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2012 IL App (3d) 110423-U

Order filed May 8, 2012

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

GLORIA BALLERINI,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiff-Appellant,	)	La Salle County, Illinois
	)	
v.	)	Appeal No. 3-11-0423
	)	Circuit No. 09-L-107
	)	
WAL-MART STORES, INC.,	)	Honorable
	)	Eugene P. Daugherty,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices McDade and O'Brien concurred in the judgment.

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**ORDER**

¶1 *Held:* The trial court properly granted summary judgment for defendant on plaintiff's claims of common law negligence and spoliation of evidence. The appellate court, therefore, affirmed the trial court's judgment.

¶2 Plaintiff, Gloria Ballerini, filed suit against defendant, Wal-Mart Stores, Inc., to recover for injuries she sustained when she tripped and fell over a bag of mulch that was on the floor of defendant's store. Plaintiff's amended complaint alleged a common law negligence claim and a spoliation of evidence claim. Defendant filed a motion for summary judgment as to both claims, which the trial court granted after a hearing. Plaintiff appeals. We affirm the trial court's judgment.

¶ 3

## FACTS

¶ 4 At the time of the summary judgment hearing, the trial court had before it the pleadings, the written arguments of the parties, and the depositions of plaintiff, Wal-Mart garden supervisor Susan Eplin, Wal-Mart co-manager Tom Ryan, and Wal-Mart asset management coordinator Rita Perrin.<sup>1</sup>

¶ 5 In her deposition, the 83-year-old plaintiff testified that during the morning hours of November 4, 2008, she went to the Wal-Mart store in Ottawa to purchase some mulch. The only employees plaintiff saw in the garden center were two girls working at one of the checkout counters. Plaintiff went over to where bags of mulch had been stacked into a pile on display. She took one of the 40 pound bags down from the pile and inspected it. Satisfied with the condition of the mulch, plaintiff left the bag and turned around to go back to the checkout counter for assistance. After she took a couple of steps, plaintiff tripped over a broken bag of mulch that was on the floor, and fell to the ground hard, striking her left hip. Plaintiff was not in view of the checkout counter at the time and no one was in sight, so plaintiff managed to pull herself up. She went over to the checkout counter and told the two girls that she had fallen. A manager was called to the area. Plaintiff told the manager that if he checked the store's film, he would see how hard she had fallen. The manager wrote down plaintiff's name, address, and phone number on a piece of paper, which according to plaintiff was not an incident report. Plaintiff bought some of the mulch, had it carried out to her car, and left the store. She did not seek medical attention at that time. Later that month, she suffered a blood clot in her spinal area, allegedly from the fall, and had to have surgery. According to plaintiff, one of her doctors told her that a blood clot of that nature was usually brought on by a fall.

¶ 6 During deposition questioning, plaintiff denied that she told the store manager or the cashiers

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<sup>1</sup>Perrin also provided an affidavit, which was similar to her deposition testimony.

that she did not want to fill out an incident report. Rather, plaintiff testified that she told the manager that she wanted to fill out an incident report, but the manager did not do so. Plaintiff admitted that she did not know how the broken bag of mulch got on the floor or how long it had been on the ground. Plaintiff stated that she did not see the bag of mulch on the ground when she initially approached the display or when she initially started to walk away from the display. Plaintiff testified that she was looking forward and was not looking at merchandise when she tripped, but later in the same deposition stated that she did not remember whether she was looking forward. During the deposition, plaintiff was shown photographs of the garden center in Wal-Mart and described where she fell in relation to the area that was depicted in one of the photographs.

¶ 7 Susan Eplin testified that she was the garden department manager at the Ottawa Wal-Mart store for the past 13 years. Eplin remembered when plaintiff fell but did not agree that it happened in November. Eplin started work the day of the fall at 7 a.m. She opened the doors and checked the garden-center area to make sure that it was clean and free of merchandise. Eplin picked up a few bags of merchandise that had fallen and put them back on the pallet. About mid-morning, 9 or 10 a.m., Eplin was told that a woman had tripped over a bag of mulch and wanted to talk to a manager. Eplin called Tom Neal, the manager who was working at the time. Eplin informed Neal what had happened, informed Neal that the woman wanted to speak to a manager, and told Neal to bring an accident report with him. Neal came to the garden center, went over to the checkout counter, and spoke to the woman. Eplin was moving freight and was not present for that conversation. After talking to the woman, Neal went over to Eplin and told her that the woman did not want to fill out an accident report. Eplin checked the area but did not see a bag of mulch on the floor. Eplin never had a conversation with the woman and did not document the occurrence in any way. The

occurrence stayed in her mind, however, because the woman did not fill out an accident report. Eplin did not know how the bag of mulch got on the floor or how long it had been there. According to Eplin, all Wal-Mart employees were supposed to inspect the floor, if they were not helping customers.

¶ 8 Roger Thomas Neal testified that he was a co-manager of the Ottawa Wal-Mart store and was working at the time of the fall. One of Neal's duties was to help document any incident, accident, or injuries that occurred in the store. According to Neal, by store policy, such occurrences were classified as either "accidents" or "incidents." If the injured person needed medical attention or indicated that he or she might seek medical attention, the occurrence was classified as an "accident," and Neal would try to get as much information as possible from the person; he would survey, and take pictures of, the scene; would send a request to determine if there was surveillance footage of the occurrence; would fill out an accident report on the computer; and would notify the claims department within 24 hours of the occurrence. On the other hand, if the person did not need medical attention and indicated that they were not going to seek medical treatment, the occurrence was classified as an "incident." "Incidents" were not put into the computer. Neal would take the person's information and keep it in the managers' file cabinet. If the "incident" did not get upgraded to an "accident," the file of the occurrence would eventually be discarded.

¶ 9 During his deposition testimony, Neal did not remember much about his conversation with plaintiff. He only remembered that he asked plaintiff if she wanted to fill out an accident report, and that plaintiff said that she did not want to. Neal did not write anything down about the occurrence because plaintiff told him that she was fine and Neal did not have any of plaintiff's information. Neal did not remember if he inspected the area after the fall. Neal did not input anything into the

computer for the occurrence and did not request surveillance footage because the occurrence never rose to the level of being an "accident." Neal had no knowledge of how the bag of mulch got on the floor on the date of the accident or how long it had been there.

¶ 10 Rita Perrin testified that she was the asset protection coordinator for the Wal-Mart store in Ottawa. As part of her duties, Perrin had control over the surveillance footage for the store and was responsible for making DVD copies of surveillance footage if an accident occurred. According to Perrin, there were over 300 video surveillance cameras in the store. About nine of those cameras were located in the garden center: four over the checkout counters and another five or six over the doors and the main traffic areas. Perrin did not recall being informed of an accident involving plaintiff or of being asked to check whether there was surveillance footage from the day in question. Perrin had no control over how long video remained on the surveillance system and testified that it was usually 60 to 120 days. Pursuant to store policy, such occurrences had to be reported to the claims department within 24 hours. When questioned about the specific area where the fall occurred, Perrin testified that there were no surveillance cameras in that area of the garden center and that there would not, therefore, be any surveillance footage from that area.

¶ 11 At the conclusion of the hearing on the motion for summary judgment, after hearing the arguments of the attorneys, the trial court granted the motion and entered summary judgment for defendant on both counts of the complaint. Plaintiff appealed.

¶ 12 ANALYSIS

¶ 13 As her first point of contention on appeal, plaintiff argues that the trial court erred in finding that defendant had no legal duty to preserve the surveillance video from the date in question and in granting summary judgment for defendant on that basis on plaintiff's spoliation of evidence claim.

Plaintiff asserts that because defendant had notice of plaintiff's fall and had a standard procedure in place to preserve surveillance video in such instances, defendant had a duty to preserve the surveillance video in the instant case. Defendant argues that the trial court's grant of summary judgment for defendant on plaintiff's spoliation of evidence claim was proper and should be affirmed. Defendant asserts first that summary judgment was proper because plaintiff failed to establish that it had a legal duty to preserve the surveillance video. Second, and in the alternative, defendant asserts that summary judgment was proper because plaintiff failed to establish causation—that defendant's failure to preserve the surveillance video harmed plaintiff's underlying common law negligence claim.

¶ 14 The purpose of summary judgment is not to try a question of fact, but to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Adams*, 211 Ill. 2d at 43. Summary judgment should not be granted if the material facts are in dispute or if the material facts are not in dispute but reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill. 2d at 43. Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free from doubt. *Adams*, 211 Ill. 2d at 43. In appeals from summary judgment rulings, the standard of review is *de novo*. *Adams*, 211 Ill. 2d at 43.

¶ 15 A claim of spoliation of evidence may be stated under a negligence cause of action. See

*Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194 (1995); *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335-36 (2004); *Brobbey v. Enterprise Leasing Co. of Chicago*, 404 Ill. App. 3d 420, 433 (2010). To prevail on a negligence cause of action, a plaintiff must plead and prove the following elements: (1) that defendant owed a duty to the plaintiff; (2) that defendant breached that duty; (3) that defendant's breach proximately caused an injury to the plaintiff; and (4) that plaintiff suffered damages as a result. See *Boyd*, 166 Ill. 2d at 194; *Dardeen*, 213 Ill. 2d at 336. Generally, a defendant has no duty to preserve evidence. *Dardeen*, 213 Ill. 2d at 336. To establish that such a duty exists, a plaintiff must show that: (1) a duty to preserve evidence arose in the defendant by either agreement, contract, statute, special circumstance, or voluntary undertaking; and (2) the duty extended to the evidence in question in that a reasonable person would have foreseen that the evidence was material to a potential civil action. See *Dardeen*, 213 Ill. 2d at 336. If the plaintiff fails to satisfy either prong of the two-prong test, there is no duty to preserve the evidence in question. *Dardeen*, 213 Ill. 2d at 336.

¶ 16 In the present case, the evidence before the trial court at the summary judgment hearing did not establish that defendant had a duty to preserve the video surveillance footage. First, plaintiff presented no evidence to suggest that a legal duty to preserve the surveillance video arose in defendant. There was no agreement, statute, or special circumstances that would have given rise to such a duty, and defendant's internal policy to save its surveillance video if an accident occurred was not sufficient to constitute a voluntary undertaking that would create such a duty. See *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213, 238 (1996) (the law, not a defendant's internal policies, defines whether a duty exists). Second, plaintiff did not establish that it was reasonably foreseeable that material evidence relevant to a future litigation would be contained on the surveillance footage.

In fact, the evidence is undisputed that there was no surveillance cameras in the area of the garden center where the fall took place. Because plaintiff failed to establish either prong of the two-prong test, the trial court correctly concluded that defendant did not have a duty to preserve the surveillance footage from the day in question. The trial court, therefore, properly granted summary judgment for defendant on plaintiff's spoliation of evidence claim. Having reached that conclusion, we need not address defendant's alternative assertion on this issue—that plaintiff failed to establish causation.

¶ 17 As her next point of contention on appeal, plaintiff argues that the trial court erred in finding that defendant had no notice of the defective condition (the bag of mulch on the floor) and in granting summary judgment for defendant on that basis on plaintiff's common law negligence claim. Plaintiff asserts that viewed in the light most favorable to her, the evidence of notice was sufficient to create a genuine issue of fact that should have been submitted to the jury. Plaintiff asserts further that since the surveillance footage of the accident was not preserved, it must be presumed that the footage would have contained evidence sufficient to establish notice, a presumption which plaintiff claims is supported by her testimony that there were no Wal-Mart employees in the area when the accident occurred. Defendant argues that the trial court's ruling was proper and should be affirmed. Defendant asserts that trial court correctly determined as a matter of law that notice was lacking in this case because there was no evidence presented whatsoever to establish notice or an inference of notice.

¶ 18 As indicated above, in an appeal from a trial court's grant of summary judgment, the appellate court's standard of review is *de novo*. *Adams*, 211 Ill. 2d at 43. As a general rule, when a business invitee is injured by slipping on a foreign substance on the premises, liability will be imposed if: (1) the substance was placed there by or through the negligence of the proprietor, or (2) the proprietor's

servant knew of the presence of the substance, or (3) the proprietor had constructive notice of the substance in that the substance was there a sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered. *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980). In a case such as the instant case where constructive notice is alleged, time is a material factor, and "it is incumbent upon the plaintiff to establish that the foreign substance was on the floor long enough to constitute constructive notice to the proprietor." *Hayes*, 80 Ill. App. 3d at 1030. If there is evidence that tends to show constructive notice, the issue is a question of fact and must be submitted to the jury. See *Hayes*, 80 Ill. App. 3d at 1030; *Coultas v. City of Winchester*, 208 Ill. App. 3d 238, 240-41 (1991) (constructive notice is generally a question of fact for the jury). The issue of constructive notice, however, may be decided by the court as a matter of law when the facts are undisputed and only one reasonable inference can be drawn from the facts. *Coultas*, 208 Ill. App. 3d at 240-41.

¶ 19 In the present case, plaintiff relies upon constructive notice. However, there is simply no evidence from which constructive notice can be established or inferred, even when the evidence is viewed in the light most favorable to plaintiff. Neither plaintiff or any of the Wal-Mart employees involved had any information about how the bag of mulch got on the floor or about how long it had been sitting there. Plaintiff tries to get around this lack of evidence by claiming that the surveillance footage might have provided sufficient evidence to establish notice, but it is clear and undisputed in the record that there were no surveillance cameras in the area where plaintiff fell. Liability cannot be based upon surmise or conjecture. *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 817 (1981). Plaintiff failed to establish notice of the defect in the present case. The trial court, therefore, properly granted summary judgment for defendant on plaintiff's common law negligence claim.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of La Salle County.

¶ 21 Affirmed.