

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MAKALLA DAVIS

Appellee

v.

TARGET CORPORATION

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2098 EDA 2011

Appeal from the Judgment Entered on June 24, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 1005, August Term 2009

BEFORE: SHOGAN, J., WECHT, J., and FITZGERALD, J.*

DISSENTING MEMORANDUM BY WECHT, J. Filed: March 27, 2013

Our standard of review mandates that we view the evidence through a lens highly deferential to the verdict winner. In this case, that was Appellee Makalla Davis (“Davis”). Notwithstanding this standard, the learned majority finds that Davis has failed to demonstrate that Appellant Target Corporation (“Target”) had actual or constructive notice of the dangerous condition that caused Davis’s injuries. Maj. Mem. at 7. To be sure, the evidence regarding notice in this case was less than overwhelming. Yet, viewing the trial evidence through the lens that our law requires, I believe it was sufficiently established that Target was on constructive notice of the dangerous condition. Therefore, I respectfully dissent.

* Former Justice specially assigned to the Superior Court.

The majority aptly sets forth the underlying factual and procedural histories. **See** Maj. Mem. at 1-4. Their reproduction here is unnecessary. This appeal arises principally from Target's post-verdict motions, wherein Target sought judgment notwithstanding the verdict ("JNOV"), a new trial, or a remittitur.

The first issue that Target presents, and the issue which the majority concludes warrants relief, assigns error to the trial court for denying Target's motion for JNOV. Our standard of review over such claims is well-settled:

In reviewing a trial court's decision whether or not to grant judgment in favor of one of the parties, we must "consider the evidence, together with all favorable inferences drawn therefrom, in a light most favorable to the verdict winner." **Walker v. Grand Central Sanitation, Inc.**, 430 Pa.Super. 236, 634 A.2d 237, 240 (Pa. Super. 1993). "Our standard of review when considering motions for a directed verdict and judgment notwithstanding the verdict are identical." **Brown v. Philadelphia College of Osteopathic Medicine**, 2000 PA Super 262, 760 A.2d 863, 868 (Pa. Super. 2000). We will reverse a trial court's grant or denial of a judgment notwithstanding the verdict only when we find an abuse of discretion or an error of law that controlled the outcome of the case. **Mitchell v. Moore**, 1999 PA Super 77, 729 A.2d 1200, 1203 (Pa. Super. 1999). Further, "the standard of review for an appellate court is the same as that for a trial court." **Ferry v. Fisher**, 709 A.2d 399, 402 (Pa. Super. 1998).

There are two bases upon which a judgment N.O.V. can be entered: one, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, the court reviews the record and concludes that even with all factual inferences decided adverse[ly] to the movant the law nonetheless requires a verdict in his favor, whereas with the second the court reviews the evidentiary record and concludes

that the evidence was such that a verdict for the movant was beyond peradventure.

Campo v. St. Luke's Hospital, 2000 PA Super 155, 755 A.2d 20, 23 (Pa. Super. 2000) (citations omitted).

Goldberg v. Isdaner, 780 A.2d 654, 659-60 (Pa. Super. 2001).

Davis sued Target for negligence. A viable cause of action for negligence requires proof of the following four elements:

(1) a duty or obligation recognized by the law that requires an actor to conform his actions to a standard of conduct for the protection of others against unreasonable risks; (2) failure on the part of the [actor] to conform to that standard of conduct, *i.e.*, a breach of duty; (3) a reasonably close causal connection between the breach of duty and the injury sustained; and (4) actual loss or damages that result from the breach.

Gutteridge v. A.P. Green Serv. Inc., 804 A.2d 643, 654 (Pa Super. 2002).

A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. **Palange v. City of Philadelphia Law Dep't**, 640 A.2d 1305, 1308 (Pa. Super. 1994). As such, Davis was entitled to the highest duty of care. **Beary v. Penna. Elec. Co.**, 469 A.2d 176, 178 (Pa. Super. 1983). A possessor of land owes a duty to an invitee entering that property only if the possessor has notice of the dangerous condition and realizes that the condition creates an unreasonable risk of harm to the invitee. **Sharp v. Luska**, 269 A.2d 659, 661 (Pa. 1970). Actual or constructive notice of a defective condition is a prerequisite to imposing

liability upon a possessor of land. **Stais v. Sears-Roebuck & Co.**, 106 A.2d 216, 217 (Pa. 1954).

No evidence of record suggests that Target had actual notice of the dangerous condition. Our inquiry must focus upon whether Target had constructive notice of that condition. “A person is charged with having constructive notice when he has knowledge of facts putting him upon inquiry. Once the *duty* to inquire is raised, the party is deemed to have such knowledge as he would have acquired by the exercise of ordinary intelligence and understanding.” **Felton v. Spratley**, 640 A.2d 1358, 1362 (Pa. Super. 1994) (emphasis in original).

In determining constructive notice to a possessor of land, we are guided by several factors. These include, but are not limited to, the following: (1) the time that elapsed between the creation of the defect and the incident in question; (2) the size and physical condition of the premises; (3) the nature of the business; (4) the number of people using the premises; (5) the frequency of use of the premises; (6) the nature of the defect; (7) the defect’s location on the premises; and (8) the opportunity that the defendant had to remedy the defect. **Davanti v. Hummell**, 185 A.2d 554, 556-57 (Pa. 1962). “[T]he time of constructive notice depends on the particular circumstances of the case.” **Lederhandler v. Bolotini**, 167 A.2d 157, 159 (Pa. 1961). In certain cases, five minutes would suffice as adequate notice; in others five or more hours would not. **Branch v. Phila. Transp. Co.**, 96 A.2d 860, 862 (Pa. 1953).

We must remember always that the question of whether a landowner had constructive notice of a dangerous condition, and therefore should have known of the defect, is a question of fact. ***PennDOT v. Patton***, 686 A.2d 1302, 1305 (Pa. 1997). Thus, constructive notice is a question for a jury to decide. A court may decide this issue, in response to a motion for JNOV or otherwise, only if there is absolutely no dispute as to the facts and only if reasonable minds could not differ as to the conclusion. ***Id.*; Carrender v. Fitterer**, 469 A.2d 120, 124 (Pa. 1983).

The factual question of whether Target had constructive notice of the toddler chair and three beanbag chairs that impeded passage through one of its aisles is a close call indeed. However, we must view the evidence in the light most favorable to Davis. In that light, the evidence demonstrated that Target, a large department store, implemented a policy that requires an employee to walk the floor and to inspect the aisles for dangerous conditions. Notes of Testimony (“N.T.”), 2/28/2011, at 186-87. Presumably, this policy reflects, among other considerations, Target’s sound recognition that items periodically block its aisles, creating dangerous conditions. The trial evidence showed that Target knew that customers frequently removed chairs from the shelves and sat on them in the aisles. N.T., 3/1/2011, at 20. Although no evidence was presented as to how long the chairs were in the aisle, with this policy in place and operating, it was not plainly unreasonable for the jury to draw the inference that Target should have known of the dangerous condition.

It should not be forgotten that the chairs in question here were not insignificant in size. It is not as if Davis was injured by a stray marble hiding on the floor of the aisle. The items blocking the aisle were a toddler chair and three beanbag chairs. These items were sufficiently large to allow a jury reasonably to conclude that Target had constructive notice of the items' obstruction of the aisle.

The majority relies principally upon ***Estate of Smith v. Northeastern Hosp. of Phila.***, 690 A.2d 719, 722 (Pa. Super. 1997), to support its conclusion that Davis failed to demonstrate that Target had notice (actual or constructive) of the chair or the beanbags. On the strength of ***Estate of Smith***, the majority determines that Target was entitled to judgment as a matter of law because “[Davis] did not establish how the beanbags got on the floor or how long they were there.” Maj. Mem. at 7. Undoubtedly, these two factors are important in a constructive notice analysis. However, I find unsupportable in the law the majority's limited view that failure to prove these two particular factors, standing alone, destroys a party's constructive notice claim. To the contrary, per ***Davanti supra***, Pennsylvania courts must consider many factors in determining whether constructive notice can be assigned to a party. Neither the presence nor the absence of any one or two particular factors automatically defeats the claim as a matter of law.

Moreover, ***Estate of Smith*** is patently distinguishable from the instant case. In the former case, the plaintiff slipped and fell on a spot of water in a hospital restroom. 690 A.2d at 721. Water on a restroom floor differs

substantially in character and discoverability from a toddler chair and three beanbag chairs sitting openly in a store aisle. Unquestionably, items such as those that created the dangerous condition in the instant case are more readily detectible, and more likely to be noticed, than a spill of water in a closed restroom. The cases being so factually distinguishable, I do not agree that ***Estate of Smith*** controls the case *sub judice*.

Viewing the evidence of record in the light most favorable to Davis, as we must, and considering the factors and standards set forth above, I can discern no abuse of discretion by the trial court. While Davis' evidence is not overwhelming, it nonetheless is quite clear, from the jury's verdict and from the evidence upon which the jury relied, that reasonable minds could differ as to whether Target had constructive notice of the defective condition in one of its aisles. *Ipsa facto*, Target was not entitled to a JNOV.

I am also unpersuaded by Target's argument that it is not liable to Davis for her injuries because Davis knew of the dangerous condition. Target argues that Davis, knowing that the chairs were in the aisle, should have waited until the older woman passed by before proceeding down the aisle. Target maintains that this was a reasonable way to avoid the known danger. While Target's argument has facial merit, reasonable minds could disagree as to whether Davis voluntarily encountered the risk. Hence, the question was for the jury, not for the court.

As a general rule, a property owner has no duty to an invitee if that invitee "discovered dangerous conditions which [were] both obvious and

avoidable, and nevertheless proceeded voluntarily to encounter them.” **Carrender**, 469 A.2d at 125. While Davis knew of the danger, reasonable minds certainly could differ as to whether Davis voluntarily encountered the dangerous condition in Target’s aisle. Davis did not carry the shelving unit down the aisle intending to tempt fate and step on the beanbag chairs. Davis clearly intended to avoid the dangerous condition. However, the presence of the older woman required Davis to alter course and encounter that condition. Target has not demonstrated that reasonable minds could reach only the conclusion that Davis knowingly walked into the chairs. Therefore, again, the trial court did not abuse its discretion in denying Target’s motion for JNOV.

Having found no relief is due on Target’s first issue, I must address Target’s remaining two challenges. In the first of those two issues, Target argues that the trial court erred in precluding police officer testimony that Davis was under the influence of marijuana at the time of the fall, and that Davis was observed striking her knee against a wall or door after the accident. “Questions concerning the admission and exclusion of evidence are within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. The basic requisite for the admissibility of any evidence in a case is that it be competent and relevant.” **Moran v. G. & W.H. Corson, Inc.**, 586 A.2d 416, 428 (Pa. Super. 1991).

After Davis injured her knee, Target’s store manager called an ambulance. Before the ambulance arrived, police officers responded to the

scene. They questioned Davis and her three friends. One of the officers smelled marijuana emanating from the quartet. The officer searched them and found marijuana on one of the individuals, not Davis. The officer also searched the trunk of the car that Davis drove to Target. The officer found a purse containing prescription medication, as well as three additional bags of marijuana. After being treated at the hospital, Davis was arrested and taken to the police department. Davis was described as being unsteady on her feet. One officer opined that Davis was intoxicated to a degree sufficient to render her a danger to herself and others. No chemical testing was conducted on Davis' blood or urine.

Target contends that, had it been permitted to do so, it would have introduced police officer testimony that Davis' eyes were red and glossy and that she smelled of burnt marijuana. The officers would have expressed the belief that Davis was intoxicated and a danger to herself and others. One officer would have testified that Davis was agitated and argumentative. Finally, the police officers would have testified that, in a holding cell at the police station, Davis was observed banging her knees on the door/wall of her cell.

Target argues that this evidence would have established that Davis was intoxicated to a degree that she was unable to avoid the beanbag chair on her own, and that this intoxication is what actually caused her injuries. Further, Target avers, the evidence of her behavior at the police station was relevant to prove that the damages to her knees were not completely the

result of the fall, but were due also to her voluntary banging of her knees against the door and wall of her cell.

The trial court held that the intoxication evidence was inadmissible because the police officers could not properly establish that Davis in fact was intoxicated. The trial court highlighted the fact that Davis was never administered a blood test to determine definitively whether she had smoked marijuana. The trial court also noted that the police officers did not observe Davis prior to the accident; thus, it could not be demonstrated that Davis was impaired at the time she stepped on the beanbag chair. T.C.O. at 6. Accordingly, because Target could not establish that Davis was intoxicated at the time of the fall, the trial court concluded that the marijuana evidence was unduly prejudicial and inadmissible. *Id.* (citing **Hawthorne v. Dravo Corp., Keystone Div.**, 508 A.2d 298, 303 (Pa. Super. 1986)). As to Davis' behavior in her jail cell, the trial court found that the prejudicial nature of that evidence outweighed its probative value, because the jury would have been told that Davis was incarcerated, which is inherently prejudicial information. T.C.O. at 6.

On their face, Target's claims are not without merit. However, once again, we must remember and adhere faithfully to the applicable standard of review. Trial courts have great discretion in the admissibility of evidence. We may reverse an evidentiary decision only when we discern a clear abuse of discretion. *See Moran, supra*. Applying this deferential standard, I can detect no abuse of discretion by the trial court.

This brings us to the marijuana evidence. Target was unable definitively to prove that Davis smoked marijuana. No chemical testing was done on Davis' blood or urine. Target did not have an expert available to testify at trial that Davis was under the influence of marijuana at the time of the accident. Because Target could not prove that Davis ingested marijuana, and, if so, how much and at what time relative to the accident, the trial court concluded that the prejudicial nature of the speculative evidence of marijuana use outweighed its probative value. An abuse of discretion occurs when the trial court's decision represents "not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias, or ill will." ***Rose v. Annabi***, 934 A.2d 743, 746 (Pa. Super. 2007). I am unable to conclude that the court's ruling in this regard amounted to an abuse of discretion.

Without the marijuana evidence, any testimony regarding Davis' behavior while in jail also was unduly prejudicial. The jury would hear that Davis was incarcerated, which by itself is inherently prejudicial. The jury would be left to speculate as to why Davis was incarcerated. It is plain to me that the trial court did not abuse its discretion in finding that the prejudice caused by this evidence outweighed its probative value. **See** Pa.R.E. 403.

In its final issue, Target argues that it is entitled to a substantial remittitur or a new trial because the jury's \$150,000 award to Davis was

plainly excessive and not supported by the evidence. Target notes that Davis only sustained \$6,250 in out-of-pocket damages. Davis admitted that she was not permanently disabled. Target also points out that Davis was only in the hospital for one hour and has been cleared to go back to work. Finally, Target notes that the award was three times what Davis sought in her original complaint (\$50,000). For these reasons, Target maintains that the award was plainly excessive.

Our standard of review from the denial of a remittitur is “circumspect”: “judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant.” ***Rettger v. UPMC Shadyside***, 991 A.2d 915, 932 (Pa. Super. 2010) (quoting ***Potochnick v. Perry***, 861 A.2d 277, 285 (Pa. Super. 2004)). “The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption.” ***Id.*** Additionally, “[t]he decision to grant or deny remittitur is within the sole discretion of the trial court, and proper appellate review dictates this Court reverse such an Order only if the trial court abused its discretion or committed an error of law in evaluating a party's request for remittitur.” ***Id.***

Davis initially was found to be disabled for a period of time. While she subsequently was determined not to be permanently disabled, Davis nonetheless will have pain for the remainder of her life and will likely develop arthritis. Davis was diagnosed with traumatic chondromalacia

(softening of the patella cartilage) in both knees. The condition caused her to experience pain and discomfort when sitting or standing for long periods of time. The pain further prevented Davis from working as a store manager in a shoe store.

While the award was larger than what Davis requested in her original pleading, there is clear evidence in the trial record to support that award. Accordingly, I find no reason to conclude that the verdict was exorbitant or excessive. The award certainly was not so excessive as to shock the court's conscience, or to demonstrate that the jury's decision was predicated upon or influenced by partiality, prejudice, mistake, or corruption. Therefore, the trial court did not abuse its discretion in denying Target's motion for remittitur of the jury's award.

For the foregoing reasons, I respectfully dissent from the majority's memorandum. I would affirm the trial court.