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NO. COA03-1705

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

SALLY ELLIOTT,
Plaintiff,

v.

New Hanover County
No. 01-CVS-3706

FOOD LION, L.L.C.,
Defendant.

Appeal by Defendant from rulings entered 1 and 2 May 2003 by Judge Ernest B. Fullwood in Superior Court, New Hanover County. Heard in the Court of Appeals 13 September 2004.

Ward & Smith, P.A., by Lynwood P. Evans and E. Bradley Evans, for plaintiff-appellee.

Poyner & Spruill L.L.P., by Douglas M. Martin, for defendant-appellant.

WYNN, Judge.

Defendant Food Lion, L.L.C. appeals the trial court's denial of its motions for a directed verdict and the admission of deposition transcript excerpts of two Food Lion employees into

evidence during the jury trial. For the reasons stated herein, we uphold the trial court's rulings.

The factual and procedural background of this case is as follows: While shopping at Food Lion's Landfall Center store in Wilmington, North Carolina on 4 July 2001, Plaintiff Sally Elliott stepped on grapes or cherries and fell to the floor, fracturing her kneecap. Elliott contended that Food Lion's grapes were displayed in overfilled and tilted produce bins, out of which Food Lion should have known produce would fall. Elliott further alleged that Food Lion's produce area flooring was insufficiently carpeted and littered with crushed and dried fruit - a claim substantiated by witnesses Judy Murphy and Maria Cassalls.

Murphy and Cassalls had also been shopping at Food Lion's Wilmington store at the time of Elliott's fall. Cassalls had seen grapes on the floor in the area where Elliott fell twenty minutes to a half hour prior to her fall, and Murphy and Cassalls noted that the produce area floor was "very messy" and "really dirty." After Elliott's fall, Amy Bass, Customer Service Manager of the Landfall Food Lion and the highest level employee at the Landfall Center Food Lion at the time of Elliott's fall, failed, according to her own testimony, to enact certain procedures -

such as photographing the accident site and maintaining the surveillance video from the day of Elliott's fall – mandated by Food Lion's policy manual. Food Lion contended, as evidenced by Thomas David Smith, Assistant Manager of Food Lion's Landfall Center store, that it had accidentally preserved the surveillance video for a day other than that of Elliott's accident. This contention was contradicted at trial by Food Lion's claims adjustor Bobby Lee Clontz, who suggested no video had been made on the day on Elliott's fall.

On or around 6 September 2001, Elliott brought suit against Food Lion, alleging Food Lion's negligence caused her injury and demanding an award in excess of \$10,000. On or around 9 October 2001, Food Lion filed an answer to Elliott's complaint, denying, *inter alia*, Elliott's negligence claims. From 30 April 2003 through 2 May 2003, this case was tried before a jury in Superior Court, New Hanover County, the Honorable Ernest B. Fullwood presiding. The trial court allowed Elliott to read into evidence excerpts from the Bass and Smith depositions regarding accident policies and procedures and the 4 July 2001 surveillance tape. Food Lion twice moved unsuccessfully for a directed verdict, alleging that Elliott failed to present sufficient evidence of negligence for the case to be submitted to the jury. The case

went to the jury, which found that Food Lion's negligence caused Elliott's injury and awarded Elliott \$120,000. Food Lion did not file for a judgment notwithstanding the verdict but appealed the denial of its motions for a directed verdict, as well as the admission of Bass and Smith deposition excerpts into evidence at trial. For the reasons stated below, we deny Food Lion's appeal in all respects.

*A. Motions for Directed Verdict
(Assignment of Error Number 1)*

In reviewing a motion for a directed verdict, the Court must consider the evidence "in the light most favorable to the non-moving party, giving it the benefit of all reasonable inferences to be drawn therefrom, and resolving all conflicts in the evidence in its favor." *Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 273, 488 S.E.2d 617, 619 (1997); *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). The burden carried by the movant is particularly significant in cases in which the principal issue is negligence. *Cook v. Wake County Hosp. Sys., Inc.*, 125 N.C. App. 618, 621, 482 S.E.2d 546, 549 (1997). Indeed, "the court should deny such a motion if it finds any evidence more than a scintilla to support plaintiff's prima facie case." *Smith v. Pass*, 95 N.C. App. 243, 255, 382 S.E.2d 781, 789

(1989) (citing *Clark v. Moore*, 65 N.C. App. 609, 309 S.E.2d 579 (1983)).

In this case, Elliott alleged that Food Lion's negligence caused her injury. Under North Carolina law, in order to maintain a suit for negligence, Elliott needed to demonstrate that Food Lion, who owed her a duty of reasonable care: (1) negligently created a condition causing Elliott's injury, or (2) negligently failed to correct a condition causing Elliott's injury after receiving actual or constructive notice of that condition. *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 653-54, 547 S.E.2d 48, 50 (2000); *Carter*, 127 N.C. App. at 274-75, 488 S.E.2d at 620. We therefore look to whether Elliott presented more than a scintilla of evidence that Food Lion negligently created a condition causing her injury, or negligently failed to correct the condition causing her injury.

At trial, Elliott contended that Food Lion negligently created a condition causing Elliott's injury by displaying produce in a manner causing unreasonable risk of injury. The manner in which a store displays goods may negligently cause injury to patrons. See, e.g., *Rives v. Great Atl. & Pac. Tea Co.*, 68 N.C. App. 594, 315 S.E.2d 724 (1984) (directed verdict should have been denied where plaintiff claimed that hazardous

grape display proximately caused her injuries); *Keith v. Kresge Co.*, 29 N.C. App. 579, 581-82, 225 S.E.2d 135, 137 (1976) (summary judgment for defendant properly denied where plaintiff claimed store's product display caused her injuries).

Elliott alleged, *inter alia*, that Food Lion had displayed grapes in overfilled, tilted produce bins that created an unreasonable risk of injury, especially at the beach on the Fourth of July, where produce aisle traffic was high. Moreover, Elliott alleged that, as she lay on the floor after her fall, she saw grapes rolling onto the insufficiently carpeted floor from a customer's merely moving by the produce bins. [Tr. 86-88] This evidence constituted more than a scintilla of evidence that Food Lion negligently created a condition causing Elliott's injury. The trial court therefore properly denied Food Lion's motions for a directed verdict.

Elliott also contended that Food Lion negligently failed to correct the condition causing Elliott's injury after receiving constructive notice of that condition. Constructive notice of a dangerous condition may be shown "in two ways: the plaintiff can present direct evidence of the duration of the dangerous condition, or the plaintiff can present circumstantial evidence from which the fact finder could infer that the dangerous

condition existed for some time.” *Thompson*, 138 N.C. App. at 654, 547 S.E.2d at 50.

Elliott offered both direct and circumstantial evidence of the duration of the dangerous condition, not only through her own contentions but also through the testimony of Murphy and Cassalls. Murphy and Cassalls testified that the area in which Elliott fell was “very messy,” littered extensively with “dried up” and “smooshed” grapes that had shopping cart tracks through them. Cassalls testified that grapes littered the floor when she passed through the produce area twenty to thirty minutes prior to Elliott’s fall. Murphy testified that, given the grapes’ appearance, “they had been there a while.” Evidence of dried, smashed fruit with cart tracks and general dirtiness supports a finding that the fruit had been on the floor for a substantial period and that Food Lion therefore had constructive notice. *Carter*, 127 N.C. App. at 273, 488 S.E. 2d at 619; *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997). Because Elliott clearly offered more than a scintilla of direct and circumstantial evidence that Food Lion had constructive notice of the dangerous condition that Elliott alleged caused her injury, the trial court properly denied Food Lion’s motions for a

directed verdict.¹

*B. Admission of Bass Deposition Transcript Excerpts at Trial
(Assignment of Error Number 2)*

Food Lion asserts that deposition testimony of Food Lion Customer Service Manager Bass was improperly admitted into evidence at trial. Food Lion contends that, because Bass was available to testify live, use of the deposition at trial violated North Carolina General Statute section 1A-1, Rule 32.²

¹Food Lion relies on *Williamson v. Food Lion, Inc.*, 131 N.C. App. 365, 507 S.E.2d 313 (1998), *France v. Winn-Dixie Supermarket, Inc.*, 70 N.C. App. 492, 320 S.E.2d 25 (1984), and the unpublished opinion *Worthington v. Food Lion, Inc. LLC*, No. COA03-98, 2003 N.C. App. LEXIS 2280 (N.C. App. Dec. 16, 2003), to argue that Elliott failed to provide sufficient evidence of constructive notice for the issue to go to the jury. Importantly, however, in *Williamson* and *France*, the plaintiffs lacked evidence establishing the amount of time the dangerous condition existed prior to the plaintiffs' respective injuries. Here, Elliott presented a witness who saw the dangerous condition "at least 20 minutes prior to the fall" and "who was present when the fall occurred. The jury could reasonably find from the evidence that [the dangerous condition] had been on the floor for at least 20 minutes." *Mizell v. K-Mart Corp.*, 103 N.C. App. 570, 574, 406 S.E.2d 310, 312 (1991). The Court refrains from analysis of *Worthington*, which is unpublished and thus not controlling precedent, and which does not have precedential value to a material issue for which "there is no published opinion that would serve as well." N.C. R. App. P. 30(e).

²In its second assignment of error, Food Lion cites to Rule 33. Because North Carolina General Statute section 1A-1, Rule 33 addresses party interrogatories and has no relevance to the admission of deposition testimony at trial, and because Food Lion, in its appellate briefing, refers to North Carolina General Statute section § 1A-1, Rule 32, the Court will address Food Lion's second assignment of error only as to Rule 32, not as to Rule 33.

North Carolina General Statute section 1A-1, Rule 32(a)(3) permits a party to introduce deposition testimony of a witness who is a "managing agent" of a corporation that is a party to the action, regardless of witness availability. N.C. Gen. Stat. § 1A-1, Rule 32 (2003). An employee's status as a "managing agent" is a factual question left to the discretion of the trial court. 1 G. Gray Wilson, *North Carolina Civil Procedure* § 32-4 (2003). "[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed . . . only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted).

North Carolina case law has not yet addressed the meaning of "managing agent" under North Carolina General Statute section 1A-1, Rule 32(a)(3). For the corresponding Federal Rule of Civil Procedure 32, a United States District Court within the Fourth Circuit and other federal courts have applied the following factors in analyzing whether a person is a "managing agent:"

- (1) whether the corporation has invested the person with discretion to exercise his judgment,
- (2) whether the employee can be depended upon to carry out the employer's directions, and
- (3) whether the individual can be expected to identify him or herself

with the interests of the corporation as opposed to the interests of the adverse party. Other factors to consider include the degree of supervisory authority which a person is subject to in a given area and the general responsibilities of the individual regarding the matters at issue in the litigation.

In re Honda Am. Motor Co., Inc. Dealership Relations Litig., 168 F.R.D. 535, 540-41 (D. Md. 1996) (citations omitted).

Here, the trial court considered a number of these factors in determining that Bass was indeed a managing agent. The trial court was aware of Bass's title of Customer Service **Manager**, confirmed that Bass was the person in charge of the Landfall Center Food Lion at the time of Elliott's fall, contemplated Bass's not necessarily being a managing agent of Food Lion for all purposes, such as shareholder derivative suits, but found Bass to be a managing agent for purposes of North Carolina General Statute section 1A-1, Rule 32(a)(3) in this litigation. Because the trial court's finding Bass to be a managing agent was clearly not "manifestly unsupported by reason," the Court affirms the trial court's admitting into evidence Bass's deposition testimony pursuant to North Carolina General Statute section 1A-1, Rule 32(a)(3).

Food Lion further alleges that Bass's deposition testimony was irrelevant to the issues the jury would decide and therefore

the trial court erred in admitting the testimony. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). "[T]his standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has *any* logical tendency to prove any fact that is of consequence." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citations omitted).

In this case, the admitted testimony pertained to Food Lion's policies regarding accidents such as Elliott's, as well as Bass's lack of training in and failure to execute those policies. It covered, *inter alia*, Bass's failure to photograph the accident and Bass's making, but Food Lion's failing to maintain or produce, documentary and video evidence of the store conditions on the day of Elliott's fall. The trial court found that these matters were relevant, not least to the application of the spoliation of evidence doctrine, on which the trial court instructed the jury. Under the spoliation of evidence doctrine, "where a party fails to introduce in evidence documents that are relevant to the matter in question and within his control . . .

there is a presumption, or at least an inference that the evidence withheld, if forthcoming, would injure his case.'" *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 565, 551 S.E.2d 867, 872 (2001) (quoting *Yarborough v. Hughes*, 139 N.C. 199, 209, 51 S.E. 904, 907-08 (1905)). Because Bass's deposition testimony was relevant, *inter alia*, as to spoliation of evidence, the trial court did not err in admitting it despite Food Lion's relevancy objections.

*C. Admission of Smith Deposition Transcript Excerpts at Trial
(Assignment of Error Number 3)*

Finally, Food Lion asserts that the trial court erred in admitting into evidence deposition testimony of Smith because Smith was not identified as a witness in the trial court's pretrial order. We disagree. Deposition were explicitly listed in Attachment C to the pretrial conference order **signed by Food Lion's counsel** as exhibits Elliott was allowed to offer at trial.

For the reasons stated herein, we affirm the trial court's denial of Food Lion's motions for a directed verdict and the trial court's admitting into evidence excerpts of the Bass and Smith deposition transcripts.

Affirmed.

Chief Judge MARTIN and Judge HUNTER concur.

Report per Rule 30(e).