IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

January 26, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

		E1999-02285-COA-R3-CV
MAUREEN McINTYRE,	)	03A01-9905-CV-00189
	)	
Plaintiff/Appellant	)	Appeal As Of Right From The
	)	HAMILTON COUNTY
vs.	)	CHANCERY COURT
	)	
CBL & ASSOCIATES MANAGEMENT INC.,	)	HON. L. MARIE WILLIAMS
CBL & ASSOCIATES, INC., LEE PARTNERS,	)	JUDGE
a limited partnership, and SHARED	)	
APPRECIATION 1, LTD.,	)	
	)	
Defendants/Appellees	)	

For the Appellant:
Charles D. Paty
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For the Appellees:
Thomas E. LeQuire
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AFFIRMED and REMANDED Swiney, J.

O P I N I O N

____________In this case, the Trial Court granted Defendants' motion for directed verdict after hearing Plaintiff's proof on her claim that the Defendants as the owners of a building negligently maintained a restroom in the building, and that this negligence caused Plaintiff to slip and fall. We affirm the judgment of the Trial Court.

BACKGROUND

Maureen McIntyre ("Plaintiff") owns a business which leases office space from CBL & Associates Management, Inc. and other named parties, ("Defendants") at One Park Place, Chattanooga. On January 3, 1994, she was using the restroom facilities provided by Defendants and

slipped and fell. She sustained injuries to her lower back and knee. She underwent two arthroscopic surgeries for her knee injury.

Plaintiff alleged in her Complaint that the towel rack in the restroom was installed too far away from the sink, causing patrons who use the sink to drip water from the sink to the floor while reaching for a paper towel. She also alleged that Defendants failed to inspect the premises and failed to keep spilled water off the floor. Plaintiff further alleged that these actions or inactions by the Defendants created the hazard which caused her injuries, and that Defendants failed to warn her of the danger.

Defendants answered that there was no hazardous condition on the premises. In the alternative, Defendants answered that if such a condition existed, Plaintiff failed to exercise ordinary and reasonable care for her own safety so that her fault was equal to or greater than Defendants' and bars Plaintiff's recovery. Defendants also answered that Plaintiff, as a long-term resident of the building, had knowledge equal to or greater than that of Defendants of any potential danger, and that Plaintiff assumed the risk of any dangerous condition.

Trial was held on March 30, 1999. Plaintiff testified at trial that she moved her business from Eastgate Mall to Defendants' building in 1984 and has leased the same office space from Defendants since that time. When she is at work, she uses the women's restroom down the hall from her office. That restroom has four stalls on the right wall and two sinks and a paper towel dispenser on the left wall. The floor is tiled and there is a drain in the center of the floor.

Plaintiff testified that on January 3, 1994, she arrived at her office at 8:00 or 8:15 a.m. and started doing paperwork. She went to the restroom at about 9:00 a.m. She was wearing flat dress shoes with leather soles. She got a few steps in the restroom and "my feet went out from underneath me and I wound up on my back in the floor." She remembers realizing she was going to fall and remembers feeling a lack of control knowing that her feet were not below her any more. She remembers that a woman came in, and Plaintiff told her that if she could just get some water that she would be fine. She thought the wind had been knocked out of her at the time. A woman from

a nearby office came in the restroom, got her a drink of water and called a "big fellow to lift me up. And he said, no, look at your knee. And it was all swollen." Someone called an ambulance, and she was taken to a local hospital. She had arthroscopic surgery, was treated with coritsone shots for six to ten months, and then had a second arthroscopic surgery. She still has pain in the knee and takes pain medication and water therapy.

Plaintiff testified that she had used the same restroom at work at least once or twice every day for nine or ten years before the day on which she fell. During that nine or ten years, the sinks and towel rack were always in the same place and the tile floor was the same. For the most part, she had always found the restroom to be well kept and well maintained and clean. She had never seen any water on the floor of the restroom and had never made any complaints to any of Defendants' employees about the condition of the restroom in general. Specifically, she never told anyone about any water on the floor because she had never found water on the floor. She had occasionally seen paper towels on the floor. On the morning she fell, she never saw anything on the floor that would have caused her to fall, but she wasn't looking at the floor. If there were something on the floor that caused her to fall, she doesn't know how it got there or how long it had been there. She doesn't know whether any employee of Defendants was ever told by anyone that there was anything on the floor that might be a hazard or danger.

Plaintiff's witness, Frances Hatfield, worked for Plaintiff for about five years but now works for another company. Hatfield testified that she was at work for Plaintiff on the morning of January 3, 1994. Plaintiff left the office and said she would be back in a moment. Then a woman from another office came in and told Hatfield that Plaintiff had fallen in the bathroom. Hatfield went in the bathroom and found Plaintiff lying on the floor. Someone called an ambulance and Hatfield "basically just held her hand . . . ." Hatfield testified that she remembers there were a few droplets of water on the floor, in the middle of the floor near where Plaintiff was lying, and there was a skid place or smeared place there. Hatfield did not recall whether she had been in the restroom that morning before Plaintiff fell, and she did not know what kind of condition the facility was in before

Plaintiff's fall. Hatfield testified that this was not the first time she had seen water on the floor. Hatfield said she had seen water on the floor in that bathroom daily or almost daily and she would wipe up droplets off the floor. Hatfield also testified that "everybody that walked in that bathroom from the day I went to work there in '92 I complained to them about that." However, she had no specific memory of making any complaints to any of Defendants' employees, including the Maintenance Coordinator, Charlotte Nabors.

Charlotte Nabors testified by deposition that she has been employed by the Defendants as the Maintenance Coordinator at One Park Place for about ten years. Cleaning maintenance is contracted through an independent company, "ERMC," which cleans the building daily from 5:00 p.m. until 9:30 p.m. That company is not located on site, and there is no maintenance person on site during the day. When a lightbulb goes out or paper towels are needed or the restroom needs to be cleaned during regular office hours, Nabors receives the calls and, on occasion, has cleaned the restroom herself. She received complaints about the restrooms needing to be cleaned occasionally, maybe once or twice every couple of months. "It was normally a commode had overrun or something of that occasion. There may be a little bit of water on the floor where the commode had overflowed." During the ten years that she has been Maintenance Coordinator, no one has ever slipped or fallen in any of the restrooms in the building. She has never had any complaint by any tenant or anyone else that water on the floor in the bathrooms was an ongoing problem creating any kind of a danger or hazard. She has never been told to clean the restroom or to make regular inspections of the premises on a daily basis, but she does look over the building occasionally on a weekly to monthly basis to see that the maintenance contractor performs its work. She has never found any problems with water on the floor in the bathrooms that's created any kind of hazard. No routine written record of maintenance complaints or requests is made.

Nabors testified that she went to the restroom after Plaintiff fell and stayed there for five minutes until the paramedics assisted Plaintiff. She went back later that day to check the bathroom and did not find anything on the floor that would have presented a hazard or danger to

anybody. She made a written incident report indicating that there were small drops of water on the floor because someone told her that. She testified that she does not remember who told her about drops of water on the floor, but on cross-examination she acknowledged making an earlier statement about a conversation with Plaintiff in which "Basically she [Plaintiff] said that there were drops of water on the floor."

At the close of Plaintiff's proof, and upon motion of the Defendants, the Trial Court granted a directed verdict in favor of Defendants. The Trial Court found:

> . . . that plaintiff had failed to make out a case against defendants and carried her burden of going forward and that reasonable minds could not differ as to conclusions to be drawn from the evidence and that [the] motion should be granted.

Plaintiff appeals, contending that the directed verdict should not have been granted because there is material evidence in the record that would support a verdict for the Plaintiff and that reasonable minds could draw more than one conclusion from the proof.

Discussion

Since the propriety of the Trial Court's granting of a motion for directed verdict is a question of law, we review the record de novo with no presumption of correctness of the Trial Court's decision. *Underwood v. Health Services of Tennessee, Inc.,* 892 S.W.2d 423, 425 (Tenn. Ct. App. 1994). We do not assess the credibility of witnesses, *Id.*, or weigh the evidence. *Benton v. Snyder,* 825 S.W.2d 409, 413 (Tenn. 1992). We must view the evidence in the light most favorable to the non-moving party, take the strongest legitimate view of it in favor of the opponent of the motion, and allow all reasonable inferences from it in her favor. *Arcata Graphics Co. v. Heidelberg Harris, Inc.,* 874 S.W.2d 15, 21 (Tenn. Ct. App. 1993) (quoting *Country Maid Dairy, Inc. v. Hunter,* 57 Tenn. Ct. App. 138, 149, 416 S.W.2d 367, 372 (1967). If there is any material evidence in the record that would support a verdict for the non-moving party, or any reasonable doubt as to the conclusion to be drawn from the evidence, the Court should deny the motion. *Potter v. Tucker,* 688 S.W.2d 833, 835 (Tenn. Ct. App. 1985); *Tennessee Farmers' Mut. Ins. Co. v. Hinton,* 651 S.W.2d 235, 238 (Tenn. Ct. App. 1983).

Plaintiff in this case has alleged that Defendants' negligence caused her injury. In a case factually similar to the case now before us, we described the standards for evaluating a motion for directed verdict in negligence cases:

> A directed verdict is appropriate when the evidence supports only one conclusion. *Williams v. Brown,* 860 S.W.2d 854, 857 (Tenn. 1993). However, "[a] case should go to the jury, even if the facts are undisputed, if reasonable persons could draw conflicting inferences from the facts." *Underwood v. HCA Health Services of Tenn., Inc.,* 892 S.W.2d 423, 426 (Tenn. Ct. App. 1994) (citing *Sauls v. Evans,* 635 S.W.2d 377, 379 (Tenn. 1982)). The jury is permitted to reasonably infer facts from circumstantial evidence, and these inferred facts may be the basis of further inferences of the ultimate fact at issue. *Benson v. H. G. Hill Stores, Inc.,* 699 S.W.2d 560, 563 (Tenn. Ct. App. 1985). "An inference is reasonable and legitimate only when the evidence makes the existence of the fact to be inferred more probable than the nonexistence of the fact." *Underwood,* 892 S.W.2d at 426. On the other hand, the jury is not permitted to engage in conjecture, speculation, or guesswork as to which of two equally probable inferences is applicable. *Stringer v. Cooper,* 486 S.W.2d 751, 756 (Tenn. Ct. App. 1972).

Martin v. Washmaster, 946 S.W.2d 314, 317 (Tenn. Ct. App. 1996) *perm. app. denied* (Tenn. 1997).

Applying this standard, we must determine whether, as a matter of law, Plaintiff's evidence would enable a reasonable person to conclude that her injury was, more probably than not, caused by Defendants' negligence.

A negligence claim requires a plaintiff to prove the following elements:

> (1) a duty of care owed by the defendant to the plaintiff;
> (2) conduct by the defendant falling below the standard of care amounting to a breach of the duty;
> (3) an injury or loss;
> (4) causation in fact; and
> (5) proximate causation.

Rice v. Sabir, 979 S.W.2d 305, 308 (Tenn. 1998).

In order for an owner or operator of premises to be held liable for negligence in allowing a dangerous or defective condition to exist on its premises, it must be shown that the condition (1) was caused or created by the owner, operator, or his agent, or (2) if the condition was created by someone other than the owner, operator, or his agent, there must be actual or constructive notice on the part of the owner or operator that the condition existed prior to the accident.

Washmaster, 946 S.W.2d at 318 (citing *Ogle v. Winn-Dixie Greenville, Inc.,* 919 S.W.2d 45, 47 (Tenn. Ct. App. 1995); *Jones v. Zayre, Inc.,* 600 S.W.2d 730, 732 (Tenn. Ct. App. 1980). Constructive knowledge can be shown by proving the dangerous or defective condition existed for such a length of time that the Defendant, in the exercise of reasonable care, should have become aware of such condition. *Simmons v. Sears, Roebuck and Co.,* 713 S.W.2d 640, 641 (Tenn. 1986).

An owner or occupier of premises has a duty to exercise reasonable care by removing or warning against latent or hidden dangerous conditions on the premises which it is aware of or should have been aware of through the exercise of reasonable diligence. *See Blair v. Campbell,* 924 S.W.2d 75, 76 (Tenn. 1996). That duty may exist even where the injury-causing condition is alleged to be "open and obvious" to the plaintiff. *Coln v. City of Savannah,* 966 S.W.2d 34, 43 (Tenn. 1998). However, our Supreme Court has held:

> The duty imposed on the premises owner or occupier, however, does not include the responsibility to remove or warn against "conditions from which no unreasonable risk was to be anticipated, or from those which the occupier neither knew about nor could have discovered with reasonable care." Prosser and Keeton on Torts, supra § 61 at 426. In this regard, "the mere existence of a defect or danger is generally insufficient to establish liability, unless it is shown to be of such a character or of such duration that the jury may reasonably conclude that due care would have discovered it."

Rice v. Sabir, 979 S.W.2d at 309

As explained in *Washmaster,* we must determine whether, as a matter of law, Plaintiff's evidence would have enabled a reasonable jury to conclude that her injury was, more probably than not, caused by Defendants' negligence. That conclusion requires a showing that the condition (1) was caused or created by the owner, operator, or his agent, or (2) if the condition was created by someone other than the owner, operator, or his agent, there must be actual or constructive notice on the part of the owner or operator that the condition existed prior to the accident. Constructive knowledge can be shown by proving the dangerous or defective condition existed for such a length of time that the Defendants, in the exercise of reasonable care, should have become aware of such condition. *Washmaster,* 946 S.W.2d at 318.

The evidence viewed in the light most favorable to Plaintiff shows that Plaintiff had

worked in Defendant's building for ten years and used this same restroom daily throughout that time. By her own testimony, she had never seen water on the floor, had never complained of water being on the floor, and did not see water on the floor on the day she fell. The Maintenance Coordinator had seen water on the floor in the past from the overflow of toilets, and had cleaned it up. Another witness testified that she had seen water on the floor almost daily and had cleaned it up. However, this witness testified that she does not know that she ever reported the problem to the Maintenance Coordinator or any employee of the Defendants. That witness testified that she saw a "few droplets" of water and a smear on the floor when she went to the bathroom after being told that Plaintiff had fallen.

There was no proof that Defendants caused or created this condition, water droplets on the floor. There was no proof that Defendants had actual notice of this condition. Moreover, there was no evidence in the record showing how those water droplets got on the floor or how long they had been on the floor. Without any proof as to how long the water droplets had been on the floor, there was no evidence in this record by which the jury reasonably could have concluded that by exercising due care the Defendants would have discovered the condition. Did the water get on the floor right before the Plaintiff went in the bathroom? Had the water been on the floor for an hour? How did the water get on the floor? Did the water get on the floor when the Plaintiff was brought a drink of water? There was no evidence presented to the jury by which a reasonable jury could have determined that this water had been on the floor for a sufficient length of time that the Defendants, in the exercise of reasonable care, would or should have discovered it. That being the case, the jury would have been forced to speculate whether or not Defendants were negligent. Such speculation or guesswork by the jury is not permitted. *See Martin v. Washmaster*, 946 S.W. 2d at 317.

This Court faced a similar situation in *Chambliss v. Shoney's Inc.,* 742 S.W.2d 271 (Tenn. Ct. App. 1987). In that case the Trial Court directed a verdict for the Defendant in a situation where the Plaintiff had fallen in a large puddle of water in the Defendant restaurant's bathroom. The

Plaintiff had no information as to the origin of the water. It was Plaintiff's theory that the water was tracked in from outside as the proof showed that there was snow and slush outside. In upholding the Trial Court's decision to grant a directed verdict in favor of Defendant, this Court stated that "[t]here is no evidence of the source of the water which caused the Plaintiff to fall." Id. At 273. In the case now before us, there is neither proof of the source of the water droplets seen by Ms. Hatfield nor proof concerning how long the droplets had been on the floor.

CONCLUSION

We find the Trial Court did not err in taking the matter from the jury by granting Defendants' motion for directed verdict. The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for such further proceedings, if any, as may be required, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellant, Maureen McIntyre.

D. MICHAEL SWINEY, J.

CONCUR:

HOUSTON M. GODDARD, P.J.

HERSCHEL P. FRANKS, J.