Affirmed and Opinion filed December 14, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00581-CV

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BARBARA CARLSON, Appellant

V.

FIESTA MART, INC., Appellee

On Appeal from the County Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 703,042

O P I N I O N

This is an appeal from a no evidence summary judgment in Barbara Carlson's premises liability suit. Carlson raises two points of error, challenging the grant of Fiesta's motion for summary judgment and the lack of notice of assignment of a visiting judge. We affirm.

Carlson slipped and fell while shopping in a Fiesta grocery store. Carlson claimed she slipped on a liquid substance that smelled like lighter fluid. Carlson alleged the liquid substance covered the width of the store aisle. Carlson sustained injuries to her hand, knee, and thigh.

Summary Judgment

In her first issue, Carlson claims the trial court erred in granting Fiesta's motion for summary judgment because her response to the motion pointed out evidence raising fact issues. This evidence included her affidavit and Fiesta's incidents report.

When reviewing a no-evidence summary judgment, we apply the same standard as applied to a review of a directed verdict. *See Grant v. Joe Myers Toyota, Inc.*, 11 S.W.3d 419, 422 (Tex. App.–Houston [14th Dist.] 2000, no pet.). We review the summary judgment proof in the light most favorable to the nonmovant, disregarding all contrary proof and inferences. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). A trial court may not grant a no-evidence summary judgment if the nonmovant brings forth more than a scintilla of proof to raise a genuine issue of material fact. *See Grant*, 11 S.W.3d at 422. If the proof, however, "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions," the nonmovant has provided more than a scintilla of proof and summary judgment is improper. *See Havner*, 953 S.W.2d at 711. To defeat a no-evidence summary judgment, the nonmovant need not marshall its proof, but it must point out evidence that raises a fact issue on the challenged elements. *See* TEX. R. CIV. P. 166a (comments).

Because Carlson alleged premises liability, she as an invitee of Fiesta Mart was required to establish the following elements:

> (1) Actual or constructive knowledge of some condition on the premises by the owner/operator;
>
> (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 the owner/operator's failure to use such care proximately caused the plaintiff's injuries.

Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992).

An inference of knowledge of the condition may arise if the defendant placed the foreign substance on the floor, knew it was there and negligently failed to remove it, or if the substance was on the floor so long that the defendant should have known of its existence and removed it in the exercise of ordinary care. *See id.* at 265. If uncontroverted, this inference is sufficient to support a finding of knowledge as a matter of law. *See id.*

In its motion for summary judgment, Fiesta claimed there was no evidence it had knowledge of the foreign substance on the floor. Citing *Keetch*, Fiesta argued that, because Carlson had produced no proof of Fiesta's knowledge of the condition, and because Fiesta had denied knowledge, an inference of knowledge was controverted.

Fiesta misunderstands the court's statement in *Keetch*. The court did not say that, if the defendant denies knowledge, the inference of knowledge disappears. Instead, the *Keetch* court stated that denial of knowledge would prevent the inference of knowledge from constituting proof of knowledge as a matter of law. *See id.* 845 S.W.2d at 265. Denial of knowledge merely raises a fact issue.

Nonetheless, the summary judgment record supports the trial court's finding of no evidence that Fiesta had actual or constructive knowledge of the fluid on the store aisle floor. Carlson's affidavit in response to the motion for summary judgment offers evidence that she claims raises an inference of knowledge. Because Carlson observed no broken or open containers of lighter fluid on the floor, Carlson alleged that fluid must have been leaking from containers on the shelf and, because the spill was so large, the leak must have been occurring for some time. Carlson contends that Fiesta would have detected the spill if a regular inspection had been conducted.

In response to this argument, Fiesta contends that Carlson's proof of knowledge consists solely of circumstantial evidence, but, more importantly, Carlson's proof rests on speculation. From the lack of a broken or open container on the floor, Carlson infers that a container on the shelf must have been leaking, and assuming a container on the shelf was leaking, it must have been leaking a long time because the pool of liquid on the floor was large.

Based on these inferences, Carlson reasoned that the liquid was on the floor for so long that Fiesta should have known about the substance on the floor and removed it in the exercise of ordinary care.

Carlson has presented no proof, other than mere speculation, that a container of lighter fluid on the shelf was leaking. Therefore, the inference that the liquid had been on the store floor for a long period of time is based on pure speculation.

> An ultimate fact may be established by circumstantial evidence, but the circumstances relied upon must have probative force sufficient to constitute a basis of legal inference. It is not enough that the facts raise a mere surmise or suspicion of the existence of the fact or permit a purely speculative conclusion. The circumstances relied on must be of such a character as to be reasonably satisfactory and convincing, and must not be equally consistent with the non-existence of the ultimate fact.

See Summers v. Fort Crockett Hotel, Ltd., 902 S.W.2d 20, 25 (Tex. App.–Houston [1st Dist.] 1995, writ denied). Because Carlson's proof of knowledge is based on mere speculation, it is insufficient to defeat a no evidence motion for summary judgment.

Appointment of Visiting Judge

In her second issue, Carlson claims it was error for the trial court to appoint a visiting judge to rule on the summary judgment motion without notice to Carlson of the appointment.

When a judge is assigned to a court, the presiding judge of the administrative region "shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case. . . ." TEX. GOV'T CODE ANN. § 74.053(a) (Vernon 1998). Thus, notice is not mandatory. *See Tivoli Corp. v. Jewelers Mut. Ins. Co.*, 932 S.W.2d 704, 709 (Tex. App.–San Antonio 1996, writ denied). Carlson has not included the assignment in the record and did not object to the visiting judge. Accordingly, we find no error requiring reversal.

We affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed December 14, 2000.

Panel consists of Justices Anderson, Fowler and Edelman.

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