Affirmed and Opinion Filed September 7, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00110-CV

ANGELA NICHOLSON, Appellant
V.
WAL-MART STORES TEXAS, LLC, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-14576

MEMORANDUM OPINION

Before Justices Myers, Osborne, and Nowell
Opinion by Justice Osborne

The trial court granted appellee Wal-Mart Stores Texas, LLC's motion for summary judgment on appellant Angela Nicholson's premises liability claim. Nicholson appeals, contending she raised genuine issues of material fact on the elements of her claim. We affirm in this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Nicholson alleges that during a trip to Wal-Mart on November 1, 2018, she slipped and fell "on a substance on the floor" near the store's entrance. She contends

that she suffered injuries to her right knee, right thigh, and back as a result of her fall.

Nicholson filed suit asserting premises liability, negligence, and gross negligence claims against Wal-Mart. The parties exchanged written discovery and Nicholson was deposed, as was Amika Sullivan, a Wal-Mart employee who was working as a customer service manager at the store on the day Nicholson fell. In addition, the record contains a surveillance video showing Nicholson's fall and the activity in the same area of the store before and after her fall.

Wal-Mart filed a traditional and no-evidence motion for summary judgment. Its no-evidence motion was directed to Nicholson's premises liability claim. Wal-Mart contended that there was no evidence of (1) an unreasonable risk of harm, (2) actual or constructive knowledge that a premises condition posed an unreasonable risk of harm, (3) breach of duty, and (4) proximate cause.

Wal-Mart's traditional motion was directed to Nicholson's negligence and gross negligence causes of action. Wal-Mart contended the undisputed evidence demonstrated that Nicholson's claim did not arise from any ongoing or contemporaneous activity.

The trial court granted Wal-Mart's motion without stating the grounds. This appeal followed.

ISSUE AND STANDARD OF REVIEW

In one issue, Nicholson contends the trial court erred by granting Wal-Mart's no-evidence summary judgment on her premises liability claim.[1] She argues that she raised genuine issues of material fact whether (1) an unreasonably dangerous condition existed on Wal-Mart's premises, (2) Wal-Mart had constructive knowledge of the condition, (3) Wal-Mart failed to warn and make safe the unreasonably dangerous condition, and (4) the unreasonably dangerous condition was the proximate cause of her injury.

We review a trial court's ruling on a summary judgment motion de novo. *See*, *e.g.*, *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When reviewing a no-evidence summary judgment, "we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017).

A trial court must grant a no-evidence motion for summary judgment unless the nonmovant produces more than a scintilla of summary judgment evidence to raise a genuine issue of material fact on the challenged elements. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810–11 (Tex. 2005); *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003); TEX. R. CIV. P. 166a(i). A

[1] Nicholson does not challenge the trial court's ruling on her negligence claim.

nonmovant produces no more than a scintilla of evidence when the evidence is so weak that it does no more than create a mere surmise or suspicion of a fact. *Forbes*, 124 S.W.3d at 172. “More than a scintilla of evidence exists if it would allow reasonable and fair-minded people to differ in their conclusions.” *Id.*

DISCUSSION

Under Texas law, a property owner owes an invitee a duty to protect the invitee from dangerous conditions that are known or reasonably discoverable. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000). The property owner is not, however, an insurer of the invitee’s safety. *Wal–Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002). A plaintiff asserting a claim for premises liability must prove that: (1) the owner or occupier had actual or constructive knowledge of a condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) the owner or occupier did not exercise reasonable care to reduce or eliminate the risk; and (4) the owner or occupier’s failure to use such care proximately caused the plaintiff’s injury. *CMH Homes, Inc.*, 15 S.W.3d at 99. Wal-Mart’s no-evidence motion challenged each of these grounds.

We turn first to the actual or constructive knowledge requirement. Nicholson contends she raised a genuine issue of material fact that Wal-Mart had constructive knowledge of the substance. “Constructive knowledge is a substitute in the law for actual knowledge,” and can be established when “the condition had existed long enough for the owner or occupier to have discovered it upon reasonable inspection.”

CMH Homes, Inc., 15 S.W.3d at 102–03. The question of constructive knowledge requires analyzing the combination of proximity, conspicuity, and longevity. *Wal–Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 567 (Tex. 2006) (per curiam). The court in *Reece* referred to this analysis as application of the "time-notice" rule. *Reece*, 81 S.W.3d at 816.

In *Reece*, the court explained that under the "time-notice" analysis, the factors are considered in combination. *See Reece,* 81 S.W.3d at 816; *see also Spates,* 186 S.W.3d at 568. If the dangerous condition is "conspicuous as, for example, a large puddle of dark liquid on a light floor would likely be, then an employee's proximity to the condition might shorten the time in which a jury could find that the premises owner should reasonably have discovered it." *Reece,* 81 S.W.3d at 816; *Spates,* 186 S.W.3d at 568. Similarly, if a worker was "in close proximity to a less conspicuous hazard for a continuous and significant period of time, that too could affect the jury's consideration of whether the premises owner should have become aware of the dangerous condition." *Reece,* 81 S.W.3d at 816; *Spates,* 186 S.W.3d at 568. In either case, however, "there must be some proof of how long the hazard was there before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition." *Reece,* 81 S.W.3d at 816. Without temporal evidence, no basis exists upon which a factfinder "can reasonably assess the opportunity the premises owner had to discover the dangerous condition." *Reece,* 81 S.W.3d at 816.

Nicholson argues that Wal-Mart had constructive notice for two reasons. First, she argues that "Wal-Mart's employee admits a reasonable inspection would have discovered the dangerous condition an hour before Ms. Nicholson fell." Second, she contends "there were several employees in close proximity to where the fall occurred demonstrating that an inspection or sweep could have easily been conducted."

In support of her first argument, Nicholson relies on the "time-notice" rule of *Reece*. She cites her testimony that the spill appeared to have expanded and separated as circumstantial evidence that "the substance existed long enough for Wal-Mart to have discovered it upon reasonable inspection." She testified:

> Q. Do you have any personal knowledge as to how long that substance had been on the floor prior to you falling on it?
>
> A. Um, the way it had separated, like, in different areas, I would say about 45 minutes to an hour.
>
> Q. Okay. Can you explain a little bit more? When you say it was separated, what do you mean by that?
>
> A. Like, it was, uh, some in one area, and then it had, like, expanded, like, on the floor. Like, it was some in one area, some in another area, but it was, like, close by. . . .
>
> Q. Okay. And so how were you able to determine, just based off looking at the substance, that it was there for, I think you testified what, 45 minutes?
>
> A. Forty-five minutes. I couldn't tell because it had—like, it had been, like, sitting there. It's not like, uh, it had separated. Like, it was some right here and a little bit to the left, a little bit to the right. It was, like, in different areas.

Nicholson relies on *Moreno v. Wal-Mart Stores Texas, LLC*, 506 F. Supp.3d 503 (S.D. Tex. 2020) (mem. op. and order) in support of her argument. In *Moreno*,

the plaintiff slipped and fell after walking through "a puddle of approximately a gallon of water" in front of a storage freezer. *Id.* at 505–06. The court denied Wal-Mart's motion for summary judgment on the issue of constructive notice, concluding that "[t]he puddle in the photos Moreno submits is large and visible enough to create a question of material fact as to whether it reasonably should have been seen by a passing employee." *Id.* at 508. The court relied on Moreno's evidence that in the thirty minutes prior to Moreno's injury, "Wal-Mart employees walked nine times past the area where the puddle allegedly coalesced." *Id.* Moreno's photos also showed that the floor was "notably darkened allegedly due to what looks like a puddle on top of and around a drain—a puddle which was large and spread out enough so that a question of material fact exists as to whether it was there for a long enough time period so that Wal-Mart or its employees reasonably should have discovered it." *Id.* Explaining that "slip-and-fall plaintiffs may use circumstantial evidence to meet the temporal requirement of constructive knowledge" and Moreno had done so, the court denied Wal-Mart's summary judgment motion. *Id.* at 509.

In *Reece*, in contrast, the supreme court concluded that Wal-Mart did not have constructive knowledge of the hazardous condition. *Reece*, 81 S.W.3d at 817. There, Reece slipped and fell in a puddle of clear liquid, "about the size of a small- or medium-sized pizza," at a snack bar. *Id.* at 813. A Wal-Mart employee walked past the area where Reece fell and bought a beverage from the snack bar directly in front of her, but did not then notice the spill. *Id.* at 814. There was no evidence, direct or

circumstantial, about how the liquid came to be on the floor or how long it had been there before Reece fell. *Id.* The court held that without direct or circumstantial evidence about how the dangerous condition came to be, how long the dangerous condition existed, and whether the dangerous condition was conspicuous, Reece failed to meet her burden to establish that Wal-Mart had constructive notice of the dangerous condition. *Reece*, 81 S.W.3d at 816–17.

We conclude the circumstances here are more like those in *Reece* than those in *Moreno*. Nicholson testified that she had been in the store "maybe a minute" before she fell. She testified that there was "a substance on the floor" that caused her to fall, but she did not know what the substance was "because it was clear. It didn't have, like, a color to it. It was a clear substance on the floor." She testified that she was not sure how large the substance was before she fell because after she fell, "it was on my clothing. Like, my clothing was wet, so I'm not sure how much was down on the floor."

Nicholson also testified that she took a picture of the substance on the floor with her phone and gave the picture to her attorney, but there is no picture in the record, and the substance cannot be seen on the surveillance video. The surveillance video shows that the floor is a light color. It also shows many people, including Wal-Mart employees, traversing through the same area without incident before Nicholson entered the store. After Nicholson's fall, an employee can be seen wiping the area

with a paper towel under her foot, but Sullivan testified that neither she nor the employee who was using the paper towel saw any substance or spill:

> Q. Well, why would [the employee] be cleaning the floor if there was no liquid on the floor?
>
> [Objection omitted.]
>
> A. She is making—she is just making sure there was nothing there, because, usually, you know, when customers complain, we don't want to seem like we are not believing—we don't believe them. We want to do what we can to please the customer. She is just drying the floor with a paper towel just to appease a customer, because, you know, we don't want them to think it's unbelievable when they tell us stuff.

Sullivan concluded that "[w]e didn't really see anything," but "[w]e put the paper towel" because "we wanted to appease the customer." Although we take as true Nicholson's testimony about the existence and appearance of the substance, her testimony does not create a fact issue whether the substance was conspicuous; that is, "large and visible enough to create a question of material fact as to whether it reasonably should have been seen by a passing employee," in contrast to the evidence in *Moreno*. *See Moreno*, 506 F. Supp.3d at 508–09.

Nicholson's second argument that Wal-Mart had constructive notice is that several employees were near the area where Nicholson fell and could have conducted an inspection or a sweep. Nicholson argues that her testimony about the substance's appearance should be considered together with Sullivan's testimony that Wal-Mart's policy requires "safety sweeps" of the floor every thirty minutes. Sullivan conceded that it "would be a Wal-Mart violation" if the video did not "show

anyone sweeping or mopping in the hour before [Nicholson] fell." And in response to the question, "You would agree that, if a visual inspection had been performed in the hour before my client's fall, the spill would have been seen and cleaned," Sullivan answered, "Correct." The video does not reveal anyone sweeping in the hour before Nicholson's fall.

Nicholson relies on *Rivas v. MPII, Inc.*, No. 13-09-00177-CV, 2011 WL 1106692, at *5 (Tex. App.—Corpus Christi Mar. 24, 2011, pet. denied) (mem. op.), in support of her argument that Wal-Mart's failure to comply with its sweep policy raises a fact issue on constructive knowledge. In that case, Rivas was acting as a pallbearer in a funeral when he fell into a deep hole at the grave site. *Id.* at *1, 5. The grave site had been prepared by Mission Park, the defendant and appellee. *Id.* at *4. Mission Park's foreman testified that as part of the company's procedures, employees typically inspected grave sites to clear debris and prepare for burial services one or two days before a funeral. *Id.* The trial court granted the cemetery's motion for summary judgment, but the court of appeals reversed, concluding that reasonable minds could differ on whether the hole had existed long enough to give the cemetery reasonable opportunity to discover and remedy it. *Id.* at *5. Nicholson argues that similar to the foreman's testimony in *Rivas*, Sullivan testified here that in accordance with Wal-Mart's policies, an inspection or safety sweep would have discovered the dangerous condition before Nicholson fell.

Wal-Mart responds that *Rivas* is distinguishable because the appellate court's ruling "did not turn on whether the defendant complied with safety or inspection practices." We agree. The court "analyz[ed] the combination of proximity, conspicuity, and longevity" as required under *Spates* and *Reece*, and concluded that (1) the employees' close proximity to the condition when preparing the gravesite, (2) the size of the hole, "big enough for Rivas's whole leg and hip to go into," and (3) the employees' work "within one day or, at most, two days of the burial service," "support a conclusion that Mission Park should reasonably have discovered the large hole into which Rivas fell." *Id.* at *5 (citing *Spates*, 186 S.W.3d at 567–68, and *Reese*, 81 S.W.3d at 816). The court concluded, "[r]easonable and fair-minded individuals could differ in their conclusions regarding whether the hole had existed long enough for Mission Park to have discovered it or whether it existed long enough to give Mission Park a reasonable opportunity to discover and remedy it based on the size of the hole, its location, and the work done by Mission Park's employees either the day of or the day before the burial service." *Id.* Consequently, the court reversed the trial court's no-evidence summary judgment. *Id.* Here, there is no similar evidence raising a fact issue that the substance was conspicuous or had been on the floor long enough for an employee walking near it to notice and remedy. Wal-Mart's failure to comply with its sweep policy, even given Sullivan's admission, does not provide the temporal proof required under the "time-notice" rule. *See Reece*, 81 S.W.3d at 816.

Nicholson also cites *Pay and Save, Inc. v. Martinez*, 452 S.W.3d 923 (Tex. App.—El Paso 2014, pet. denied), in support of her argument. In *Pay and Save, Inc.*, the plaintiff slipped on a cucumber peel in a Big 8 food store. *Id.* at 925. At trial, the plaintiff offered evidence that the store's "sweep log" contained discrepancies about when the floor had been swept before the slip and fall occurred, the floor was very dirty, and there was a "slip mark" showing that someone else had already slipped in the area. *Id.* at 928–29. A store employee who had been in the area for approximately fifteen minutes prior to the incident was six or seven feet away from where the incident occurred. *Id.* Further, the cucumber peel was described by one witness as "[a] dark green substance . . . about two- to two-and-a-half inches long." *Id.* at 929.

Here, in contrast, Nicholson's argument focuses on Wal-Mart's failure to follow its safety sweep policy. Unlike the plaintiff in *Pay and Save, Inc.*, Nicholson has not offered any evidence to show that Wal-Mart "had a reasonable opportunity to discover and remedy [the] dangerous condition." *Reece*, 81 S.W.3d at 816. She does not contend the substance was conspicuous to employees or customers. Nicholson described the substance at issue here as "clear" and "didn't have . . . a color to it." Further, as in *Molina v. HEB Grocery Co., L.P.*, there is no evidence that a Wal-Mart employee saw the substance on the floor before Nicholson fell, and the video does not show any substance on the floor. *Molina v. HEB Grocery Co., L.P.*, No. 03-17-00343-CV, 2017 WL 4766655, at *4 (Oct. 19, 2017, no pet.) (mem. op.). As in *Molina*, the video "instead shows numerous people walking over the same

area in the minutes leading up to the fall, without anyone showing signs of noticing liquid on the floor." *Id.* Under those circumstances, the court in *Molina* affirmed a summary judgment for HEB. *Id.*

Merely establishing that it was possible for the defendant to discover the defect is not sufficient. *See Reece*, 81 S.W.3d at 816. As the court in *Reece* explained:

> The so-called "time-notice rule" is based on the premise that temporal evidence best indicates whether the owner had a reasonable opportunity to discover and remedy a dangerous condition. An employee's proximity to a hazard, with no evidence indicating how long the hazard was there, merely indicates that it was *possible* for the premises owner to discover the condition, not that the premises owner reasonably *should* have discovered it. Constructive notice demands a more extensive inquiry. Without some temporal evidence, there is no basis upon which the factfinder can reasonably assess the opportunity the premises owner had to discover the dangerous condition.

Id. at 816 (citation omitted). Nicholson's argument here is that it would have been possible for an employee to discover the substance had a timely sweep been made. But without evidence of how long the substance had been on the floor, and no indication from the video or other evidence that any other employee or customer noticed the substance before Nicholson's fall, we conclude that Nicholson has failed to raise a genuine issue of material fact on Wal-Mart's constructive knowledge of the condition. *See CMH Homes, Inc.*, 15 S.W.3d at 102–03 (constructive knowledge can be established by evidence that "the condition had existed long enough for the owner or occupier to have discovered it upon reasonable inspection").

Because we conclude that Nicholson did not produce more than a scintilla of evidence to raise a genuine issue of material fact on the constructive knowledge requirement of her premises liability claim, we need not address her other arguments. *See Forbes, Inc.*, 124 S.W.3d at 172; TEX. R. CIV. P. 166a(i). We decide Nicholson's sole issue against her.

CONCLUSION

The trial court's judgment is affirmed.

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/Leslie Osborne//
LESLIE OSBORNE
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ANGELA NICHOLSON, Appellant

No. 05-21-00110-CV   V.

WAL-MART STORES TEXAS, LLC, Appellee

On Appeal from the 134th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-19-14576.
Opinion delivered by Justice Osborne. Justices Myers and Nowell participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Wal-Mart Stores Texas, LLC recover its costs of this appeal from appellant Angela Nicholson.

Judgment entered this 7th day of September, 2022.