Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00152-CV

Mary **BARRERA**,
Appellant

v.

HEB GROCERY COMPANY, L.P.,
Appellee

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2013-CI-14809
Honorable Michael E. Mery, Judge Presiding[1]

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice (concurring in the judgment only)
Luz Elena D. Chapa, Justice

Delivered and Filed: July 27, 2016

AFFIRMED

Mary Barrera appeals a take-nothing judgment in her premises-liability suit against HEB Grocery Company, L.P. Barrera argues the trial court committed reversible error by granting HEB's motion for partial summary judgment that the floor in HEB's store is not a dangerous condition. Because we cannot conclude the trial court's partial summary judgment order probably caused the rendition of an improper judgment, we affirm.

[1] The Honorable David A. Canales signed the partial summary judgment order that is the subject of this appeal.

BACKGROUND

Barrera sued HEB alleging she slipped and fell on a wet floor in the produce section of HEB's grocery store in Cleveland, Texas. Barrera pled HEB breached its duty to exercise ordinary care as a premises owner, identifying numerous acts and omissions she alleged were negligent. Among those alleged acts and omissions was HEB's selection of a dangerous floor material considered unreasonably slippery under wet and dry conditions. HEB generally denied Barrera's allegations and filed a traditional and no-evidence motion for summary judgment, which the trial court denied. HEB then filed a traditional and no-evidence motion for a second time and argued "the floor in and of itself" did not constitute a dangerous condition under wet or dry conditions. The trial court signed an order that "granted in part and denied in part" HEB's second motion. Upon considering a motion to reconsider, the trial court signed a partial summary judgment order. The decretal portion of the order states "that since there is no genuine issue of material fact that the floors in [HEB]'s store are a dangerous condition, [HEB]'s Motion for Summary Judgment is granted."

At a pre-trial hearing, the trial court ruled Barrera may not present her expert witness's opinion that HEB's floor is inherently dangerous. Discussing the partial summary judgment order, the trial court ruled, "[T]his case is not about H.E.B. going and selecting a floor covering that at the outset was bad, was the wrong floor, [or] is inherently dangerous." However, the trial court permitted Barrera's expert to testify about his slip-resistance testing of HEB's floor and whether the floor's slip resistance under both wet and dry conditions met applicable safety standards. In closing arguments, Barrera argued HEB was negligent by failing to warn about water on the floor and failing to hire a sufficient number of employees to monitor the produce area in which Barrera slipped and fell. The jury found HEB was not negligent, and the trial court rendered a final, take-nothing judgment on Barrera's claims against HEB. Barrera appeals.

PARTIAL SUMMARY JUDGMENT

Barrera argues the trial court committed reversible error by granting partial summary judgment. Her first issue is whether the trial court "err[ed] in granting . . . HEB's partial motion for summary judgment via the motion to reconsider." In her second issue, she argues the trial court erred by concluding HEB's floor was not dangerous as a matter of law and the summary judgment evidence raised a fact issue that HEB's floor is a dangerous condition when wet.

A. HEB's Motion to Reconsider

An appellant's "brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). "Failure to provide citations or argument and analysis as to an appellate issue may waive it." *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 500 (Tex. 2015). Barrera presented her issue regarding HEB's motion to reconsider in a separate issue statement, but her brief does not contain any argument or citations to authorities or the record that the trial court erred by granting HEB's motion for summary judgment via the motion to reconsider. In a footnote following her issue statement, Barrera suggests she intended to present an issue under *Malooly Brothers, Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970), to challenge all bases for the trial court's partial summary judgment order. To the extent Barrera intends to argue the trial court erred by granting summary judgment when ruling on HEB's motion to reconsider, we hold the issue is waived. *See Ross*, 462 S.W.3d at 500. To the extent Barrera intends to raise a *Malooly* issue that broadly challenges the trial court's summary judgment order, we consider Barrera's two issues together.

B. The Partial Summary Judgment Order

In its second traditional and no-evidence motion for summary judgment, HEB argued (1) there was no evidence that its floor constituted a dangerous condition and (2) the deposition testimony of Barrera's expert witness, Jason English, established that under both wet and dry

conditions, its floor is not a dangerous condition. The trial court ordered "that since there is no genuine issue of material fact that the floors in [HEB]'s store are a dangerous condition, [HEB]'s Motion for Summary Judgment is granted." The trial court's order does not contain any decretal language that actually disposed of any cause of action or theory of liability. Rather, the decretal portion of the order grants HEB's motion for summary judgment on the sole issue of whether HEB's floor is a dangerous condition because "there is no genuine issue of material fact that the floors in HEB's store are a dangerous condition."

Barrera argues the order prevented her from presenting evidence and arguing to the jury that HEB's floor was a dangerous condition when wet and that HEB should have selected an alternative floor type that was not unreasonably slippery when wet. Even if the partial summary judgment order declared HEB's floor not to be a dangerous condition when wet, and the trial court erred by rendering that order, we may not reverse unless we conclude "the error complained of probably caused the rendition of an improper judgment." *See* TEX. R. APP. P. 44.1 (formatting omitted); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (applying this rule to an erroneous summary judgment order). "[A] trial court's erroneous decision to grant summary judgment can be rendered harmless by subsequent events in the trial court." *Progressive Cnty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex. 2005). If, after granting partial summary judgment, a trial court permits a party to present evidence and arguments regarding the claim on which the trial court granted summary judgment, the trial court's reconsideration of its partial summary judgment order renders the order harmless. *See In re M.S.C.*, No. 05-14-01581-CV, 2016 WL 929218, at *2-3 (Tex. App.—Dallas Mar. 11, 2016, no pet.) (mem. op.).

At a pre-trial hearing, HEB raised a motion in limine and moved to exclude English's expert testimony based on the trial court's summary judgment order. HEB requested that Barrera "not be allowed to make any arguments or any references or any comments [about HEB's] floors."

The trial court and the parties discussed the partial summary judgment order's intended effect, and its relation to Barrera's pleadings, at length. The trial court denied HEB's motion and permitted English to testify about applicable slip-resistance standards, the tests he conducted on HEB's floor under both wet and dry conditions, and whether the results showed the floor tested below safety standards for slip resistance. At trial, English testified about the applicable safety standards for slip resistance[2] and about the results of tests he conducted on HEB's floor under both wet and dry conditions.

Barrera contends the partial summary judgment order precluded her from arguing "that HEB failed to exercise ordinary care to protect Barrera from the danger posed by the floor by failing to make the floor itself reasonably safe." The record does not support this contention. The decretal portion of the partial summary judgment order does not dispose of Barrera's cause of action that HEB was negligent by failing to make the floor safe under wet conditions. At the pre-trial hearing, the trial court ruled English could testify "[a]s long as he [did not] come out and say that [HEB] should not have gotten that [floor material] and that floor was dangerous." When overruling HEB's objection to English's testimony at trial, the trial court admitted English's testimony but instructed English that he could not testify HEB's floor in and of itself was a dangerous condition or that HEB should have selected a different floor material.

The only theory the trial court prohibited Barrera from presenting to the jury was that HEB was negligent by *selecting* a floor type that was a dangerous condition because it was unreasonably slippery when wet. "[W]hen a claim does not result from contemporaneous activity, the invitee

[2] Although Barrera asserts "the jury was prevented from hearing evidence that the *floor itself* violated the International Building Code, International Fire Code, NFPA 101 - Life Safety Code, ASTM International (ASTM), ANSI F1637, and OSHA," the record does not support this assertion. The trial court ruled English could testify to applicable safety standards and, during trial, English testified about relevant safety standards including the ASTM International and ANSI standards and that the floors' *slip resistance* tested below the safety standards.

has no negligent-activity claim, and his claim sounds exclusively in premises-liability." *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 215 (Tex. 2015). Barrera alleged she was injured by a dangerous condition on HEB's property and did not allege HEB engaged in any contemporaneous activity that caused her injury. Thus, Barrera's claim against HEB is exclusively a premises-liability claim. *See id.* Because Barrera did not allege HEB's selection of unreasonably slippery floor material occurred contemporaneously with Barrera's slip and fall and caused her injury, HEB's selection of floor material is not properly part of Barrera's premises-liability claim against HEB. *See id.* Thus, the record does not demonstrate the partial summary judgment order precluded Barrera from presenting proper premises-liability theories to the jury.

Barrera suggests premises-liability theories will differ depending upon whether the dangerous condition is characterized as "a floor" that is unreasonably slippery when wet or "water on the floor" that causes a floor to become unreasonably slippery. Barrera relies on *Farrar v. Sabine Management Corp*., 362 S.W.3d 694 (Tex. App.—Houston [1st Dist.] 2011, no pet.). The appellant in *Farrar* appealed a summary judgment on his premises-liability claim, in which he alleged he slipped and fell while walking on appellee's wet, recently painted wheelchair ramp. *Id.* at 698-99. The court of appeals reversed the summary judgment, holding the evidence raised a fact issue as to whether the ramp was a dangerous condition because the painted wheelchair ramp was slippery when wet and it was foreseeable that it would be wet from rain. *See id.* at 701-02. Although *Farrar* could be understood as recognizing a floor may be a dangerous condition if it is unreasonably slippery when wet, the *Farrar* court did not hold "a floor that is unreasonably slippery when wet" and "water on the floor that causes a floor to become unreasonably slippery" are two distinct dangerous conditions that give rise to different premises-liability claims. *See id.* In *Farrar*, as in this case, "water" and "a floor material that is unreasonably slippery when wet"

were two necessary parts of the same dangerous condition. Neither the water, nor the floor itself, is an inherently dangerous condition.

The trial court permitted Barrera to present evidence and argue to the jury that HEB's floor is a dangerous condition because it becomes unreasonably slippery when wet. The trial court also admitted, over HEB's objection, English's testimony that HEB's floor, when wet, falls below applicable standards for reasonably safe slip resistance. Even if the partial summary judgment order precluded Barrera from presenting her theory that HEB's floor is a dangerous condition when wet, the trial court reconsidered its partial summary judgment order and permitted Barrera to present her theory that HEB's floor is a dangerous condition because it becomes unreasonably slippery when wet. We therefore hold subsequent events rendered any error in granting partial summary judgment harmless. *See In re M.S.C.*, 2016 WL 929218, at *2-3.

CONCLUSION

Because we cannot conclude the trial court's partial summary judgment order probably caused the rendition of an improper judgment, we affirm the trial court's judgment.

Luz Elena D. Chapa, Justice