IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 24, 2014 Session

BEVERLY MEADOW v. D & G LIMITED ASSORTMENTS, INC.

Appeal from the Circuit Court for Sumner County
No. 83CC12011CV1121 C.L. Rogers, Judge

No. M2013-01627-COA-R3-CV - Filed September 11, 2014

The trial court granted a directed verdict pursuant to Tenn. R. Civ. P. 50.01 in favor of the defendant in a premises liability action. The court found the defendant did not have constructive notice of the defective condition stating, "the plaintiff has not met the burden of proof of more likely than not that this unsafe condition existed for a period of time in order to be corrected or warned about[.]" The plaintiff, who sustained a broken femur when the automatic sliding glass door at the front of the grocery store closed on her, presented an expert witness who testified that "the immediate cause of the accident was the failure of the presence sensing capability" of the automatic door. The expert testified that had the defendant conducted daily safety checks of the sensors in the proper manner, the defendant would have known that they were not functioning properly, and the likelihood the sensors first failed on the day of the incident "was extremely small." Whether the defendant conducted daily safety checks in the appropriate manner was disputed. Taking the strongest legitimate view of the evidence and allowing all reasonable inferences in favor of the plaintiff while discarding all evidence to the contrary as Rule 50.01 requires, we have concluded the evidence is sufficient to create an issue for the jury to decide whether the defendant had constructive notice in time to remedy or warn customers of the defective condition of the door. We, therefore, reverse and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, J.J., joined.

Luvell L. Glanton and Timothy T. Ishii, Nashville, Tennessee, for the appellant, Beverly Meadow.

C. Benton Patton, Nashville, Tennessee, for the appellee, D & G Limited Assortment, Inc.

OPINION

Beverly Meadow was injured on August 31, 2011, when the automatic sliding glass door at the entrance of the Save-A-Lot grocery store in Millersville, Tennessee, closed while she was in its path. She suffered a broken femur and other injuries as a result of the incident and underwent surgery the following day.

In September 2011, Ms. Meadow commenced this premises liability action against the owner and operator of the store, D&G Ltd. Assortments, Inc. d/b/a Save-A-Lot ("the defendant"). D&G is owned by David Johnson and his wife. Mr. Johnson has been the store manager and his daughter, Shelley Johnson, has been the assistant manager since D&G purchased the store in 1995.

In her complaint, Ms. Meadow alleged, *inter alia*, that the defendant was under a duty to reasonably inspect the automatic door, that it failed to properly inspect and maintain the automatic door in compliance with industry standards and the owner's manual, and as a direct result of the defendant's negligence she was injured.

A three-day jury trial proceeded in June 2013 and the witnesses included Ms. Meadow; Ms. Meadow's grandson who was with her when the incident occurred; David and Shelley Johnson; the store cashier, Scarlet Brown; and Ms. Meadow's expert witness in automatic door accident investigation, Dr. Warren F. Davis, Ph.D.[1]

It was undisputed that Ms. Meadow was a regular customer of the store and that she was injured while exiting the store through the automatic sliding door. For purposes of the dispositive issue on appeal, whether the defendant had constructive notice of the dangerous and defective condition, what was disputed was whether the defendant should have known prior to the incident that the automatic door sensors were not functioning properly.[2]

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[1]Dr. Davis has a bachelor's degree in physics and a Ph.D. in physics from the Massachusetts Institute of Technology. Additionally, he has over twenty years of experience in inspecting and reverse engineering sensors used on automatic doors; he has simulated their function on a computer and built them to examine how they work, what they do, and what they cannot do. He has been retained in 325 cases as an expert and has qualified as an expert witness in over twenty trials.

[2]The defendant disputed that there was any problem with the door; insisting it was functioning properly before and after the incident. However, the issue on appeal, for purposes of the trial court's grant of a directed verdict, is whether the defendant knew or should have known that a dangerous or defective condition existed.

The automatic sliding door at issue, Stanley Access Technologies model Dura-Glide 2000, was installed in 2009 by trained Stanley technicians. At the time of installation, David and Shelley Johnson were instructed how to "walk-test" the door for safety. They were also given the Owner's Manual for Dura-Glide Automatic Sliding Door Systems; however, David and Shelley Johnson both testified that they never read the manual. They also testified that the door was never inspected nor serviced prior to the incident.[3]

The Owner's Manual was introduced into evidence at trial, and it was a focal point when David and Shelley Johnson were questioned regarding the warnings and recommendations for daily safety checks and annual safety inspections by trained technicians. The first page provided a warning that injury or property damage could result from: a failure to perform daily inspections using the safety checklist, a failure to have the door adjusted if necessary, and a failure to have the door inspected at least annually by a trained technician. The safety checklist referenced in this warning was located on page 12 of the manual, and the checklist was also printed on a bright yellow decal secured to the door next to the lock. The checklist detailed a specific process for properly conducting daily safety checks of the numerous sensors; specifically, the Stan-Guard presence sensor and the hold-open beams, which are located in different positions on the door and perform different functions.[4]

Ms. Meadow's expert witness, Dr. Davis, testified extensively about how the door operates and its safety features including the motion and presence sensors on the door. He discussed the Owner's Manual in detail, explaining the importance of the daily safety checks, how to properly conduct a safety check of the sensors, and their respective purposes. Dr. Davis testified that the Dura-Glide 2000 was equipped with two types of presence sensors designed to detect the presence of a person in the door-closing path, a Stan-Guard and a hold-open beam; he also discussed the "hold-open time delay" that keeps the door open for a predetermined amount of time regardless of whether a person is in its path. Based on his

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[3]The record reflects the first time the doors were serviced since installation in 2009, was in 2013, due to tornado damage.

[4]The proper safety check for the hold-open beam sensor is to "remain motionless at the side of the door with the door closed and cover the doorway holding beam with your hand. The door should open fully." The proper safety check for the Stan-Guard presence sensor, is to: "(1) Walk towards the door opening from several angles. The door should start opening when you are about five feet from the door. The door should slide open smoothly and stop without impact. (2) When the door starts to open, the Stan-Guard sensor will be activated. Walk into the threshold area and stop. A red indicator light on the Stan-Guard will turn off when the control senses you. Stand in the threshold zone for several seconds. The door should remain open. Continue on through the opening and walk at least five feet from the door. After a brief delay, the door should close. Turn and repeat the above zone tests by approaching the door from the opposite direction."

review of the testimony of Ms. Meadow and her grandson concerning how the door closed on Ms. Meadow while she was in their path, the defendant's failure to properly conduct daily safety checks, and the defendant's failure to have the door inspected or maintained annually, it was Dr. Davis' opinion that the immediate cause of the door's malfunction was the failure of its presence-sensing capability. Had the presence sensors been operating properly, the door would have either been triggered to remain open, or in the event that the door had started to close, it would have been triggered to re-open and remain open as long as Ms. Meadow remained in the door-closing path. He testified that the defendant's failure to do the daily safety checks and to perform maintenance on the door prevented the defendant from knowing that the automatic sensors were not operating properly, which allowed the accident to occur.

It was undisputed that the door had not been serviced since it was installed in 2009; thus, there had been no annual inspections or servicing of the door as the Owner's Manual directed. Mr. Johnson, however, testified that the door had worked appropriately without any reported complaints or incidents and, thus, he believed there was no need for any inspections or maintenance. Dr. Davis countered this rationale testifying that the pre-set hold-open delay feature would mask the failure of the presence sensors, thereby allowing numerous store patrons to walk through without incident if they went through in time. He testified that if the daily safety checks are performed as recommended, failure of these sensors can be expediently discovered thereby averting potential accidents. Further, he stated the likelihood that the sensors had not malfunctioned prior to the day of the accident was extremely small.

At the close of Ms. Meadow's proof, the defendant moved for a directed verdict which was taken under advisement by the trial judge. After all of the proof was presented, the defendant renewed its motion for a directed verdict on the limited issue of actual and constructive notice, arguing that no proof had been submitted to show the defect in the door had existed for such a length of time that the defendant knew or should have known of the dangerous condition.

The trial court granted a directed verdict on this issue, stating from the bench:

> The court . . . finds that the plaintiff has not met the burden of proof of more likely than not that this unsafe condition existed for a period of time in order to be corrected or warned about, nor was there any proof of any notice, actual or constructive, to the owner . . . . So having not met that burden the Court will reluctantly grant the directed verdict on behalf of the defendant, dismissing plaintiff's case.

Following dismissal of her claim by the trial court, Ms. Meadow timely appealed.

The sole issue in this appeal is whether the trial court erred in granting a directed verdict in favor of the defendant on the issue of constructive notice of a defective or dangerous condition associated with the automatic door.

ANALYSIS

I. DIRECTED VERDICTS

A motion for a directed verdict may be made at the close of the evidence offered by an opposing party or at the close of the case. Tenn. R. Civ. P. 50.01. When such a motion is made, the trial court is to determine, as a matter of law, whether the evidence is sufficient to create an issue for the jury to decide. *See Underwood v. Waterslides of Mid-America, Inc.*, 823 S.W.2d 171, 176 (Tenn. Ct. App. 1991). Thus, whether to grant a directed verdict is a question of law. *Stanfield v. Neblett*, 339 S.W.3d 22, 29 (Tenn. Ct. App. 2010).

When considering a motion for directed verdict, the trial court must take the strongest legitimate view of the evidence and allow all reasonable inferences in favor of the non-moving party, while discarding all evidence to the contrary. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003). Courts reviewing a motion for directed verdict may not weigh the evidence or evaluate the credibility of the witnesses. *Island Props. Assocs. v. Reaves Firm, Inc.*, 413 S.W.3d 392, 397 (Tenn. Ct. App. 2013).

A directed verdict is proper only when reasonable minds could reach but one conclusion. *Id*. A case should go to the jury if reasonable persons could draw conflicting inferences from the facts. *Id*.

II. PREMISES LIABILITY

To prevail in a premises liability claim, the plaintiff bears the burden of proving the five essential elements of negligence: (1) a duty of care owed by the defendant owner, operator, or agent to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss to plaintiff; (4) causation in fact; and (5) legal or proximate cause. *Lawrence v. HCA Health Servs. of Tenn.*, No. M2007-01128-COA-R3-CV, 2008 WL 3451799, at *2 (Tenn. Ct. App. Aug. 12, 2008); *Williams v. Linkscorp Tenn. Six, L.L.C.*, 212 S.W.3d 293, 296 (Tenn. Ct. App. 2006); *Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004).

Additionally, the plaintiff in a premises liability case must establish that the owner, operator, or his agent either: (1) caused or created the dangerous or defective condition which caused injury, or (2) if the condition was created by a third party, that the owner had actual or constructive notice of the condition. *Goumas v. Mayse*, No. E2013-01555-COA-R3-CV, 2014 WL 1713195, at *4 (Tenn. Ct. App. Apr. 29, 2014) (citing *Blair*,130 S.W.3d at 764); *Ogle v. Winn-Dixie Greenville, Inc.*, 919 S.W.2d 45, 47 (Tenn. Ct. App. 1995)).

Ms. Meadow does not claim the defendant created the dangerous or defective condition or that the defendant had actual notice of the dangerous or defective condition prior to her injury. Therefore, the viability of Ms. Meadow's claim depends on whether she can establish that the defendant or its agents had constructive notice of the condition. *See Longmire v. The Kroger Co*., 134 S.W.3d 186, 189 (Tenn. Ct. App. 2003) (citing *Stringer v. Cooper*, 486 S.W.2d 751, 757 (Tenn. Ct. App.1972)).

A. CONSTRUCTIVE NOTICE

Constructive notice is defined as "information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such to cast upon him the duty of inquiring into it." *Christian v. Ayers L.P.*, No. E2013-00401-COA-R3-CV, 2014 WL 1267247, at *4 (Tenn. Ct. App. Mar. 28, 2014) (citing *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 15 (Tenn. 1997) (quoting *Kirby v. Macon Cnty*., 892 S.W.2d 403, 409 (Tenn.1994))); *see also McCormick v. Warren Cnty. Bd. of Educ.*, No. M2011-02261-COA-R3-CV, 2013 WL 167764, at *7 (Tenn. Ct. App. Jan. 15, 2013). By showing the defendant had constructive notice of a defective or dangerous condition, a plaintiff demonstrates that the defendant had a duty to act reasonably under the circumstances and remedy the condition that caused injury. *See Blair*, 130 S.W.3d at 766.

A plaintiff may establish constructive notice by presenting evidence that the condition "existed for a length of time" that the defendant, "in the exercise of reasonable care, should have become aware of that condition." *Christian*, 2014 WL 1267247, at *4 (quoting *Elkins v. Hawkins County*, No. E2004-02184-COA-R3-CV, 2005 WL 1183150, at *4 (Tenn. Ct. App. May 19, 2005)). Proof submitted by a plaintiff that a defendant-owner or its agent failed to adequately perform an inspection of its property is "directly relevant" to the question of whether it had constructive notice of the dangerous condition or defective condition resulting in injury. *See Brown v. Chester Cnty. Sch. Dist*., No. W2008-00035-COA-R3-CV, 2008 WL 5397532, at *6 (Tenn. Ct. App. Dec. 30, 2008) (quoting *Hawks*, 960 S.W.2d at 16).

There is no bright-line test to determine the minimum or maximum amount of time that a dangerous condition must be present for purposes of establishing constructive notice.

White v. BI-LO, LLC., No. M2007-02698-COA-R3-CV, 2008 WL 4415781, at *5 (Tenn. Ct. App. July 11, 2008). Instead, the lapse of time is one of a number of factors for the jury to consider including the nature of the existing danger, its source and cause, the location of the defect, and foreseeable consequences. *Id.* (citing *Friar v. Kroger Co.*, No. 03A01-9710-CV-00470, 1998 WL 170140, at *3 (Tenn. Ct. App. Apr. 14, 1998)).

The dangerous or defective condition that allegedly caused Ms. Meadow's injuries was the malfunction of the "presence sensing capability" on the automatic sliding door, which allowed the door to automatically close on Ms. Meadow while she was in the doorway. Ms. Meadow's expert witness, Dr. Davis, testified that because the door closed on Ms. Meadow, "[i]t means [the] presence sensing sensors and the hold open beams . . . failed to do what they were suppose[d] to do. They failed to detect her presence. Had they detected her presence, they would have either held the door open once it was already open. Or if the door had started to close, they would have caused the door to reopen and remain open for as long as she was in the door closing path and the accident wouldn't have occurred." Dr. Davis concluded that "the immediate cause of the accident" was the failure of the presence sensing capability that was on the door.

When asked what the defendant could have done to prevent this incident, Dr. Davis referred to the daily safety checks outlined in the Owner's Manual, and listed within the manual as one of the responsibilities of the owner. He explained that the Owner's Manual for the Dura-Glide 2000 door includes a very prominent notice of the importance of the daily safety checks. As he explained, on the inside page of the cover of the manual is a "big box with a caution and a triangle with an exclamation point in it" that directs one's attention to the instructions on how to perform the daily safety check for the three different types of sensors on the door. Dr. Davis identified these instructions as "very important" and read the following: "Inspect the door operation daily using the safety checklist in the Owner's Manual and at the door. . . . Have the door adjusted as recommended by the Owner's Manual if necessary. And have the door inspected at least annually by a Stanley trained technician."

Dr. Davis then explained the importance of the daily safety checks:

> It's important because the sensors are like anything else that's ever been made by humans. They can fail. And they can fail at any time. And it's important because if any one of the sensors fails, there is then the probability of a serious accident, and as the manual said, possibly a serious injury.

Moreover, he testified that the failure to do the safety checks and maintenance "absolutely" played a part in this incident happening. When asked if he thought Ms. Meadow's incident would have happened if the safety checks had been done properly, he answered "no."

Dr. Davis acknowledged that he did not know exactly when the presence sensors first failed. When asked whether the sensors could have failed after a safety check had been performed on the day of Ms. Meadow's incident, he responded: "I know the likelihood [it failed on the day of Ms. Meadow's injury] was extremely small. In other words, more likely than not it did not happen [on the day of her injury]. And that's strongly more likely than not it did not occur in that interval." He explained further stating:

> Presumably when the door was installed all of the sensors were operating as they were supposed to. And obviously at the time of the accident, something had failed. So somewhere in between, in those approximately two years something failed. If the daily safety check[s] had been done each and every day, at most one day after the failure had occurred it would have been detected and presumably they would call for service and it would be corrected and the accident never would have occurred.

He additionally testified: "[I]f you do a daily safety check the next day . . . no more than a day later, you will . . . discover that there's something wrong," therefore, if a sensor fails after daily safety check, it would be detected the next day when the next safety check is performed; thus, the dangerous condition would last no more than one day. But if the daily safety checks are not performed daily or properly, the dangerous condition would go undetected for days, weeks or months.

When asked why a failed presence sensor could go undetected for days, weeks or longer, Dr. Davis explained that an automatic door has a time delay function and other types of sensors that can mask the failure of the presence sensors or hold open beams because the door will remain open a few seconds even if these sensors are not functioning properly. One set of sensors opens the door when you approach (typically programmed when you are within five feet of the door). There is also a separate time delay feature, that is not a sensor, which is pre-programmed to control how long the door will remain open; these are typically set to hold the door open three to four seconds regardless of the presence of a person in the door path. The purpose of the time delay function is to hold the door open the amount of time it takes the average person to walk through the door. As Dr. Davis explained it, this time delay feature "can mask the failure of the presence sensors because it holds the door open that extra time, gives you time to get through even if there were no presence sensors working at all."

Dr. Davis was the only expert witness to testify during the jury trial; the defendant called lay witnesses to testify, including David Johnson, owner and manager of the store, Shelley Johnson, assistant manager of the store, and store employees, but no experts. All of the defendant's witnesses testified they had no prior knowledge that there was a problem with the automatic door. Mr. Johnson testified that the automatic door was installed in

August 2009; he acknowledged receiving the Owner's Manual on the day of installation but stated that he never read it. He testified that neither he nor any of his employees had ever performed the recommended daily safety checks in the manner specified in the Owner's Manual.[5] He also testified that the automatic door had never been serviced since its installation even though the manual recommended it be serviced by a trained mechanic at least annually.

Shelley Johnson also admitted that she never read the Owner's Manual or the daily safety check guidelines. Although her father testified that no one had performed daily safety checks of the automatic door, Ms. Johnson testified that she performed daily safety checks of the door on each occasion she opened the store. She explained the means by which she performed the safety checks as follows:

> I go get the key from the area we keep the keys so they don't get lost. I go to the doors, unlock the doors, turn the doors to the automatic open position. I would step back and let them close. Step to the doors to make sure that they open. I'd say nine times out of ten there's a customer out there so I step through the doors to motion them into [the] store to let them know I opened the store.

Ms. Johnson's testimony, however, is far less detailed and it contradicts with that of Dr. Davis, as he detailed how to properly perform a safety check, in accordance with the Owner's Manual, to determine if the presence sensors are functioning properly. She stated that she would approach the door to cause them to open, then she would step through the door so that she could then motion customers into the store to let them know it was open; however, she never stated that she checked the presence sensors, the ones that would keep the door open when a person's presence was detected, which Dr. Davis explained was an essential aspect of the safety check.

Taking the strongest legitimate view of the evidence, including specifically that provided by Dr. Davis, while discarding all evidence to the contrary, *see Gaston*, 120 S.W.3d at 819, a reasonable person could conclude that no one performed daily safety checks or, that if Shelley Johnson did perform daily safety checks, she did not perform them properly, and, had the checks been conducted daily and in the proper manner, the defendant could have discovered the dangerous or defective condition in time to warn customers or remedy it. Thus, a reasonable person on the jury could have concluded that the defendant had constructive notice. *See Hawks*, 960 S.W.2d at 15; *see also Kirby*, 892 S.W.2d at 409.

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[5]David Johnson stated that he reviewed the manual after this action was commenced.

For the foregoing reasons, we have concluded this matter should have been submitted to the jury to determine whether the defendant had constructive notice of the defective condition; therefore, it was error to grant the defendant a directed verdict on the issue of constructive notice.

IN CONCLUSION

The judgment of the trial court is reversed and this matter is remanded for further proceedings consistent with this opinion with costs of appeal assessed against D & G Limited Assortment, Inc.

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FRANK G. CLEMENT, JR., JUDGE