Affirmed and Opinion filed April 4, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00100-CV

VELMA PARRISH, Appellant

V.

RICE FOOD MARKETS, INC., Appellee

On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 96-18668

O P I N I O N

Appellant Velma Parrish appeals from a take-nothing jury verdict in favor of appellee Rice Food Markets, Inc., in her slip-and-fall action against the store.

In her lawsuit, Parrish claimed she broke her ankle in July of 1994 when she slipped and fell in a watery substance near a frozen foods cooler while shopping at a Rice Food Markets store. The jury found neither party was negligent. Under four points of error, appellant challenges the sufficiency of the evidence, complains of the trial court's voir dire of a witness, and its exclusion of certain testimony. We affirm.

Exclusion of Broussard's Testimony

Under her first point of error, Parrish complains the trial court erred in excluding certain deposition testimony of witness Yolanda Frank Broussard, an employee of Rice Food Markets. According to appellant, the trial court excluded Broussard's testimony that the subject cooler and other store coolers had leaked at times while she was employed at the store, and that paper towels and other materials were used to absorb the leaking water.

Our review of the record fails to reflect that these deposition excerpts were excluded by the trial court, and appellant has not aided our review with citations to the record to show where the excerpts were introduced and excluded. To complain of excluded evidence on appeal, the record must show that the evidence was presented to the trial court and that the trial court excluded the evidence. *See Richards v. Commission for Lawyer Discipline*, 35 S.W.3d 243, 252 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Appellant did present an offer of proof (or bill of exceptions) after the close of evidence, reading into the record the purportedly excluded testimony. While she asserts this offer was merely to clarify what had previously been offered, the trial court disagreed with that characterization and the record lends appellant no support.

Moreover, even had this evidence been properly offered, its exclusion would not have constituted reversible error. Broussard's deposition excerpts established only that the coolers in aisle 12 had leaked some time before Parrish's fall; Broussard was unable to say whether they leaked the day of the fall. Her testimony was also cumulative of similar testimony provided by witness Karen Price, who testified emphatically that she had regularly observed cooler leaks at the store, including the morning of appellant's fall. We cannot say that, even had the proffered portions of Broussard's deposition testimony been excluded, that such exclusion probably resulted in the rendition of an improper judgment. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). The first point of error is overruled.

Voir Dire of Witness

By her second point of error, appellant complains the trial court erred in allowing voir dire of her witness Karen Price, that doing so was a comment on Price's credibility, and hindered appellant's ability to present Price as a witness. Appellant further complains that by telling the jury it would be staying a few minutes past 5:00 p.m., the trial court exerted a "chilling effect" on appellant's ability to present the witness. We find no merit to any of these claims.

During her direct examination of Price, appellant asked the witness whether she ever saw water leaking from the freezers at the Rice store during 1994. Appellee objected, at which point the trial court excused the jury and asked to hear Price's testimony prior to letting the jury hear it. Appellant did not object to the court's request, and commenced presentation of the witness outside the presence of the jury. The trial court then invited cross-examination and re-direct, to which appellant again did not object. The trial court did not ask the witness any questions. The jury was returned and informed by the trial court that trial would be continuing for a "little bit over 5:00." Appellant then presented Price as a witness and both sides examined and passed her as a witness.

As appellant failed to object to any of these actions by the trial court, any alleged error has been waived. Nothing in the record demonstrates any comment by the trial court on Price's credibility, any "chilling effect" on appellant's ability to present the witness, or that appellant was in any way unduly hindered in presenting Price as a witness to the jury. To the contrary, counsel for appellant stated a desire to "finish up" with Price so that Price could return to work the next day, such that any time limitation was due to appellant's own scheduling. Appellant does not show how any of the trial court's actions, individually or collectively, led to the rendition of an improper judgment, and our review of the record fails to show that the trial court's actions were improper. A trial court exercises substantial discretion in determining the general conduct of a trial, and even with proper objections, such decisions will not be set aside unless they constitute an abuse of that discretion. *Metzger v.*

Sebek, 892 S.W.2d 20, 38 (Tex. App.—Houston [1st Dist.] 1994, writ denied). No abuse of discretion is shown here, and appellant's second point of error is overruled.

Challenges to the Sufficiency of the Evidence

By her third and fourth points of error, Parrish alleges that the jury's failure to find Rice Food Markets negligent or that appellant sustained damages is against the great weight and preponderance of the evidence. In considering whether a jury's negative finding is against the great weight and preponderance of the evidence, we review the entire record. *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951). Reversal and remand for a new trial is warranted only if the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Id.*

Appellant argues the evidence clearly established that she slipped and fell in water located close to the aisle 12 freezers, and that from prior leaks Rice Food Markets knew of the dangerous condition. But no witness, not even Parrish herself, testified that water was leaking from the coolers at the time of or shortly prior to her fall. Two Rice Food Markets employees testified that they had inspected the entire store ten minutes prior to appellant's fall as part of their procedures for closing at midnight, and did not see any leaks or water on the floor where appellant fell. According to Broussard, the water was a small puddle in the middle of the aisle, with no obvious source or point of origin. Another store employee testified that Parrish fell some fifteen or twenty feet away from the aisle 12 coolers, and some four feet away from the water itself. Parrish testified she assumed she had slipped in the water, but admitted that her clothing was dry after she fell.

When circumstantial evidence is relied upon to prove constructive notice of the unreasonably dangerous condition, 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. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). Here, the evidence was conflicting as to prior leaks, any source for and

duration of the puddle involved, and even whether the puddle was involved in appellant's fall. The jury's failure to find negligence on the part of Rice Food Markets is not so against the great weight and preponderance of the evidence as to be manifestly unjust, and appellant's third point of error is overruled.

In her fourth and final point of error, appellant complains that the jury's failure to find damages is against the great weight and preponderance of the evidence. A failure to find damages is immaterial in absence of a finding of negligence. *Jones v. Lurie*, 32 S.W.3d 737, 744 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Appellant's fourth point of error is overruled.

The judgment is affirmed.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed April 4, 2002.
Panel consists of Chief Justice Brister and Justices Anderson and Frost.
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