NO. COA09-393

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

AGNES L. PINKNEY,
Plaintiff,

v.

Mecklenburg County
No. 07 CVS 12928

HMS HOST USA, INC. d/b/a
CHILI'S TOO RESTAURANT,
Defendant.

Appeal by plaintiff from order entered 27 August 2008 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 September 2009.

Law Offices of Michael J. Bednarik, P.A., by Michael J. Bednarik, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by James P. Cooney III, for defendant-appellee.

GEER, Judge.

Plaintiff Agnes L. Pinkney appeals from an order granting summary judgment to defendant HMS Host USA, Inc. after plaintiff slipped and fell at a restaurant owned by defendant. Although plaintiff presented evidence suggesting that the floor was wet where she fell, plaintiff offered no evidence tending to show that defendant either caused a spill or had actual or constructive knowledge of a spill — necessary elements of plaintiff's negligence

claim. Consequently, we affirm the trial court's order granting summary judgment.

Facts

On 5 July 2004, plaintiff, then 59 years old, and her adult son, Kenneth Pinkney, went to the Concord Mills Mall in Concord, North Carolina, and had lunch at a Chili's Too Restaurant ("Chili's") operated by defendant. After they finished their meal, plaintiff decided to use the bathroom.

Plaintiff had begun walking toward the bathroom when she suddenly slipped and fell to the floor. On her way down, the right side of plaintiff's body slammed into a step that led up into a booth, and she may have also hit her head. As people tried to help plaintiff to her feet, she experienced an instant pain in her left foot. Her left hand felt "moist, . . . kind of wet like" or "gooey."

Plaintiff did not actually observe any liquid on the floor before or after her fall. As she was initially walking toward the bathroom, she looked straight ahead and did not look down, so she had no chance to see whether there was any liquid or other material on the floor along her path. After the fall, when plaintiff was being led to the bathroom, she was "dazed" and did not see whether anything was on the ground.

At some point after plaintiff fell, Christie Brown, the manager on duty at Chili's at the time, filled out a claim

reporting form with Mr. Pinkney's help.[1] On the form, Ms. Brown wrote 11:50 a.m. in the pre-printed box asking for "Date and Time of Loss." In the box asking for "Date and Time Floor Last Swept or Mopped" and "Inspected By," she wrote (1) her name, (2) 11:45 a.m., and (3) "5 min before incident." In her deposition, Ms. Brown explained that her notations related to her last inspection of the area. Based on Ms. Brown's conversation with Mr. Pinkney, she included the following description of the incident: "[S]itting next to work station got up to go to restroom. [C]ustomer says drops of water. Hurt back, left ankle, right shoulder. [S]ide hit on booth."

On the back of the form, Ms. Brown listed contact information for Chris Hanes, who had been sitting at another booth along the aisle where plaintiff fell. With regard to Mr. Hanes, Ms. Brown made the following notation: "[W]itness said he saw her as she was falling but did not see what happened [sic] he did say he did not see any water or paper or anything that would've cause [sic] accident."

Ms. Brown also included her own observations on the form, noting "none" as to whether a "Foreign Substance or Obstacle" was on the ground. Ms. Brown was standing at the bar when plaintiff fell. She went over to help plaintiff and to make sure plaintiff was all right. Plaintiff was still on the floor when Ms. Brown

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[1]In her deposition, Ms. Brown indicated that she did not remember plaintiff speaking "at all" and said that Mr. Pinkney was the only one who provided her with the information listed on the form.

reached her. After plaintiff got to her feet, Ms. Brown inspected the floor where plaintiff fell, but saw "nothing" — no "water, liquid, debris, or any other obstruction."

Lisa Jackson, who was plaintiff and Mr. Pinkney's server, also inspected the floor after plaintiff had gotten up and did not see anything there. Mikel Walker, the general manager of Chili's, who arrived at the restaurant shortly after plaintiff's fall, observed Mr. Pinkney and Ms. Brown "trying to figure out what possibly [plaintiff] could have fallen on." He recalled that "Ms. Brown and this gentleman was [sic] inspecting the area where the lady had fallen, and . . . couldn't figure out what she could have fallen on because there was nothing in that area." Mr. Walker also saw nothing on the floor.

Eventually, paramedics arrived and took plaintiff directly to the Northeast Medical Center emergency room. She received treatment that day at the ER and subsequently at other facilities for injuries.

On 29 June 2007, plaintiff filed suit against defendant, alleging that her injuries had been proximately caused by defendant's negligence. Defendant ultimately moved for summary judgment, contending that plaintiff could not present evidence sufficient to establish a *prima facie* case of negligence. On 27 August 2008, the trial court entered an order granting defendant's motion for summary judgment. Plaintiff timely appealed to this Court.

Discussion

Summary judgment is properly granted "if 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.R. Civ. P. 56(c). Our Supreme Court has explained the burdens applicable to a motion for summary judgment:

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Once the moving party satisfies these tests, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial.

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681-82, 565 S.E.2d 140, 146 (2002) (internal citations and quotation marks omitted).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). This Court reviews the trial court's grant of summary judgment de novo. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004).

Plaintiff contends that the trial court erred in granting summary judgment to defendant because she presented sufficient evidence that she fell and was injured as a result of a wet spot on the Chili's aisle leading from her booth to the bathroom. Plaintiff argues that the wet spot was a dangerous condition about which defendant failed to give customers any warning.

"In a premises liability case involving injury to a store customer, the owner of the premises has a duty to exercise 'ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.'" *Furr v. K-Mart Corp.*, 142 N.C. App. 325, 326, 543 S.E.2d 166, 168 (quoting *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963)), *disc. review denied*, 353 N.C. 450, 548 S.E.2d 525 (2001). When, however, an unsafe condition has been created by a third party or independent agency, the plaintiff must show that the unsafe condition "'existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or given proper warning of its presence.'" *Id.* (quoting *Powell v. Deifells, Inc.*, 251 N.C. 596, 600, 112 S.E.2d 56, 58 (1960)).

Accordingly, in order to prove a breach of the duty of care in a premises liability case, a plaintiff "is required to 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.'" *Id.* (quoting *Roumillat*, 331 N.C. at 64, 414 S.E.2d at 342-43). In this case, plaintiff has focused on her evidence that she slipped on something wet on the restaurant floor. Plaintiff has not, however, presented evidence either (1) that defendant was responsible for the liquid's being on the floor, or (2) that defendant had actual or constructive knowledge of the existence of the liquid, assuming a customer was responsible for the wet spot.

In arguing that defendant was responsible for the wet spot, plaintiff points to the presence of a beverage station in the area of the booths. That station, which servers reached by turning off the aisle, was set back about a foot from the aisle and included an ice bin, soda machine, sweet tea urn, and counter space for pitchers of water and tea. Ms. Brown, one of the managers at Chili's, acknowledged that condensation occasionally collected on the outside of the pitchers at the station and that, sometimes, there was a carpet mat in front of the beverage station to catch water spills. She could not say whether the mat was there on the day of plaintiff's fall. Ms. Jackson, the Pinkneys' server, stated that the counter tiles of the beverage station were at times wet, but she never found the floor to be wet around the beverage station.

Even though this evidence might suggest that water was on the floor at the beverage station, plaintiff has failed to demonstrate that the beverage station was likely the source of any liquid on

the floor where plaintiff fell. In her brief on appeal, plaintiff loosely characterizes the evidence, stating as fact that she slipped and fell "*as she passed* the beverage station area," although later she states that she had passed or was passing a booth "near the beverage station area" when she fell. (Emphasis added.) The evidence cited by plaintiff in her brief, however, does not support an inference of such proximity to the beverage station.

The evidence establishes that there was at least a booth's distance between the beverage station and plaintiff when she fell. Plaintiff presented no evidence that any drops of condensation or spills at the beverage station could have or ever did travel over to the aisle and down the aisle to the location of plaintiff's fall. While the evidence showed that condensation sometimes collected on the pitchers or counter tiles, there was no evidence that condensation ever traveled several feet from the beverage station off the aisle down to the spot where plaintiff fell.

Plaintiff, however, points to a note written by Mr. Pinkney to an insurance adjuster:

> During lunch I noticed water dripping from the urns. I was concerned about the waiters working in the area since the floor was wet. Being an insurance adjuster, I tend to pay attention to seemingly hazardous areas. I also noticed that there was no carpet placed in the area where the waiters were working. From that point, I paid no more attention to that wet area. My last thought was that they had just opened and had not yet had time to put everything in place.
>
> We were preparing to leave and Agnes needed to go to the restroom. A moment later,

> I heard someone scream out. I turned and saw Agnes lying on the floor. The first remark from one of the patrons was that she must have slipped on the water on the floor. . . .

We first observe that this note constitutes inadmissible hearsay and double hearsay and ordinarily could not be considered on summary judgment. *See Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 276, 258 S.E.2d 864, 868 (1979) (exhibit that constituted hearsay "could not be considered by the trial court on motion for summary judgment"). Since, however, defendant has not objected on hearsay grounds and, in fact, has chosen to rely upon hearsay evidence itself, we consider this evidence. *See Lindsey v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 432, 437, 405 S.E.2d 803, 805-06 (1991) (party could not object on appeal to contents of summary judgment affidavits when party did not object to affidavits before trial court).

In any event, Mr. Pinkney's note is evidence of water being present at the beverage station. It does not, however, provide evidence that any water traveled the distance necessary to reach the location of plaintiff's fall. The "remark" from the unknown patron regarding water on the floor supports plaintiff's allegation that there was water on the floor, but does not connect that water to the beverage station.

In her brief, plaintiff also suggested that liquid on the floor could have been caused by mopping. The record, however, contains no evidence that the area where plaintiff was walking had recently been mopped. Although the pre-printed claim reporting form filled out by Ms. Brown had a box that asked for the time the

floor had last been swept or mopped, the same box also asked who had last inspected the area and when. Ms. Brown wrote "5 min before incident" in that box, but explained in her deposition that this reference related to the time of her inspection. The record contains no evidence of sweeping or mopping in that area.

In sum, plaintiff has presented no evidence that defendant was responsible for any liquid ending up on the floor where plaintiff fell. Plaintiff provides no real theory as to how the liquid came to be on the floor where she fell, but instead leaves for speculation whether, for example, a server tracked liquid over from the beverage station, a server dripped a liquid while serving a customer, or a customer spilled a drink on the floor. Therefore, plaintiff's evidence did not give rise to any issue of fact as to whether defendant negligently created the condition causing plaintiff's injury. *See Hill v. Allied Supermarkets, Inc.*, 42 N.C. App. 442, 447, 257 S.E.2d 68, 70 (1979) (affirming directed verdict for defendant supermarket where "[t]here was no evidence from which the jury could find either what was the source of the water in which plaintiff fell or how long the water had been there" and where plaintiff's and witness' statements identifying vegetable bin as source of water were no more than conjectures arrived at solely because of proximity of water to bin).

Given that there was no evidence that defendant caused the liquid to be on the floor, the burden was on plaintiff to show that defendant had actual or constructive knowledge of the liquid. In her brief, however, plaintiff points to no evidence suggesting

actual or constructive knowledge. The record contains no evidence of any employee of defendant's seeing the liquid, no evidence as to how long the liquid had been on the floor, and no evidence that one of defendant's employees should have seen the liquid prior to plaintiff's fall. We think this Court's decisions in *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 547 S.E.2d 48 (2000), and *Williamson v. Food Lion, Inc.*, 131 N.C. App. 365, 507 S.E.2d 313 (1998), *aff'd per curiam*, 350 N.C. 305, 513 S.E.2d 561 (1999), are controlling given this lack of evidence.

In *Thompson*, 138 N.C. App. at 652-53, 547 S.E.2d at 49, the plaintiff, who was injured when she slipped and fell in the defendant store's shampoo aisle, appealed the trial court's grant of the defendant's motion for directed verdict. Because the plaintiff never suggested that the defendant created or had actual knowledge of a shampoo spill, this Court limited its inquiry to whether the plaintiff demonstrated that the defendant was negligent because it had constructive knowledge of the spill. *Id.* at 654, 547 S.E.2d at 50. The Court observed that although the plaintiff had offered evidence showing this particular store did not follow the defendant's guidelines for inspections, the plaintiff "offered no evidence about how long the spill was on the floor." *Id.* at 655, 547 S.E.2d at 51. The Court concluded that a jury "could make no reasonable inference that it was there for any length of time" and, therefore, affirmed the entry of a directed verdict for lack of evidence of constructive knowledge of the spill. *Id.*

In *Williamson*, 131 N.C. App. at 366, 507 S.E.2d at 314, the plaintiff slipped on a grape and fell in the bread and dairy aisle of defendant's supermarket. The plaintiff could present no evidence of how the grape ended up on the floor of that aisle and, therefore, could not show that the supermarket was responsible for the presence of the grape. *Id.* at 367, 507 S.E.2d at 315. She also had no evidence that a supermarket employee had actual knowledge that the grape was there. *Id.* Instead, the plaintiff attempted to argue constructive notice based on the fact that a store employee, contrary to company procedures, had failed to pick up a loaf of bread on the floor of the same aisle earlier that day. *Id.* at 367-68, 507 S.E.2d at 315. The Court deemed this evidence irrelevant to the question of constructive notice because there was no evidence that the grape had been on the floor for any length of time prior to the fall. *Id.*

The Court ultimately concluded: "The grape may have been on aisle twelve because one of defendant's employees threw it there from its proper location, or because it fell from another customer's shopping cart, or because it was already stuck to the bottom of plaintiff's shoe; the possibilities are seemingly endless. In any case, plaintiff is unable to establish through anything more than 'mere speculation or conjecture' that defendant knew or should have known of the grape, and as such her case cannot withstand defendant's motion for summary judgment." *Id.* at 369, 507 S.E.2d at 316 (quoting *Roumillat*, 331 N.C. at 68, 414 S.E.2d at 345).

Here, as in *Thompson* and *Williamson*, plaintiff offered no evidence that defendant had actual knowledge of any liquid on the floor and offered neither direct nor circumstantial evidence of how long the wet spot had been there. No one saw any liquid spill on the floor, and nothing about the wet spot suggested that it had been there for any length of time. In both *Thompson* and *Williamson*, the lack of compliance with inspection procedures was insufficient to establish constructive notice without evidence of how long the hazardous condition had existed. Thus, although the evidence in this case varied as to how much time might have passed since the floor was last inspected — ranging from five minutes (the amount of time Ms. Brown listed on the claim reporting form) to "no more than 20 minutes" (the amount of time Ms. Brown apparently told the insurance adjuster) to 45 minutes (the maximum usual interval between Ms. Brown's inspections) — this evidence is not sufficient to permit a finding of constructive knowledge in the absence of evidence of the time that had elapsed since the spill.

As in *Thompson*, a jury in this case "could make no reasonable inference that [the spill] was there for any length of time" and, therefore, could not find constructive knowledge. 138 N.C. App. at 655, 547 S.E.2d at 51. As in *Williamson*, plaintiff is "unable to establish through anything more than 'mere speculation or conjecture' that defendant knew or should have known of" the presence of liquid on the floor. 131 N.C. App. at 369, 507 S.E.2d at 316 (quoting *Roumillat*, 331 N.C. at 68, 414 S.E.2d at 345). Since "[w]e cannot imply any constructive notice to defendant from

plaintiff's evidence[,]" plaintiff's case "cannot withstand defendant's motion for summary judgment." *Id.* at 368-69, 507 S.E.2d at 316. *See also France v. Winn-Dixie Supermarket, Inc.*, 70 N.C. App. 492, 492-93, 320 S.E.2d 25, 25 (1984) (affirming directed verdict for defendant where plaintiff, who had fallen in puddle of pickle juice in defendant's store, "made no attempt to show that defendant either created or knew of the slippery condition caused by the broken pickle jar and puddle of juice on its floor," leaving jury to "speculate as to how long the pickle juice had been on the floor and as to whether defendant had actual or constructive notice of the dangerous condition"), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985).

Having determined that plaintiff presented no evidence that defendant caused the liquid to be on the floor and no evidence that defendant had actual or constructive knowledge of a spill, we conclude that plaintiff failed to produce a forecast of evidence sufficient to establish a *prima facie* case of negligence. We, therefore, affirm.

Affirmed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).