saw was "so old it was unrecognizable." Mr. Worthington also stated that he had experience in packaging ground beef, and that it is impossible for ground beef to fall out of its packaging if the employees are careful.

The trial court granted defendant's motion for summary judgment; plaintiff appeals.

Plaintiff's single assignment of error is 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. After careful consideration of the evidence, we affirm.

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) (2001). Specifically in a slip and fall case, a premises owner is entitled to summary judgment if he can prove that "an essential element of the opposing party's claim is nonexistent, or . . . that the opposing party cannot produce evidence to support an essential element of his claim." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). If the moving party meets its burden for summary judgment, then the nonmoving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* (citation omitted). In order to meet that burden, the nonmovant, herein the plaintiff, may not rest upon the allegations or denials of her pleadings but "must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2001). When considering a summary judgment motion, "[a]ll 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.

In North Carolina, a store owner has a duty to use "ordinary

care to keep its store in a reasonably safe condition and to warn her of hidden dangers or unsafe conditions" of which the store owner knows or should know. *Norwood v. Sherwin Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981). In order to prove that a store owner breached its duty of care, a plaintiff must show that the defendant either "(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) (internal quotation marks omitted), *aff'd,* 347 N.C. 666, 496 S.E.2d 379 (1998). Our inquiry is to determine whether there is sufficient evidence from the pleadings, affidavits and other documents to create a genuine issue of material fact on plaintiff's allegations of negligence.

Plaintiff argues that she presented sufficient circumstantial evidence that defendant, including its agents and employees, negligently created the dangerous condition upon which plaintiff fell. A plaintiff can prove negligence, or in this case show that a material issue of fact exists, by the use of circumstantial evidence. *See Kennedy v. K-Mart Corp.*, 84 N.C. App. 453, 455, 352 S.E.2d 876, 878 (1987). Mr. Worthington stated in his affidavit that it is impossible for ground beef to fall out of its packaging if the person packaging the meat is careful. Plaintiff also points to the deposition of defendant's store market manager, Doug Barnes, who stated that defendant's employees are trained to regularly clean the meat area and coolers and to look for loose pieces of

meat. Plaintiff argues these statements, combined with the fact that a piece of ground beef ended up on the floor, lead to the conclusion that defendant's employees were negligent in their duties and caused the dangerous condition.

Plaintiff's argument, however, is not based upon facts in evidence but rather upon assumptions and speculation. The mere presence of ground beef on the floor is not enough for a reasonable person to conclude that defendant negligently created the dangerous condition; there are too many other reasonable explanations for the existence of the condition. A plaintiff must offer some factual evidence to show that her theory is more than mere speculation. *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). While the threshold to defeat summary judgment is not great, "[c]ases are not to be submitted to a jury on speculation, guesses, or conjectures." *Roumillat*, 331 N.C. at 69, 414 S.E.2d at 345. Without offering some factual evidence to show defendant negligently created the dangerous condition, there is no genuine issue of material fact to submit to a jury and summary judgment is appropriate.

Plaintiff also argues she presented sufficient evidence to create a material issue of fact on the issue of whether defendant failed to remedy the dangerous condition after constructive notice of its existence. Plaintiff offered no evidence that defendant had actual knowledge of the ground beef presence on the floor, so the present issue for this Court is whether defendant had constructive

knowledge of the dangerous condition. "Constructive knowledge of a dangerous condition can be established in two ways." *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000). A plaintiff may present direct evidence of the dangerous condition's duration or the plaintiff can present circumstantial evidence from which a jury could infer that the dangerous condition existed for a sufficient length of time that the defendant should have known of its existence. *Id.* Where there is a "reasonable inference that a dangerous condition existed for such a period of time as to impute constructive knowledge to the defendant," it is a question for a jury to decide. *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). However, any inferences a jury makes must be based upon facts established by evidence, and not based solely upon other inferences. *See Thompson*, 138 N.C. App. at 654, 547 S.E.2d at 50.

In this case, plaintiff offered no direct evidence of the dangerous condition; she argues instead that circumstantial evidence creates a genuine issue of material fact. Plaintiff claims that Mr. Worthington's statement that the piece of meat was "so old it was unrecognizable," supports a finding that it had been on the floor for a sufficient period of time to impute constructive notice to defendant. However, that conclusion would require a jury to make inferences based upon other inferences and not established facts. First, though a jury could infer from Mr. Worthington's description of the piece of ground beef that it was old, in order

to conclude that the defendant was negligent in allowing the condition to exist after having constructive knowledge thereof, the jury would also have to infer that the piece of meat had been *located on the floor* long enough to place the defendant on notice that it was there. However, a finding that the ground beef was old does not logically lead to the conclusion that it had been in a dangerous location long enough to place the defendant on constructive notice of its presence; in other words, it could have become old and discolored long before it found its way to the floor of the dairy section of defendant's store. Summary judgment is appropriate when a jury is forced to make inferences based upon other inferences rather than facts established by evidence in order to reach a conclusion on the issue of constructive notice. *Id.* In this case, plaintiff's evidence, without more, is sufficient only to permit speculation that the condition had existed long enough to impute constructive knowledge of its existence to defendant. *See France v. Winn-Dixie Supermarket*, 70 N.C. App. 492, 493, 320 S.E.2d 25 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985) (holding that mere speculation about how long a dangerous condition existed was not enough to create a material issue of fact for a jury).

The facts of this case are analogous to those in *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. at 652, 547 S.E.2d at 49, in which this Court held that no issue of material fact existed on the issue of constructive notice. In *Thompson*, the plaintiff slipped on a puddle and fell in the aisle of Wal-Mart's store. The

plaintiff offered evidence to prove the puddle's existence and that glass was located underneath the shelf, but offered no evidence to show how long the puddle had existed in the aisle before she fell. The Court concluded that the jury would have to make "too many inferences based on other inferences" instead of inferences based upon factual evidence. *Id.* at 655, 547 S.E.2d at 50. Similarly, in this case, plaintiff has presented no factual evidence to show how long the ground beef had been on the floor of defendant's store.

The order granting defendant's motion for summary judgment is affirmed.

Affirmed.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).