Opinion issued February 3, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00871-CV

CRYSTLE COBURN, Appellant

V.

TOYS "R" US - DELAWARE, INC. D/B/A TOYS "R" US #7009, Appellee

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On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Case No. 934561

MEMORANDUM OPINION

In this slip-and-fall case, appellant, Crystle Coburn, sued Toys "R" Us – Delaware, Inc. *d/b/a* Toys "R" Us #7009 ("Toys R Us") for negligence after she

allegedly slipped on a "slippery substance" and sustained injuries. Toys R Us moved for traditional and no-evidence summary judgment, contending that Coburn could present no evidence that Toys R Us had either actual or constructive knowledge of the alleged dangerous condition. The trial court rendered summary judgment in favor of Toys R Us. In two issues on appeal, Coburn contends that the trial court erred in rendering summary judgment because (1) she raised a fact issue on each element of her cause of action, and (2) the trial court incorrectly ruled that "the scintillas of evidence offered by Coburn were too weak to proceed to trial on."

We affirm.

Background

On February 15, 2007, Coburn, her husband, and her youngest son visited a local Toys R Us store. While in the "Thomas the Tank Engine" section, Coburn allegedly slipped on a "slippery substance" located on the floor and fell. Coburn hit her face on the floor and bruised her right hand, which was caught between the floor and the shopping cart when she fell.

Coburn sued Toys R Us for negligence under a premises liability theory, alleging that Toys R Us "negligently failed to protect [Coburn] from known or discoverable dangerous conditions on the premises." Coburn specifically alleged that Toys R Us failed to "give adequate and understandable warning" to Coburn

about the "unsafe condition" on the floor and it failed to make the condition on the floor safe.

Toys R Us moved for both traditional and no-evidence summary judgment, contending that Coburn could present no evidence that it had actual or constructive knowledge of the substance on the floor, and thus Coburn could not prevail on her claim. As summary judgment evidence, Toys R Us attached the affidavit of Kim Magee, Toys R Us's manager on duty at the time of the accident, and Coburn's deposition testimony. Magee stated that, as part of her duties, she walks around and inspects all areas of the store on an hourly basis. She averred that, approximately fifteen to twenty minutes before Coburn fell, she had walked "directly over" the area and had not seen "any liquid or substance on the floor[,] either down the aisle or in the place where Ms. Coburn fell." Magee further averred that, immediately after the fall, she inspected the area and did not see anything on the floor.

In her deposition, Coburn testified that, as she was pushing her shopping cart, she realized that she had stepped in a "clear, sticky substance" and she fell to the ground. When Coburn fell, "[her] face hit the floor and then [her] hand was caught between the floor and the basket." Coburn stated that she did not know what the substance was, although she noted that it was clear, "dingy," and had formed a medium-sized puddle on the floor. She testified that there were no cart

tracks, other than hers, through the puddle. Coburn further testified that she did not know how long the substance had been on the floor before her fall, that nothing indicated to her that the substance had been on the floor for a long period of time, that no one had mentioned the substance to her before her fall, that she did not know if anyone else had slipped on the substance, and that she had no reason to believe that Toys R Us employees were aware of the substance before her fall.

In her response to Toys R Us's motion, Coburn contended that a scintilla of evidence existed that Toys R Us knew that the substance was on the floor. Coburn attached the "Guest Incident Report," completed by Kim Magee, and a "Guest Incident Statement" form, completed by Toys R Us employee Sean Espinoza, as additional summary judgment evidence. Espinoza stated that, at the time of the fall, he was in the "RZONE" location of the store when he heard a crash. He arrived in the area where Coburn had fallen, and he observed her standing up from the floor. He stated that he called Magee over, and, while Magee examined Coburn's injuries, Espinoza "examined the floor for anything that could have caused [Coburn] to slip." He did not find anything on the floor. In her incident report, Magee stated that a Toys R Us manager or associate last inspected the area less than five minutes before the fall. She repeatedly stated in her report that the area was "clean and dry."

Coburn argued that because Espinoza circled the "Associate Witness" option at the top of the Incident Statement form—as opposed to the "Injured Guest," "Property Damage," or "Guest Witness" options—he admitted that he was a witness to the event and, therefore, he had "placed himself in the position of being able to have effectuated a change and to have been in a position to prevent the fall." Further, because Espinoza admitted to hearing the crash and witnessing Coburn standing up from the floor, this evidence raised a fact issue regarding whether Toys R Us had constructive notice of the "unreasonable risk of harm."

Coburn also argued that Espinoza's statement contradicted Magee's affidavit, and that, therefore, the affidavit was not competent summary judgment evidence. Specifically, Espinoza stated that Magee examined Coburn's injuries while he inspected the floor, but Magee stated that she inspected the floor "immediately after" the fall. Thus, "[o]bviously," Magee did not immediately inspect the floor, but instead examined Coburn. Coburn further argued that Magee's affidavit was not competent summary judgment evidence because Magee stated in the affidavit that she inspected the area approximately fifteen to twenty minutes before the fall, but, in the incident report, Magee stated that she inspected it "less than five minutes" before the fall. Coburn also argued that her own deposition testimony raised a fact issue because she testified that she was the one

who found Magee and brought her to the scene, but Espinoza stated that he summoned Magee.

The trial court rendered summary judgment in favor of Toys R Us and this appeal followed.

Standard of Review

We review de novo the trial court's ruling on a summary judgment motion. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When a party moves for both traditional and no-evidence summary judgment, we first review the trial court's ruling under the no-evidence standard of review. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the trial court properly granted the no-evidence motion, we do not consider the arguments raised regarding the traditional summary judgment motion. *Id.*

After an adequate time for discovery, a party may move for no-evidence summary judgment on the ground that no evidence exists of one or more essential elements of a claim on which the adverse party bears the burden of proof at trial. TEX. R. CIV. P. 166a(i); *see Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The burden then shifts to the nonmovant to produce evidence raising a genuine issue of material fact on the elements specified in the motion. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

The trial court must grant the motion unless the nonmovant presents more than a scintilla of evidence raising a fact issue on the challenged elements. *Flameout Design & Fabrication*, 994 S.W.2d at 834; *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) ("More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" (quoting *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995))). To determine if the nonmovant raises a fact issue, we review the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)).

To prevail on a traditional summary judgment motion, the movant must establish that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). When, as here, the trial court's summary judgment does not state the basis for the court's decision, we must uphold the judgment if any of the theories advanced in the motion are meritorious. *Providence Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

Constructive Knowledge of Condition

In her first issue, Coburn contends that the trial court erred in rendering summary judgment in favor of Toys R Us because her summary judgment evidence raised a fact issue regarding whether Toys R Us had constructive knowledge of the allegedly slippery substance on its floor. In her second issue, Coburn contends that the trial court erred in ruling that the scintilla of evidence that she offered was too weak to create a fact issue. We consider these issues together.

Toys R Us owed Coburn, its invitee, a duty to exercise reasonable care to protect her from dangerous conditions in the store that were either known or reasonably discoverable. *See Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998); *Bendigo v. City of Houston*, 178 S.W.3d 112, 114 (Tex. App.—Houston [1st Dist.] 2005, no pet.). This duty does not, however, make the premises owner an insurer of the invitee's safety. *Gonzales*, 968 S.W.2d at 936; *Bendigo*, 178 S.W.3d at 114. To recover damages in a slip-and-fall case, a plaintiff must prove:

(1) Actual or constructive knowledge of some condition on the premises by the owner/operator;

(2) That the condition posed an unreasonable risk of harm;

(3) That the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and

(4) That the owner/operator's failure to use such care proximately caused the plaintiff's injuries

Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992). The plaintiff satisfies the notice element by establishing one of three things: (1) the defendant placed a substance on the floor; (2) the defendant actually knew the substance was on the floor; or (3) it is more likely than not that the dangerous condition had existed long enough to give the premises owner a reasonable opportunity to discover it. *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002); *Bendigo*, 178 S.W.3d at 114. Coburn has not asserted that a Toys R Us employee placed the substance on the floor, nor has she contended that a Toys R Us employee actually knew of the substance. Thus, to hold Toys R Us liable, Coburn had to raise a fact issue regarding whether the spill "had been on the floor for a sufficient period of time that [the defendant] had a reasonable opportunity to discover it." *Reece*, 81 S.W.3d at 814; *see also Wal-Mart Stores, Inc. v. Diaz*, 109 S.W.3d 584, 588 (Tex. App.—Fort Worth 2003, no pet.) (holding issue in slip-and-fall case is "whether the substance has been on the floor for so long a time that a reasonably prudent business owner exercising ordinary care should have discovered it").

Temporal evidence—evidence of the length of time the dangerous condition existed—is the best indication of whether the premises owner had a reasonable opportunity to discover and remedy the condition. *Reece*, 81 S.W.3d at 816 (citing *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 102–03 (Tex. 2000)). "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." *Id.* (emphasis in original). Temporal evidence is necessary for the fact-finder to reasonably assess the opportunity that the premises owner had to discover the condition. *Id.* A reasonable time for the owner to discover the condition varies depending upon the facts and circumstances of each case, and evidence of an employee's proximity to the hazard "will often be relevant to the analysis." *Id.* For example, if a dangerous condition is conspicuous, or an employee was in close proximity to a less conspicuous hazard for a "continuous and significant period of time," an employee's proximity might shorten the time period in which the fact finder could find that the premises owner should have reasonably discovered the condition. *Id.* Regardless, "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." *Id.*

Coburn contends that she raised a fact issue regarding constructive notice by attaching the incident statement of Sean Espinoza, a Toys R Us employee who stated that he was an "Associate Witness" to the incident. According to Coburn, by circling the "Associate Witness" option on the incident report form, Espinoza

admitted that he was a witness to the incident, and thus, he "was in the position of being able to have effectuated a change and . . . to prevent the fall."

Espinoza's own incident report, however, reflects that he did not witness Coburn slip and fall to the floor. Instead, he stated that he heard a crash while in the "RZONE" area of the store and that he walked over to see if anyone was hurt. He arrived in time to see Coburn standing up from the floor. At most, this evidence establishes that Espinoza was within hearing distance of the accident, not that he was an eye-witness.

Furthermore, as the Texas Supreme Court held in *Reece*, the mere proximity of an employee to the site of an accident does not raise a fact issue regarding constructive notice of a dangerous condition. *Id.* at 816; *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 567 (Tex. 2006) (per curiam). The plaintiff must present some evidence of how long the hazard existed to impose liability on the premises owner. *Reece*, 81 S.W.3d at 816. In her deposition, Coburn testified that the substance was clear and had formed a medium-sized puddle on the floor; thus, there is no evidence that the substance was conspicuous. *See id.* ("There was no evidence that the spill was conspicuous—it was not large and consisted of a clear liquid on a light tile floor."). Coburn presented no evidence of how long the substance was on the floor before she fell. Coburn presented no evidence that a Toys R Us employee saw the spill before she fell or that it was there when Kim

Magee made her rounds of the store approximately fifteen to twenty minutes before the fall. *See Brookshire Food Stores, L.L.C. v. Allen*, 93 S.W.3d 897, 901 (Tex. App.—Texarkana 2002, no pet.) (holding evidence legally insufficient to establish constructive knowledge when employee walked through area approximately fifteen minutes before fall and did not notice grapes on floor and plaintiff presented no evidence that others saw grapes before her fall). Coburn also presented no evidence regarding "when or how the spill came to be on the floor." *See Reece*, 81 S.W.3d at 817. Coburn acknowledged in her deposition that she did not know how long the substance had been on the floor prior to her fall, and she did not present such temporal evidence from any other source. *See Gonzalez*, 968 S.W.2d at 937–38 (holding evidence legally insufficient to establish constructive knowledge when "[t]he witnesses had not seen the macaroni salad prior to the fall and had no personal knowledge of the length of time it had been on the floor").[1]

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[1] In *Wal-Mart Stores, Inc. v. Gonzalez*, the Texas Supreme Court held that testimony that the macaroni salad that had fallen on the floor had "a lot of dirt" and shopping cart tracks through it and it "seemed like it had been there awhile" was no evidence that the macaroni salad had been on the floor long enough to charge Wal-Mart with constructive notice of the condition. 968 S.W.2d 934, 938 (Tex. 1998). The supreme court held that the cart tracks in the macaroni salad were equally consistent with inferences that the macaroni had been on the floor for a long period of time or that the macaroni had just been dropped "and was quickly contaminated by customers and carts traversing the aisle." *Id.* at 937. The testimony did not establish that it was "more likely than not that the macaroni had been there for a long time"; instead, it only established that the macaroni "could possibly have been there long enough to make Wal-Mart responsible for noticing it." *Id.* at 938. Similarly, here, Coburn presented no evidence of how long the substance was on the floor before she fell. Although she testified in her deposition

As the plaintiff, Coburn bears the burden to establish that "it was more likely than not that [the defendant] should have been aware of the spill because it existed long enough to give [the defendant] a reasonable opportunity to discover and rectify it, or to warn about it." *See Reece*, 81 S.W.3d at 817. Because Coburn presented no evidence regarding how long the substance had been on the floor before her fall, we conclude that she failed to raise a fact issue regarding whether Toys R Us had constructive notice of the allegedly dangerous condition. We therefore hold that the trial court correctly rendered summary judgment in favor of Toys R Us.

We overrule Coburn's first and second issues.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

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that the substance looked "dingy," she also stated that nothing indicated that the substance had been on the floor for a long period of time. Coburn, therefore, presented even less testimony than the plaintiff in *Gonzalez* regarding the length of time that the substance was on the floor.