TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00343-CV

Elizabeth Molina, Appellant

v.

HEB Grocery Company, L.P., Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT
NO. D-1-GN-16-001527, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING

M E M O R A N D U M   O P I N I O N

Appellant Elizabeth Molina was walking through a grocery store operated by appellee HEB Grocery Company, L.P., when she slipped on an unidentified liquid and fell, injuring her back. Molina sued for negligence and premises liability. HEB responded with a motion seeking traditional summary judgment, attaching as evidence excerpts from Molina's deposition, and a motion for no-evidence summary judgment, asserting that there was no evidence (1) that HEB had actual or constructive knowledge that the liquid was on the floor before Molina fell or (2) of how long the substance was on the floor before the incident. The trial court granted summary judgment for HEB without specifying the basis for its order. We affirm the trial court's order.

Discussion

We review a trial court's granting of summary judgment de novo, taking as true all evidence favorable to the nonmovant and indulging all reasonable inferences and resolving any

doubts in the nonmovant's favor. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). A plaintiff seeking damages in a slip-and-fall case must prove that (1) the owner/operator had actual or constructive knowledge of some condition on the premises; (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 such failure proximately caused the plaintiff's injuries. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). "A slip-and-fall plaintiff satisfies the notice element by establishing that (1) the defendant placed the substance on the floor, (2) the defendant actually knew that the substance was on the floor, or (3) it is more likely than not that the condition 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).

Molina slipped and fell in a puddle of liquid while walking down the aisle of an HEB. In her deposition testimony, HEB employee Jennifer Painter, who was working in the aisle at the time Molina fell, testified, "We were all trained that if you saw a spill you had to be the one to deal with it, no matter where it was." Neither Molina nor Painter saw the liquid on the floor before Molina fell, and the contents and size of the puddle are unknown. Painter described the liquid as light brown, with a "milky" texture, and Molina described it as a "thick, liquidy substance." Molina introduced a video from the store that includes the incident. The video shows the following:

4:45:00 p.m.	Video begins. Several people are pushing carts through the aisle. From the camera's view, a stocking cart is about 2/3 of the way down the aisle, across from the bulk bins. The video will eventually show Molina fall about fifteen minutes later, a few feet down the aisle from the stocking cart, in about the center of the aisle.
4:45:00-4:54:37 p.m.	Customers walk up and down the aisle, several passing over or standing in the same location where Molina eventually falls, including an HEB employee, who appears to stand in and walk over the location of the fall.

4:54:37-4:55:33 p.m.	A woman with a cart in which two children are seated stops her cart on the approximate location of the fall. She puts several items in the cart and then takes some things from the cart and appears to inspect or rearrange them. She then walks down the aisle, out of the camera's view.
4:55:44-4:55:58 p.m.	Another woman stops her cart slightly to the right of the location of the fall. She stands with her back to the spot while she picks out items from the bulk bins. As she moves, she appears to walk or stand on or very near the spot of the fall.
4:55:59-4:57:30 p.m.	That same woman moves her cart slowly down the aisle, continuing to choose items from the bins. Two people walk past her cart, both walking near but not through the area of the fall.
4:58:46 p.m.	A man walks down the aisle and appears to walk over or very close to the location of the fall.
5:00:14 p.m.	A woman pushes her cart down the aisle, appearing to walk over the area of the fall.
5:00:23 p.m.	An HEB employee starts down the aisle but almost immediately turns around and walks back out of the camera's view.
5:01:24 p.m.	Painter comes into view and walks to the stocking cart. As she nears the cart, she is mostly looking down or at the cart.
5:01:31-5:01:36 p.m.	Painter arrives at the cart and walks to its far side, from which she will work. Her back is to the location of the fall. Molina and her companion come into view. Molina's companion is pushing a cart and is slightly ahead of her. Molina stops at a bin, takes something out, and walks on.
5:01:43 p.m.	Molina reaches Painter's position. Molina's companion has walked over the location of the fall.
5:01:46 p.m.	Molina slips. Her companion and Painter walk over to her. Painter places what appears to be paper towels on the spot, and other HEB employees soon arrive to clean up and speak to Molina.

The floor is a greyish-brown color, and the parties concede that the video quality is such that the liquid on which Molina slipped does not show up on the tape.

Molina argues that because the video does not show the spill itself, it reasonably can be inferred that the substance was on the floor before the tape began, at least seventeen minutes

before Molina fell. She further contends that because that area of the aisle is unused for the one minute and thirty-three seconds leading up to her fall, that amounts to "'some' temporal evidence" that the spill occurred at least that long before Molina fell. That, she insists, combined with the fact that Painter was nearby when Molina slipped, would allow a reasonable person to "differ on whether HEB had constructive notice of the spill." We disagree.

"[W]hen circumstantial evidence is relied upon to prove constructive notice, the evidence must establish that it is more likely than not that the dangerous condition existed long enough to give the proprietor a reasonable opportunity to discover the condition." *Gonzalez*, 968 S.W.2d at 936. "[M]eager circumstantial evidence from which equally plausible but opposite inferences may be drawn is speculative and thus legally insufficient to support a finding." *Id*. As explained by the supreme court:

> What constitutes a reasonable time for a premises owner to discover a dangerous condition will, of course, vary depending upon the facts and circumstances presented. And proximity evidence will often be relevant to the analysis. Thus, 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. Similarly, if an employee 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. But in either case, 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. Otherwise, owners would face strict liability for any dangerous condition on their premises, an approach we have clearly rejected.

Reece, 81 S.W.3d at 816.

In *Reece*, similar to HEB's policy here, Wal-Mart's policy "required employees to intervene whenever they passed a known hazard anywhere in the store," and an employee was in the immediate vicinity at the time Reece fell, having ordered a drink from the snack bar just before the fall, but said that he did not notice the liquid until after the fall. *Id.* at 814. The supreme court stated that, in finding constructive notice, the court of appeals "relied on two factors in addition to [the employee's] proximity that it believed constituted some evidence of constructive notice"—a store manager's acknowledgement that self-service drinks and ice "increased the risk of spills" and the store's policy requiring employees to address hazards anywhere in the store. *Id.* at 817. However, the supreme court said, "this evidence is immaterial to the constructive-notice issue. It is undisputed that [the employee] did not notice the hazard that he purportedly walked past; thus, the hazard was not known and the store's policy was not implicated. Moreover, assuming the fairly obvious fact that spills are more likely to occur in a self-serve beverage area, that does not relieve Reece of her burden to prove the required premises-liability elements." *Id.* The court held that evidence of the employee's proximity was not sufficient to allow the jury to infer that Wal-Mart had a reasonable opportunity to discover the spill and reversed the jury's verdict in Reece's favor. *Id.*

Similar facts were presented in *Fontenette-Mitchell v. Cinemark USA, Inc.*, No. 03-16-00201-CV, 2016 WL 6833104 (Tex. App.—Austin Nov. 16, 2016, no pet.) (mem. op.), *Cox v. H.E.B. Grocery, L.P.*, No. 03-13-00714-CV, 2014 WL 4362884 (Tex. App.—Austin Aug. 27, 2014, no pet.) (mem. op.), and *Sova v. Bill Miller Bar-B-Q Enters., Ltd.*, No. 03-04-00679-CV, 2006 WL 1788231 (Tex. App.—Austin June 30, 2006, no pet.) (mem. op.). In *Fontenette-Mitchell*, a customer slipped on a "foreign, wet substance" while attending the movie theater's first showing of the day, but there was no evidence of how long the liquid had been on the floor, the plaintiff

admitted that she did not see it before she fell, and the assistant manager testified that he had not seen it during his morning inspection. 2016 WL 6833104, at *3. Thus, it was "equally plausible that another patron caused the substance to be on the floor between the opening of the theater and Fontenette-Mitchell's arrival." *Id.* In *Cox*, a store video showed the plaintiff's fall, apparently having slipped on a piece of peach, but the "poor quality of the video recording precludes any conclusion" about when the peach was dropped because no peach is visible either before or after the fall. 2014 WL 4362884, at *3. The Court stated that the video was "legally insufficient to constitute competent summary judgment proof of how long the piece of peach was on the floor," that there was no evidence "that anyone saw the peach piece on the floor before the fall," and that it was "equally probable that the peach piece was on the floor for two minutes or two hours." *Id.* The Court concluded that "no evidence in the record, either direct or circumstantial, that would allow a factfinder to infer that the peach piece was on the floor long enough to charge H.E.B. with notice of it." *Id.* In *Sova*, the plaintiff slipped on what she believed was melted ice because the liquid on her jeans was cool and she slipped near the restaurant's condiment bar. 2006 WL 1788231, at *3. The Court noted that, if it was melted ice, the ice could have fallen from another customer's drink "just as easily as from the condiment bar," and that it was "just as likely that the puddle was created while Sova was standing at the condiment bar (leaving [the restaurant] virtually no time to discover and remedy the condition) as it was that the substance had been on the floor for some time." *Id.*

In each of those cases, the reviewing court noted that, "with no evidence as to the length of time the substance was on the floor, there is no basis upon which a factfinder could assess the opportunity [the defendant] had to discover and remove it." *Fontenette-Mitchell*, 2016 WL 6833104, at *3; *see Cox*, 2014 WL 4362884, at *3 ("With no evidence as to the length of time the

peach piece was on the floor, there is no basis upon which a factfinder could assess the opportunity H.E.B. had to discover and remove it."); *Sova*, 2006 WL 1788231, at *4 ("It was Sova's burden to produce more than a scintilla of evidence demonstrating that [the restaurant] had actual or constructive knowledge of an unreasonably dangerous condition on its premises, based on either a specific puddle that was on the floor long enough for [the restaurant] to have discovered and rectified it or on the manner in which the condiment bar was generally maintained.").

The evidence is undisputed that Painter did not see the liquid on the floor until after Molina had fallen. The video does not show any substance on the floor. It 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. And if the spill occurred one minute and thirty seconds before Molina slipped, as she asserts a jury could have inferred, no one from HEB walked past the spill in that time. This case is similar to *Reece* and the other cases discussed above in that there is no evidence of when the spill occurred and no evidence that would allow an inference that HEB had a reasonable opportunity to discover and clean up the spill. *See* 81 S.W.3d at 817; *Fontenette-Mitchell*, 2016 WL 6833104, at *3; *Cox*, 2014 WL 4362884, at *3; *Sova*, 2006 WL 1788231, at *4. We therefore affirm the trial court's granting of summary judgment in HEB's favor.

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David Puryear, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: October 19, 2017