COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00488-CV

PAMELA VERNON APPELLANT

V.

DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD AND UBM ENTERPRISE, INC. APPELLEES

FROM THE 153RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 153-276863-15

MEMORANDUM OPINION[1]

I. INTRODUCTION

The trial court granted a traditional summary judgment for Appellees Dallas/Fort Worth International Airport Board (the Board) and UBM Enterprise, Inc. (UBM) on Appellant Pamela Vernon's claims against them following

[1] *See* Tex. R. App. P. 47.4.

Vernon's slip-and-fall injury in a large puddle of water in a bathroom at the Dallas/Fort Worth International Airport (DFW Airport). For the reasons set forth below, we will affirm.

II. Factual and Procedural Background

Vernon sustained personal injuries on February 23, 2013, when she slipped and fell in a bathroom in Terminal D of the DFW Airport. Vernon explained that she was walking toward one of the bathroom's stalls when she stepped in standing water, fell, and slid into the stall. Although she did not see the water before she fell, she examined it afterwards. Vernon said that the water spanned "the whole length of the whole thing. It was [on] all of them, all of the stalls." The water was clear, not dirty, and Vernon did not know how long it had been on the floor or how it got there. Vernon said no signs had been posted in the bathroom warning of the water, and she did not see any airport employees or janitorial/housekeeping workers in the bathroom.

When Vernon slipped and fell, UBM had contracted with the Board—the operator of the DFW Airport—to clean Terminal D of the airport, including cleaning the bathrooms located in Terminal D. According to Jimmy Oh, UBM's Vice President, UBM crews "routinely cleaned and inspected each bathroom [in Terminal D] twice an hour and cleaned up any spills or debris on the floor of the bathrooms as part of [that] process." Oh said that the bathroom in question "would not have gone without an inspection and cleaning for more than 30 minutes" and that prior to Vernon's fall, "no spill or maintenance need had been

reported to UBM concerning any water on the floor in any of the bathrooms located [in] Terminal D." Oh also stated that UBM "had not discovered any water on the floors in the bathroom where [Vernon] allegedly fell prior to her fall" and that "[n]o employee with UBM or . . . [the Board] was aware of any water spill in the bathrooms located in Terminal D . . . prior to the time of [Vernon's fall]."

Vernon sued Appellees alleging claims for premises liability, negligent activity, and negligence. Appellees' motion for traditional summary judgment asserted that they were entitled to judgment on Vernon's claims as a matter of law because they had conclusively negated the actual-or-constructive-knowledge element and the invitee element of Vernon's premises liability claim and had conclusively negated the proximate cause element of Vernon's negligent activity and negligence claims, assuming those causes of action exist based on the present facts. Vernon filed a response and two supplemental responses to Appellees' traditional motion for summary judgment. After a hearing, the trial court signed a summary judgment for Appellees and decreed that Vernon take nothing. This appeal followed.

Vernon raises two issues arguing that summary judgment on her premises liability claim was improper because she raised genuine issues of material fact on the invitee and actual-or-constructive-knowledge elements of that claim.[2]

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[2]Vernon does not challenge the summary judgment granted on her negligent activity and negligence claims. Accordingly, we affirm the trial court's summary judgment with respect to those claims. *See Little v. Delta Steel, Inc.*, 409 S.W.3d 704, 722–23 (Tex. App.—Fort Worth 2013, no pet.) (affirming trial

III. STANDARD OF REVIEW

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011); *see* Tex. R. Civ. P. 166a(b), (c). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence that raises a fact issue. *Van v. Peña*, 990 S.W.2d 751, 753 (Tex. 1999).

IV. THE ELEMENTS OF A PREMISES LIABILITY CLAIM

The essential elements of a premises liability claim are: (1) actual or constructive knowledge of a condition on the premises by the owner or occupier;

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court's summary judgment on claims when not challenged on appeal); *Haire v. Nathan Watson Co.*, 221 S.W.3d 293, 302 (Tex. App.—Fort Worth 2007, no pet.) (same).

(2) that the condition posed an unreasonable risk of harm; (3) that the owner or occupier did not exercise reasonable care to reduce or eliminate the risk; and (4) that the owner or occupier's failure to use such care proximately caused the plaintiff's injury. *Daitch v. Mid-Am. Apartment Communities, Inc.*, 250 S.W.3d 191, 194 (Tex. App.—Dallas 2008, no pet.). Whether a plaintiff must prove actual or constructive knowledge of the condition by the owner or occupier depends on the status of the plaintiff at the time of the incident giving rise to the suit. *QuickTrip Corp. v. Goodwin*, 449 S.W.3d 665, 670 (Tex. App.—Fort Worth 2014, pet. denied). When the plaintiff is a licensee, she must establish that the owner or occupier had actual knowledge of the condition; when the plaintiff is an invitee, however, the plaintiff may establish the knowledge element by demonstrating that the owner or occupier had either actual knowledge or constructive knowledge of the condition. *Tex. Dep't of Transp. v. York*, 284 S.W.3d 844, 847 (Tex. 2009); *Hunnicutt v. Dallas/Fort Worth Int'l Airport Bd.*, No. 02-08-00297-CV, 2009 WL 2356858, at *2 (Tex. App.—Fort Worth July 30, 2009, pet. denied) (mem. op.).

Actual knowledge "requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time." *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414–15 (Tex. 2008). Constructive knowledge has a temporal element; to establish constructive knowledge, a plaintiff must show that the condition had existed long enough for

the owner or occupier to have had a reasonable opportunity to discover it in the exercise of ordinary care. *Hunnicutt*, 2009 WL 2356858, at *2. "The rule requiring proof that a dangerous condition existed for some length of time before a premises owner may be charged with constructive notice is firmly rooted in our jurisprudence." *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 815 (Tex. 2002). This rule emerged "from our reluctance to impose liability on a storekeeper for the carelessness of another over whom it had no control or for 'the fortuitous act of a single customer' that could instantly create a dangerous condition." *Id.* at 816.

V. Analysis

In her first issue, Vernon contends that she raised a genuine issue of material fact as to whether she possessed invitee status.[3] But, if Appellees conclusively negated both actual and constructive knowledge of the condition (the water in the bathroom), then we need not determine whether Vernon presented summary judgment evidence controverting licensee status or tending to establish invitee status. That is, if Appellees conclusively negated the knowledge element applicable to either licensee or invitee status and Vernon did not present a genuine issue of material fact as to the knowledge element—either actual or constructive—then we are required to affirm the trial court's summary judgment on this ground regardless of Vernon's status as a licensee or an

[3]Vernon asserts that she was an invitee; Appellees assert that Vernon was a licensee.

invitee. *See* Tex. R. App. P. 47.1 (requiring appellate court to address only issues necessary to disposition of appeal); *York*, 284 S.W.3d at 847; *Hunnicutt*, 2009 WL 2356858, at *2 ("The parties dispute whether Hunnicutt paid to use the premises and was therefore an invitee. But if DFW had no actual or constructive knowledge of the condition that caused Hunnicutt's injuries, it is not liable to her even if she was an invitee."). We therefore address Vernon's second issue first; that is, whether the summary judgment evidence conclusively negates Appellees' actual or constructive knowledge of the large puddle of water in the Terminal D bathroom.

Appellees presented summary judgment evidence that none of their employees were aware of the standing water in the Terminal D bathroom prior to Vernon's injury. That evidence was buttressed by Vernon's testimony that no warning signs had been posted in the bathroom, that she did not see any airport employees or janitorial/housekeeping workers in the bathroom, and that she did not know how the water got on the ground. Jimmy Oh, the Vice President of UBM explained,

> We do not maintain "sweep logs," but the bathroom in question that the Plaintiff claims she fell in on February 23, 2013, would not have gone without an inspection and cleaning for more than 30 minutes. Prior to the Plaintiff's fall, no spill or maintenance need had been reported to UBM concerning any water on the floor in any of the bathrooms located at Terminal D at DFW Airport. Further, during our routine inspections, we had not discovered any water on the floors in the bathroom where the Plaintiff allegedly fell prior to her fall. No employee with UBM or, to our knowledge, the Dallas/Fort Worth International Airport Board was aware of any water spill in the

bathrooms located in Terminal D of DFW Airport prior to the time of this incident.

Vernon's response to Appellees' summary judgment motion objected to some of Appellees' summary judgment evidence; Vernon's supplemental responses complained that UBM spoliated evidence—specifically, records documenting proper cleaning was performed. The record before us does not reflect a ruling on Vernon's objections to Appellees' summary judgment evidence, and she does not make any complaint concerning her objections on appeal. Nor does Vernon raise an appellate complaint concerning her spoliation requests.

Vernon's controverting summary judgment evidence consisted of: (A) an attorney's fees affidavit by Vernon's attorney; (B) UBM and the Board's responses to Vernon's requests for disclosure; (C) UBM's objections and responses to Vernon's first set of interrogatories; (D) the Board's objections and responses to Vernon's first set of interrogatories; (E) UBM's staffing proposal; (F) Vernon's boarding pass; (G) the Board's custodial standards; (H) the Board's February 25, 2013 letter to Vernon regarding notice of claim; (I) Vernon's notice of claim; (J) an insurer's March 21, 2013 letter to UBM; (K) an insurer's March 21, 2013 letter to Vernon; (L) an insurer's April 23, 2013 letter to Vernon; (M) UBM and the Board's responses to Vernon's second request for admission; (N) UBM and the Board's responses to Vernon's second request for production; and (O) UBM's supplemental responses to Vernon's second request for production.

We have thoroughly reviewed all of the summary judgment evidence in the light most favorable to Vernon and have engaged in all reasonable inferences that may be drawn in Vernon's favor from the summary judgment evidence. Viewing the summary judgment evidence through this prism, we hold that Appellees conclusively negated that prior to Vernon's fall they possessed actual knowledge of the clear, non-dirty water on the floor in the bathroom of Terminal D; we also hold that Vernon failed to present summary judgment evidence that raised a genuine issue of material fact concerning this element of her claim. *See Stewart*, 249 S.W.3d at 414–15 ("Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident.").

Turning to the element of constructive knowledge, Appellees presented summary judgment evidence that the Terminal D bathrooms were cleaned and inspected twice an hour and that they "would not have gone without an inspection and cleaning for more than 30 minutes." Vernon argues in her brief that Appellees' failure to maintain "sweep logs" documenting when the airport bathrooms were cleaned was a clear violation of the Board's custodial standards and make "[i]t . . . more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it."[4] But the fact that Appellees may have been derelict in their recordkeeping is not evidence of,

[4]As mentioned, Vernon has not raised an appellate issue concerning spoliation or her objections to Appellees' summary judgment evidence, and no trial court ruling on said spoliation instruction or objections is reflected in our record.

and does not support an inference of, the temporal aspect required to attribute constructive knowledge to a defendant. *See, e.g.*, *Reece*, 81 S.W.3d at 816 ("[T]here 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."); *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 938 (Tex. 1998) (holding "evidence that the macaroni salad had 'a lot of dirt' and tracks through it and the subjective testimony that the macaroni salad 'seemed like it had been there awhile' [was] no evidence that the macaroni had been on the floor long enough to charge Wal-Mart with constructive notice of this condition"); *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983) (holding plaintiff's testimony that grapes around him after his slip-and-fall were discolored and ruptured does not tend to prove that grapes had been on floor long enough to impute constructive notice of condition to Safeway).[5] Because

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[5]We recognize that these Texas Supreme Court cases are not summary judgment cases, but the principles applied in them apply equally in the summary judgment context. *See Gillespie v. Kroger Tex., L.P.*, 415 S.W.3d 589, 593 (Tex. App.—Dallas 2013, pet. denied) (affirming summary judgment because "Gillespie failed to provide any evidence that Kroger had actual or constructive knowledge of the condition of the restroom [wet film of water on floor] at the time of her fall"); *Hunnicutt*, 2009 WL 2356858, at *4 (affirming summary judgment because Hunnicutt presented "no evidence that DFW had constructive knowledge of the defective [escalator] rollers"); *Mendoza v. Fiesta Mart, Inc.*, 276 S.W.3d 653, 656 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (affirming summary judgment because the "summary judgment record presents no probative evidence sufficient to create a material question of fact concerning Fiesta Mart's actual or constructive knowledge of the wet substance on the floor of the meat department at or before the moment Mendoza slipped"); *see also Brown v. HEB Grocery Co.*, No. 14-15-00271-CV, 2017 WL 370132, at *1 (Tex. App.—Houston [14th Dist.] Jan. 24, 2017, no pet.) (mem. op.); *Young v. Wal-Mart Stores Tex., LLC*, No. 05-

Appellees conclusively negated actual and constructive knowledge of the water on the bathroom floor in Terminal D prior to Vernon's fall, and because the summary judgment evidence, when viewed in the light most favorable to Vernon, fails to raise a genuine issue of material fact that the water had been on the floor long enough for Appellees to have had a reasonable opportunity to discover it in the exercise of ordinary care, we overrule Vernon's second issue. *See, e.g.*, *Gillespie*, 415 S.W.3d at 593; *Hunnicutt*, 2009 WL 2356858, at *2; *Mendoza*, 276 S.W.3d at 656.

VI. Conclusion

Having overruled Vernon's second issue and having determined that we need not address Vernon's first issue, we affirm the trial court's judgment.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and MEIER, JJ.

DELIVERED: July 13, 2017

14-00362-CV, 2015 WL 1062744, at *1 (Tex. App.—Dallas Mar. 10, 2015, no pet.) (mem. op.); *Salinas v. AT & T Servs., Inc.*, No. 05-13-01436-CV, 2014 WL 7248086, at *1 (Tex. App.—Dallas Dec. 22, 2014, no pet.) (mem. op.).