2018 IL App (2d) 170979-U
No. 2-17-0979
Order filed August 16, 2018



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| PAMELA POLLAK-BECKER and DANIEL M. BECKER,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>KMART STORES OF ILLINOIS, LLC, an Illinois Limited Liability Company, d/b/a KMART,<br><br>Defendant-Appellee. | ) | Appeal from the Circuit Court of Winnebago County.<br><br><br><br>No. 15-L-371<br><br><br>Honorable J. Edward Prochaska Judge, Presiding. |

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court did not err in striking a portion of plaintiff's affidavit for noncompliance with Supreme Court Rule 191(a) (eff. Jan 4, 2013). However, the court erred in granting summary judgment in favor of defendant store in this trip-and-fall negligence case, as the circumstantial evidence was sufficient to create a question of fact that defendant's employee caused the shopping basket upon which plaintiff fell to be on the floor. We therefore affirm in part, reverse in part, and remand.

¶ 2 Plaintiffs, Pamela Pollak-Becker and Daniel Becker, appeal the circuit court's grant of summary judgment in favor of defendant, Kmart Stores of Illinois, LLC (Kmart), in this ordinary

negligence action stemming from injuries Pamela received when she tripped on a shopping basket that was on the floor near Kmart's front registers. Plaintiffs argue that the court erred in striking a portion of Pamela's affidavit under Supreme Court Rule 191(a) (eff. Jan 4, 2013) and in granting defendant's motion for summary judgment. They contend that they produced sufficient circumstantial evidence to establish a genuine issue of material fact concerning whether a Kmart employee placed the shopping basket on the floor or, in the alternative, whether an employee had actual knowledge of the shopping basket's presence on the floor. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Shortly after midnight on November 29, 2013, Pamela approached the front check-out registers of the Rockford Kmart to purchase some clothes. She did not use a shopping cart or shopping basket to carry the items. Her husband, Daniel, waited in the car and fell asleep. Although it was "Black Friday," there were few customers inside the store, and it "was dead." The check-out aisles were staggered such that customers could walk easily from one register to another register on either side of it. Pamela first went to register 2, which was farthest to the right and closest to the store's entrance. The clerk there told Pamela that his drawer was being changed and that he could not ring her up. She then walked to the check-out lane two aisles over to her left, register 6, and she saw no shopping basket in her path. Register 6 was the only register that was not being changed out then.

¶ 5 Pamela waited in line at register 6 behind a customer who was in the process of being rung up. Other than herself and the customer ahead of her at register 6, no other customers were in or near the checkout area, and no customers approached register 6 or any of the registers to

Pamela's right while she waited in line. The only other people near the checkout registers were "about seven employees [who were] standing around."

¶ 6 After Pamela waited in line at register 6 for approximately two minutes, the clerk at register 2 looked at her and said that he could help her because his drawer change was complete. Pamela turned to her right, looked at the clerk, and began to walk back to register 2 using the same path she had just taken. She took two steps and encountered an empty red shopping basket, causing her to fall and become injured. She did not know whether she tripped over it or stepped into it and slipped. Pamela fell straight down and landed on the palms of her hands to break her fall. The basket was approximately 24 inches long and 12 inches high. She did not see the shopping basket before she fell because she was looking at the employee at register 2.

¶ 7 Store manager Denelle Gordon testified that she was working at the service desk, which was approximately 25 to 35 feet away from the front registers, when Pamela fell. Employee Mary Torres shouted for her to come over to the registers. After she walked over, Pamela had already stood up, and she observed an empty shopping basket on the floor. She did not observe any other objects or foreign substances that could have caused Pamela to fall. Gordon spoke with Pamela, who told her that she had slipped and fell on a shopping basket that was left at the end of the register. Gordon testified she observed the area about five minutes before Pamela fell, and the shopping basket was not then present. She was not aware of any other occurrences of customers or employees tripping over shopping baskets, nor was she aware of any video surveillance of the checkout area that may have recorded Pamela's fall. Gordon testified generally that all Kmart employees are instructed to return stray shopping baskets to the basket caddy near the front entrance to the store. Cashiers were responsible for collecting shopping baskets during the check-out process from the customers who used them. The cashiers "would

grab them and put them beside them within their cubby area and then, in between customers, they would take them back [to the basket caddy]." She knew of no employee who stored shopping baskets where plaintiff fell, and no employee told her that they had placed the basket on the floor.

¶ 8 Mary Torres testified that she was the "key carrier" at Kmart when Pamela fell. Although she did not witness the accident, she observed Pamela on the floor and a shopping basket near her feet. She called over the store manager, Gordon, and asked Pamela if she was hurt. Torres could not recall which employees were working at the front registers when Pamela fell. She testified that shopping baskets were not stored on the floor where Pamela fell, but were to be returned to the basket caddy near the front entrance.

¶ 9 On November 25, 2015, plaintiffs filed a two-count complaint against Kmart for ordinary negligence, alleging that defendant's employees were negligent in placing the shopping basket where a customer could trip over it, and in failing to remove the basket from the floor or otherwise warn of its presence. In Count I, Pamela sought damages for her injuries, lost wages, and medical bills. Daniel, in Count II, sought recovery for loss of consortium.

¶ 10 After the close of fact discovery, defendants moved for summary judgment on August 22, 2017, and advanced three main arguments. Specifically, defendant argued that plaintiffs presented no evidence that the shopping basket was on the floor through the defendant's acts, that there was no evidence that defendant had actual knowledge or constructive notice of the shopping basket's presence on the floor, and that the basket was an open an obvious hazard for which it owed Pamela no duty.

¶ 11 Plaintiffs filed a response to Kmart's motion for summary judgment on October 5, 2017, and an affidavit from Pamela was attached thereto. Plaintiffs asserted that certain issues of

material fact were present such that summary judgment was improper, namely: whether the shopping basket was placed on the floor by an employee, and whether an employee had actual knowledge of the shopping basket. Plaintiffs argued that a jury could find that a Kmart employee must have placed the shopping basket on the floor because only employees were in the checkout area during the two-minute window in which the basket was placed on the floor. Plaintiffs agreed that the shopping basket was an open and obvious hazard, but asserted that Pamela was distracted when the clerk at register 2 called her back over to his register after his drawer change was complete. They also asserted that a jury could find that the clerk at register 2 had actual knowledge of the shopping basket's presence on the floor, and that he should have either warned Pamela or picked up the basket prior to calling her over. In her attached affidavit, Pamela averred that "[t]he check-out clerk from register #2 looked directly at me when he called me over. From his perspective, the basket I tripped over would have been clearly visible to him at the time he called me over to his register." Kmart moved to strike the second sentence under Illinois Supreme Court Rule 191 (eff. Jan 4, 2013), arguing that it was speculation.

¶ 12 After a hearing on November 6, 2017, the circuit court struck the sentence from Pamela's affidavit and granted Kmart's motion for summary judgment. In announcing its ruling, the circuit court explicitly relied on Pamela's testimony that she did not see who placed the shopping basket on the floor, and stated that "[t]here was really no evidence other than speculation" that a Kmart employee placed it on the floor or that Kmart had either actual knowledge or constructive notice of the shopping basket's presence. The circuit court indicated that it was not granting summary judgment based on the open and obvious nature of the shopping basket, stating that it "could be an issue of fact as to whether [Pamela] was distracted." Rather, it was granting summary judgment based on Kmart's arguments that there was "simply not enough evidence"

that defendant negligently placed the basket on the floor or was negligent in failing to remove it or warn of its presence. Plaintiffs timely appealed.

¶ 13 ANALYSIS

¶ 14 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment a matter of law." 735 ILCS 5/2-1005(c) (West 2016). A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). In evaluating whether a genuine issue as to any material fact exists, the trial court must construe the pleadings and evidentiary material in the record strictly against the movant and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is a drastic measure and should be allowed only when the right of the moving party is clear and free from doubt. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Although a plaintiff need not prove their case at the summary judgment stage, they must present evidentiary facts to support the elements of the cause of action. *Helms v. Chicago Park District*, 258 Ill. App. 3d 675, 679 (1994). We review *de novo* a trial court's decision to grant a motion for summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 15 To state a claim of negligence, plaintiffs were required to present sufficient factual evidence to show that defendant owed Pamela a duty, defendant breached that duty, and defendant's breach was the proximate cause of Pamela's injury. See *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Here, although the parties agree that defendant owed Pamela, as a business invitee, a duty of care to maintain its premises in a reasonably safe condition (see

*Geraghty v. Burr Oak Lanes*, 5 Ill. 2d 153, 157 (1955)), plaintiffs assert that defendant breached that duty. Generally speaking, a business owner breaches its duty to a business invitee who slips on a foreign substance on the premises if: (1) the substance was placed there by the negligence of the owner or its employees; (2) the owner or its employees knew of its presence; or (3) the owner or its employees had constructive notice of the substance because it was there for a "sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered." *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 474 (1961); see *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063.

¶ 16 On appeal, plaintiffs assert that genuine issues of material fact exist as to whether the basket was on the floor due to the negligence of a Kmart employee or, in the alternative, whether an employee had actual knowledge of the basket's presence. Plaintiffs offer no argument that defendant had constructive notice of the basket.

¶ 17 For ease of discussion, we first address plaintiffs' second argument and consider whether there is a genuine issue of material fact that defendant had actual knowledge of the basket's presence on the floor prior to Pamela's fall. According to plaintiffs, the cashier who called Pamela back to register 2 had actual knowledge of the shopping basket's presence on the floor. In support, they rely on a single sentence from Pamela's affidavit that was stricken by the circuit court. It reads: "[f]rom [the cashier's] perspective, the basket I tripped over would have been clearly visible to him at the time he called me over to his register." Plaintiffs assert that the circuit court struck this sentence in error and insist that it is a factual allegation based on Pamela's personal observations. Because the circuit court struck a portion of her affidavit in conjunction with a summary judgment motion, we review that ruling *de novo*. *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 18; see also *Jackson v. Graham*, 323 Ill.

App. 3d 766, 774 (2001) ("[W]hen the trial court rules on a motion to strike a Rule 191 affidavit in conjunction with a summary judgment motion, we review *de novo* the trial court's ruling on the motion to strike.").

¶ 18 Supreme Court Rule 191(a) (eff. Jan 4, 2013) governs affidavits on motions for summary judgment. It provides that affidavits in opposition to a motion for summary judgment "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; *** shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). A Rule 191 affidavit "serves as a substitute" for trial testimony, and it is therefore "necessary that there be strict compliance with Rule 191(a) 'to insure that trial judges are presented with valid evidentiary facts upon which to base a decision.' " *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002) (quoting *Solon v. Godbole*, 163 Ill. App. 3d 845, 851 (1987)).

¶ 19 We determine that the circuit court committed no error in striking the statement from plaintiff's affidavit, as it plainly did not comply with Rule 191.[1] First, the record contains no evidence that Pamela personally observed the shopping basket or the area where she fell from the vantage point that the cashier would have had—behind register 2. More importantly, however, she has no basis upon which to assert that the shopping basket "would have been clearly visible

[1] We note that, after the briefs were filed in this case, defendant filed a motion to strike certain statements from plaintiffs' reply brief whose only support in the record was the sentence that we have determined was properly stricken from Pamela's affidavit. We ordered the motion taken with the case. Accordingly, we now grant the motion to strike, and we will disregard those portions of plaintiff's reply brief.

to [the cashier at register 2]." Plaintiffs concede that Pamela cannot testify as to what the cashier "saw," but nevertheless assert that she is competent to testify as to what the cashier "potentially could have seen." We reject this assertion, as the statement is pure speculation and conjecture because it is not based on Pamela's personal knowledge. At best, the statement is more akin to one made upon information and belief, which is insufficient to show that Pamela could testify competently to it at trial. See *Lazar Bros. Trucking, Inc. v. A & B Excavating, Inc.*, 365 Ill. App. 3d 559 (2006).

¶ 20 Plaintiffs briefly argue that, even in the absence of the stricken portion of Pamela's affidavit, facts remain that could infer that defendant had actual knowledge. In support, they highlight Pamela's testimony that the cashier looked at her immediately before she fell and that the basket was near her feet such that "the inference remains *** that the [cashier] had actual notice of the hazardous condition." We likewise reject this argument, because it is nothing more than a repackaged version of Pamela's averment that we have concluded was properly stricken by the circuit court. Plaintiffs have offered only speculative evidence to support their actual knowledge argument, which is insufficient to create an issue of fact. "In order to survive summary judgment, a plaintiff need not prove her case, but she must present a factual basis that would arguably entitle her to a judgment." *Bruns*, 2014 IL 116998, ¶ 12. We therefore agree with the circuit court that plaintiffs offered no evidence to support their argument that defendant had actual knowledge of the hazardous condition.

¶ 21 Our inquiry does not end there, however. Despite defendant's lack of actual knowledge or constructive notice of the hazardous condition, liability may nevertheless be imposed if the hazard was placed on the floor through the negligence of defendant or one of its employees. *Olinger*, 21 Ill. 2d 469, 474 (1961). Consideration of this issue brings us to plaintiffs' primary

argument on appeal—that they presented sufficient circumstantial evidence to create a question of fact as to whether the shopping basket was on the floor due to the negligence of defendant or one of its employees.

¶ 22 In *Donoho v. O'Connell's*, 13 Ill. 2d 113 (1958), the plaintiff slipped and fell on a "piece of partly smashed grilled onion" when she walked past a stand-up table at defendant's restaurant. *Id.* at 116. Although there was no direct evidence as to how the grilled onion got onto the floor, circumstantial evidence was presented that other customers had eaten hamburgers at the stand-up table while plaintiff was in the restaurant, that the table was cleaned some 15 minutes before the plaintiff's fall by a busboy whose cleaning practices sometimes caused food particles to fall to the floor, and that no one else had eaten there or was in that area from the time the busboy cleaned the table until the plaintiff fell. *Id*. at 124-25. Our supreme court found that the issue of whether the onion was on the floor through the act of one of the defendant's employees presented a jury question. In reaching its decision, the court stated as follows:

> "[w]here, *** in addition to the fact that the substance on the floor was a product sold or related to defendant's operations, the plaintiff offers some further evidence, direct or circumstantial, however slight, such as the location of the substance or the business practices of the defendant, from which it could be inferred that it was more likely that defendant or his servants, rather than a customer, dropped the substance on the premises, courts have generally allowed the negligence issue to go to the jury, without requiring defendant's knowledge or constructive notice." *Id*. at 122.

¶ 23 Plaintiffs argue that they presented sufficient circumstantial evidence to satisfy the *Donoho* standard such that their case should have been submitted to a jury. They note that the shopping basket was a product of Kmart's operations, and maintain that the basket was placed on

the floor within two minutes prior to Pamela's fall. According to plaintiffs, even though Pamela did not see who placed the shopping basket on the floor, "a jury could find that a Kmart employee must have placed the basket" because "there were no other customers in the area of the registers to [Pamela's] right" during the two-minute timeframe when the basket appeared on the floor.

¶ 24 Defendant counters, arguing that *Donoho* is distinguishable because, here, plaintiffs presented no evidence that any Kmart procedure resulted in the placement or storage of baskets where Pamela fell. To this end, defendant stresses Gordon's and Torres' testimony that employees did not store shopping baskets in the checkout area and that employees were instructed to return baskets to the basket caddy at the front of the store if they found them. According to defendant it was, at a minimum, equally likely that another customer placed the basket on the floor. Defendant states that because Pamela did not see who placed the basket, she cannot refute that another customer may have been responsible.

¶ 25 As a threshold matter, we observe that defendant does not contest that the shopping basket upon which Pamela tripped is related to defendant's business operations. In this regard, defendant effectively concedes that plaintiffs have met *Donoho's* initial requirement of demonstrating that the "substance on the floor was a product sold or related to defendant's operations." *Id.*; *cf. Olinger*, 21 Ill. 2d at 449 ("Since the evidence failed to establish that the substance was related to defendant's operations, no inference could be drawn that the substance was more likely to have been dropped by defendants' servants under the *Donoho* rule."). Therefore, plaintiffs needed only to present "some further evidence, direct or circumstantial, however slight," from which it could be inferred that it was more likely that an employee placed the basket on the floor rather than a customer. *Donoho*, 13 Ill. 2d at 122. Although there is no

direct evidence as to how the shopping basket came to be on the floor, we note that the absence of direct evidence in negligence cases is not uncommon, and the inquiry often turns on whether the circumstantial evidence is sufficient to reasonably infer that the substance was there due to defendant's actions. See *Olinger*, 21 Ill. 2d at 475 (1961).

¶ 26 Viewing the evidence in the light most favorable to plaintiffs, as we must at this stage, we agree with them that their case should have been submitted to a jury. Here, the circumstantial evidence suggests a narrow timeframe in which the basket was placed on the floor, as well as both an absence of customers who could have placed it and the presence of several employees in the area during that time. Pamela testified the basket was not on the floor when she walked from register 2 to register 6, but that she encountered it and fell two minutes later when she traversed the same path back to register 2. The brief duration of the basket's presence on the floor is supported by Gordon's testimony that she observed the area five minutes before Pamela fell and the basket was not there. Pamela also testified that, while she waited in line at register 6 during the relevant two-minute timeframe, she stood behind the only other customer in the check-out area, who was being rung up. Defendant posits that perhaps this customer may have placed the shopping basket, but Pamela's testimony implicitly refutes this possibility because it places said customer directly in front of her at register 6 during the relevant timeframe rather than in the area where Pamela fell. Defendant also opines that a customer of which Pamela was simply unaware may have placed the basket. While this theory is certainly possible, it presents a question of fact when viewed against the backdrop of Pamela's testimony regarding the absence of customers where the basket was placed during the two-minute timeframe. "[T]he query is not whether it was also possible that a customer could have dropped the [hazardous item], but whether the evidence makes it more probable that defendant or his servants dropped it." *Donoho*, 13 Ill. 2d

at 125. Pamela testified that "[t]here were about seven employees standing around" near the checkout area during this narrow timeframe. We view this circumstantial evidence as "however slight," such that it could be inferred that it was more likely that an employee placed the basket on the floor rather than a customer. See also *Mraz v. Jewel Tea Co.*, 121 Ill. App. 3d 209, 220-21 (1970) (holding that circumstantial evidence was sufficient to infer that defendant's employees were the only possible source of the dropped lettuce leaf that caused the plaintiff to slip and fall after leaving checkout counter).

¶ 27 Defendant contends that, unlike in *Donoho*, no evidence was presented that its business practices lead to the placement of the shopping basket between check-out aisles. We disagree. Although cashiers were not trained to keep shopping baskets in the exact spot where plaintiff fell, they were instructed to collect the baskets from the customers they rung up and "put them beside them within their cubby area" until there was an opportunity to return them to the basket caddy. It could be inferred that this practice could lead to baskets being placed where a customer could trip over them, especially where the check-out registers are staggered such that customers could easily walk from one register to another register on either side of it.

¶ 28 We also note that the *Donoho* court made clear that courts consider the location of the hazardous object in evaluating whether it could be inferred that the object was more likely left by defendant as opposed to a customer. *Donoho*, 13 Ill. 2d at 122. In attempting to distinguish *Donoho*, defendant makes no argument that the location of the shopping basket infers that it was more or equally likely that a customer placed it there. Based on Pamela's testimony, as stated above, the area near the shopping basket was both occupied by several employees and devoid of customers during the narrow two-minute timeframe in which the basket was placed. Finally, we note that the two-minute absence of customers near the area of the hazardous condition here is

markedly narrower than the 15 minute absence of restaurant patrons in *Donoho*—in this regard, the time element is more compelling than in *Donoho*.

¶ 29 Finally, we reject defendant's arguments that "[b]ecause plaintiff did not see who put the basket there, she cannot refute that another customer put the basket down." This simply is not the test under *Donoho*, as a plaintiff need not "refute" this possibility, but merely present "some further evidence, direct or circumstantial, however slight, *** from which it could be inferred that it was more likely that defendant or his servants, rather than a customer, dropped the substance." *Id.* Plaintiffs have done so here.

¶ 30 CONCLUSION

¶ 31 For the reasons stated above, we affirm the circuit court's decision to strike a portion of Pamela's affidavit, but we reverse the grant of summary judgment in defendant's favor, and remand the cause for further proceedings consistent with this opinion.

¶ 32 Affirmed in part and reversed in part; cause remanded.