NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SUSAN PABON AND RICHARD PABON, HER HUSBAND,	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	
v.	
MIGGY'S CORPORATION FIVE TRADING AND D/B/A MIGNOSIS FOODTOWN,	
Appellees	No. 1250 EDA 2012

Appeal from the Order Entered April 3, 2012
In the Court of Common Pleas of Monroe County
Civil Division at No(s): 1592-CV-2011

BEFORE: STEVENS, P.J., BOWES, J., and PLATT, J.*

MEMORANDUM BY STEVENS, P.J. Filed: February 25, 2013

This is an appeal from the order entered in the Court of Common Pleas of Monroe County, which granted Defendant/Appellee's motion for summary judgment calling for the dismissal of Plaintiffs/Appellants' slip-and-fall personal injury case. Herein, Appellants contend they presented sufficient evidence that Appellee grocery store had actual or constructive notice of a puddle lying in aisle 16 prior to Appellant Susan Pabon's fall. We affirm.

The trial court has provided an apt recitation of pertinent facts and procedural history as follows:

---

* Retired Senior Judge assigned to the Superior Court.

Plaintiffs, Susan and Richard Pabon, commenced this action with the filing of a Complaint on February 28, 2011. The action arises out of a slip and fall accident that occurred on June 28, 2010 at Defendant's[/Appellee's] grocery store, [Mignosis Foodtown]. Defendant filed an Answer and New Matter on April 15, 2011. Plaintiffs filed a Reply to Defendant's New Matter on May 11, 2011. Written discovery was exchanged and both Plaintiffs as well as three of Defendant's employees were deposed. On January 20, 2012, Defendant filed a Motion for Summary Judgment and Brief. Plaintiffs filed an Answer and Brief in Opposition on February 7, 2012. Oral arguments were heard on March 5, 2012.

***

The facts of this case, as viewed in the light most favorable to the [nonmovant] Plaintiffs, are as follows. On June 28, 2010, Ms. Pabon entered Defendant's grocery store to go shopping for her daughter's sixteenth birthday party. [Deposition of Plaintiff Susan Pabon, pp. 67-68.] Ms. Pabon secured a shopping cart from outside the store and proceeded to walk around the store to determine what she was going to purchase. [Id. at 68.] After approximately fifteen minutes in the store, Ms. Pabon began pushing her cart up an aisle toward the front of the store. [Id. at 70.] An ice machine was located as part of an end cap at the end of the aisle Ms Pabon was traversing. [Id.] When Ms. Pabon was about three-quarters of the way up the aisle, approximately twelve feet from the ice machine, she slipped and fell. [Id. at 70-71.]

Ms. Pabon was able to stand up under her own power. [Id. at 75.] At first, she was unaware of what caused her fall; however, she turned around and saw a puddle of water approximately three feet in diameter on the floor behind her. [Id. at 75-77.] Ms. Pabon stated that she did not know what caused the water to be on the floor or for how long it was there prior to her fall. [Id. at 77-78, 81.]

After the fall, a store employee as well as a store manager approached Ms. Pabon and offered her assistance. [Id. at 79-80.] Ms. Pabon alleges that she overheard a conversation in which the manager asked the employee how the puddle got on the floor and the employee replied "I think they left it there." [Id. at 79-80, 121-24.] Ms. Pabon testified that she was not

> sure if "they" referred to a cleaning crew, another employee, or a customer. When pressed on this issue, Ms. Pabon stated that she did not believe that the employee actually knew how the water came to be on the floor. [Id.]
>
> Following the incident, Ms. Pabon walked to the courtesy desk and completed an incident report. [Deposition of Marie Van Cleaf, pp. 22-23, 35; Incident Report.] Store employees examined the scene, placed a wet floor sign beside the puddle, and eventually mopped up the water. [Id.] While Ms. Pabon was filling out the incident report, she received a telephone call from her husband who was on his way home from work. [Deposition of Plaintiff Richard Pabon, p. 12.] Shortly thereafter, Mr. Pabon arrived at the store and inspected the scene of the accident. [Id. at 14.] In his deposition, Mr. Pabon testified that he saw a puddle between two and three feet in diameter on the floor. [Id. at 15-18.] He stated that it was a steady puddle and was not being fed by the ice machine or any other store fixture. [Id.]

Trial Court Opinion dated 4/5/12 at 1, 3-5.

To supplement the above summary of evidence, we add that when Susan Pabon gave deposition testimony about her fall, she said a young male employee who was working at the end of the aisle near the ice machine helped her get up. This employee was deposed witness John Fazekus, a senior computer science major at a local college who worked at the grocery store during summer break. Pabon claimed that about 10 minutes elapsed during the time she fell, walked slowly to the customer service desk to notify the store, and returned to the site of her fall with a manager—who would have been Deli Manager Marie Van Cleaf. When she and Van Cleaf arrived, Pabon testified, Van Cleaf asked Fazekus "what did she fall on," and he replied "there's water in the aisle." According to Pabon, When Van Cleaf then asked him how the water got there, he "said

something about cleaning the floors. Somebody left it there after cleaning the floor." It was during this exchange that Fazekus then said "I think they left it there." Van Cleaf then instructed him to get a wet floor sign for the spot. [Deposition of Plaintiff Susan Pabon at 87-88, 122. Appellee's cross-examination of Ms. Pabon emphasized that Fazekus stated only that he *thought* that was the source of the water by counsel for Appellee, and Pabon conceded she did not believe Fazekus possessed first-hand knowledge or any degree of certainty on this point.

By order of April 3, 2012, the lower court granted summary judgment in favor of Defendant/Appellee after determining Appellants failed to establish an issue of material fact regarding whether Appellee had actual or constructive notice of the puddle in aisle 16 prior to the time Ms. Pabon fell. This timely appeal followed.

Appellants raise the following issue for our consideration:

> **[DID] THE TRIAL COURT COMMIT[] AN ERROR OF LAW AND/OR ABUSE OF DISCRETION IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED, SUCH THAT A JURY TRIAL WAS WARRANTED?**

In reviewing Appellant's challenge to the trial court's granting of summary judgment, we recognize the following:

> Our scope of review ... [of summary judgment orders] ... is plenary. We apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be

> resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered. Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of his cause of action. Summary judgment is proper if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Thus a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury. Upon appellate review we are not bound by the trial court's conclusions of law, but may reach our own conclusions. The appellate Court may disturb the trial court's order only upon an error of law or an abuse of discretion.

Chris Falcone, Inc. v. Ins. Co. of the State, 907 A.2d 631, 635 (Pa. Super. 2006) (citation omitted).

To prevail against Appellee Mignosis Foodtown, Appellants must demonstrate that the store owed them a duty of care, the breach of which caused injury resulting in Appellants' damages. ***See Grossman v. Barke***, 868 A.2d 561, 566 (Pa. Super. 2005). To recover damages in a slip and fall case, where a business invitee is injured in a store, the invitee must present evidence which proves that the store owner deviated in some way from his duty of reasonable care under the existing circumstances. ***Zito v. Merit Outlet Stores***, 647 A.2d 573, 575 (Pa. Super. 1994) (citation omitted). The evidence must show that the proprietor knew or, in the exercise of reasonable care, should have known of the existence of the harmful

condition. ***Id.*** The invitee is required to prove either that the store owner participated in creating the harmful condition, or that the owner had actual or constructive notice of the condition. Restatement (Second) of Torts §343.[1] Such notice may be established by direct or circumstantial evidence, the latter often consisting of the location of the condition and its duration prior to the alleged injury. ***Zito***, ***supra***.

Read in a light most favorable to the non-movant Appellants, the record contains scant evidence of the grocery store's actual or constructive notice of the puddle in aisle 16 that caused Ms Pabon to fall. The deposition testimony of Ms. Pabon that she heard the young man working at the ice machine tell Ms. Van Cleaf "I think *they* had left [the water] there after cleaning the floors," (emphasis added), must be read to refer either to store employees or to the nighttime cleaning crew. If this supposition were true,

---

[1] Restatement (Second) of Torts §343 provides in relevant part: "A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he"(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and"(b) has no reasons to believe that they will discover the condition or realize the risk involved therein, and"(c) invites or permits them to enter or remain upon the land without exercising reasonable care . . ."(i) to make the condition reasonably safe . . . ." Section 344 provides: "A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons . . ., and by the failure of the possessor to exercise reasonable care to"(a) discover that such acts are being done or are likely to be done, or"(b) give a warning adequate to enable visitors to avoid the harm, or otherwise protect them against it."

then Appellee would have, by creating the puddle, had actual notice of the dangerous condition in aisle 16 prior to the time Ms. Pabon slipped and fell. Indeed, this statement represents the strongest evidence the Pabons present to establish notice, as there was little evidence otherwise as to how long the water lay in that location at the far side of the grocery store.

Fazekus' statement, however, is merely speculation. "I *think* they left it there" fails to provide a first-hand account as to the source of the water and, as such, leaves open the possibility of any number of other causes of the condition, such as another customer spilling water at the location just minutes earlier. Only through conjecture, therefore, could a jury take this testimony as proof of Appellee's notice of a dangerous condition in aisle 16.

Nor was this evidence bolstered when read alongside employee testimonies relevant to the issue of notice, as problematic and contradictory as these testimonies were at times. One means by which notice may be demonstrated is by establishing the duration of the dangerous condition, but no compelling evidence existed on how long the water may have been on the floor prior to Ms. Pabon's fall. Our review of deposition testimonies revealed that Ms Pabon's timeline of events indicates that that the young male employee—Fazekus—at the ice machine who assisted her immediately after she fell was still there nearly ten minutes later when Pabon returned with Marie Van Cleaf. If this is true, it is also true he had not, during his time, mopped the floor, stood at the site, or secured the area in any other

manner to ensure no one else fell. According to Pabon, Fazekus was still at the ice machine when Van Cleaf saw the puddle, asked him if he knew from where it came, and then directed him to retrieve a "Wet Floor" sign for the area.

Whether Fazekus had allowed the water to remain in place simply for the sake of a store inquiry is uncertain—indeed, he testified he could not recall either way whether he was there that morning[2] and, even if he were there, what he did or did not do. What is certain, giving Ms. Pabon's testimony the benefit of every reasonable inference, is that he allowed the water to sit an additional 10 minutes after the fall. Nevertheless, while viewing this testimony in a light most favorable to the Pabons may lead to a conclusion that Fazekus disregarded an unsafe condition *after* the fall, such conclusion permits nothing more than conjecture that Fazekus may have seen the spill prior to Pabon's fall but chose to do nothing about it.

When added to the mix, the apparent curiosities inherent in Mrs. Van Cleaf's recollection of events also fail to create actual or constructive notice. As noted above, Van Cleaf was charged with the duty of filling out an accident report, but she denied asking the only employee at the scene—Fazekus—if he saw the fall or knew how the water got there. Indeed, as she denied talking to Fazekus altogether, she did not—if her testimony were to

[2] Fazekas acknowledged that his manager had verified through records that Fazekas was working on the morning in question.

be believed—ask him to mop up the water, although his position entailed such responsibilities. She would, however, later complete an accident report indicating the water was mopped up, though she was never asked during depositions whether it was she who ordered the floor to be mopped and, if so, why she simply did not ask Fazekus, the young "utility worker" of sorts on the floor at the time, to do so.

While the sum of these deposition testimonies, therefore, may have revealed in the employees a less than vigilant attitude after Ms. Pabon's fall, it did not establish they had either created, or possessed actual or constructive notice of, the puddle in aisle 16 prior to the fall. At the time of Appellee's motion for summary judgment, therefore, Appellants' offer of notice evidence was simply not enough to present the negligence case to a jury. Accordingly, we find no error or abuse of discretion with the order entered below.

Order affirmed.