SECOND DIVISION
December 16, 2008

No. 1-08-0588

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROSIE STEWART, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 06 L 4299
DOMINICK'S FINER FOODS, LLC, a Foreign Corporation, Defendant-Appellee.	)	Honorable James D. Egan, Judge Presiding.

O R D E R

Plaintiff Rosie Stewart appeals from an order of the circuit court of Cook County granting summary judgment to defendant, Dominick's Finer Foods, LLC, in her negligence action to recover damages from a fall. She contends that the grant of summary judgment was improper because she presented triable issues as to whether defendant caused the dangerous condition which resulted in her injuries and whether defendant had actual or constructive notice of the dangerous condition.

On April 25, 2006, plaintiff filed a complaint against defendant seeking damages for personal injuries suffered when she slipped and fell on a banana in the meat department of defendant's store. She alleged that defendant owed her a duty to exercise ordinary care in the ownership, operation, and

maintenance of its premises, and that it breached that duty by failing to properly inspect the floor, maintain adequate procedures to inspect the floor, warn plaintiff of the presence of foreign debris on the floor, and remove the foreign debris from the floor in a timely fashion.

Plaintiff testified in her discovery deposition that on Monday January 2, 2006, she went to defendant's store with her husband and her granddaughter, Erika Chambliss. About 5 p.m., she was in the meat department with Chambliss and three or four other customers, when she slipped and fell. After she fell, plaintiff discovered pieces of banana on the bottom of her shoes, and another customer helped her up. Once plaintiff was back on her feet she looked at where she fell and saw the inside portion of a banana that was about the size of an egg. She then removed her shoes, and a store employee arrived and cleaned the banana remains off of the floor and the bottoms of her shoes. Plaintiff later spoke to the manager and filled out an incident report. She also showed the manager where she fell, and someone took pictures of the area. By then, however, the banana had been cleaned up, and there was nothing left on the floor.

Erika Chambliss testified in her deposition that she was with plaintiff when she slipped and fell about 4:30 p.m. on January 2, 2006. Chambliss, whose back was to plaintiff at the time, heard her fall, and then turned around and saw her on the

floor. Plaintiff told Chambliss that she had slipped on a banana, and she and a customer helped her up. Chambliss looked at the floor where plaintiff had fallen and saw the remnants of a banana. Soon thereafter, a store employee arrived and cleaned the banana off the floor and the bottoms of plaintiff's shoes.

Prior to her deposition, Chambliss viewed a security tape showing plaintiff's fall, and observed that the banana fell out of another customer's basket about five minutes before plaintiff stepped on it. Chambliss testified that the picture on the tape was clear, and that the only possible explanation for how the banana got on the floor was that it fell out of a customer's basket.

Rada Arbutina testified in her deposition that on January 2, 2006, she was the assistant manager at defendant's grocery store. She was alerted to plaintiff's fall by someone in customer service, and proceeded to that area where she met a security worker. She spoke with plaintiff, who told her that she had slipped on a banana and wanted to fill out an accident report. The security worker confirmed that there was a banana on the floor, but by the time Arbutina arrived, the banana had been cleaned up. She did not bring a camera with her to the site of the fall, and did not take pictures.

Arbutina also testified that once an hour, an employee is scheduled to sweep the entire store by walking through the aisles

and looking for hazards or spills, and then recording the time of the sweep in a log. This procedure takes about five minutes on average, and Arbutina confirmed that on the day of plaintiff's fall, there was no record of any sweep being done between 2:10 p.m. and 6:56 p.m. She further testified that employees were responsible for keeping their own departments clean, and that any sweeps that were performed within a single department were not recorded.

During the deposition, Arbutina was also shown the video of plaintiff's fall. She testified that the video showed Sandy Reece, a store employee, walk through the meat department at 4:21 p.m., defendant fall at approximately 4:30 p.m., and someone cleaning up the floor at 4:33 p.m. Arbutina stated that 4:30 p.m. on a Monday is not a peak time at the store, and that in her opinion, five minutes was too long of a time to leave a banana lying on the floor. She further stated that there were multiple surveillance cameras in the store, but she did not know when or how many security guards worked there, if they were employed by defendant, or how many monitors were in the security room.

Sandy Reece testified in her deposition that she was working in the meat department on January 2, 2006, and that at 4:21 p.m., as recorded on the security video, she was filling the meat counter. She stated that if she had seen something on the floor while she filled the counter, she would have picked it up because

that was part of her job. She further testified that Monday between 4 p.m. and 5 p.m. was a peak period at the store, and that there were many cameras in the store that were monitored by a security guard at all times. Reece suspected that if a security guard observed a product fall on the floor, it would be part of that guard's job to notify someone to clean it up.

Michael Salamone testified in his deposition that on January 2, 2006, he was the store manager. He stated that it was the function of the security guards to watch the cameras and walk through the store to look for retail theft. There were two security guards in the store at all times, and the security cameras were connected to three monitors in the security room. He stated that employees were to pick up objects which they found on the floor at all times, including during sweeps, and that there was no set time frame on how long an object could be on the ground before it should be discovered. He further stated that it appeared from the surveillance video that the banana on which plaintiff slipped had fallen out of a customer's cart.

On August 21, 2007, defendant filed a motion for summary judgment contending that plaintiff failed to present any evidence that the banana was placed on the floor by one of defendant's employees, and that plaintiff failed to present any evidence showing that it had either actual or constructive notice of the banana before she fell.

Plaintiff filed a response on September 20, 2007, contending that the evidence showed that the banana must have fallen to the floor because of defendant's negligence, and that the security guards had actual notice of it. Plaintiff further contended that constructive notice was established by evidence showing that defendant's employees failed to properly perform sweeps of the store, and that a security guard should have seen the banana on a security monitor.

In its reply, defendant stated that plaintiff presented no evidence that the banana came to be on the floor through the negligence of defendant's employees, and that it did not have constructive notice of the banana. On October 18, 2007, following oral argument and review of the surveillance video, the circuit court granted defendant's motion for summary judgment and dismissed the cause with prejudice. In announcing its decision, the court found that the failure to perform a scheduled sweep of the store was unimportant because Reece inspected the area of the fall at 4:21 p.m., and the time which elapsed between Reece's inspection and plaintiff's injury was too short to establish defendant's constructive notice. Plaintiff now challenges the propriety of that order.

Summary judgment is proper where the pleadings, depositions, admissions, affidavits, and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is

no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Jones v. Chicago HMO Ltd. of Illinois, 191 Ill. 2d 278, 291 (2000). A triable issue of fact exists where there is a dispute as to a material fact, or where reasonable minds might differ in drawing inferences from facts which are not in dispute. Petrovich v. Share Health Plan of Illinois, Inc., 188 Ill. 2d 17, 31 (1999). We review the grant of a motion for summary judgment de novo. General Casualty Insurance Co. v. Lacey, 199 Ill. 2d 281, 284 (2002).

Here, plaintiff contends that the court erred when it granted defendant's motion for summary judgment. She initially claims that she provided sufficient evidence to establish a genuine issue of material fact as to whether defendant created the dangerous condition.

A proprietor of a business owes a business invitee the duty of exercising ordinary care to maintain its premises in a reasonably safe condition. Donoho v. O'Connell's, 13 Ill. 2d 113, 118 (1958). Liability will be imposed where plaintiff was injured by slipping on a foreign substance on defendant's premises if it was placed there by the negligence of defendant or its employees; or, if there is no showing as to how the substance got on the premises, if it appears that defendant, or one of its employees, knew of its presence, or that the substance was there long enough that its presence should have been discovered in the

exercise of ordinary care. Donoho, 13 Ill. 2d at 118. If the evidence shows the substance was on the premises through the acts of third persons, liability may be imposed if it appears that defendant or its employees had actual or constructive notice. Thompson v. Economy Super Marts, Inc., 221 Ill. App. 3d 263, 265 (1991). Time is a material factor in establishing constructive notice, and plaintiff must establish that the substance was on the floor long enough to constitute constructive notice. Hayes v. Bailey, 80 Ill. App. 3d 1027, 1030 (1980).

Plaintiff argues that there is a genuine issue of material fact as to whether defendant caused the banana to be on the floor. However, in order to survive summary judgment, plaintiff must offer some evidence from which it could be inferred that it was more likely that defendant's employees, rather than a customer, dropped the substance on the premises. Thompson, 221 Ill. App. 3d at 265-66. Here, plaintiff has presented no such evidence, and the evidence that was presented shows that the banana was dropped in the meat department by a customer.

The two witnesses who viewed the security tape saw the banana fall out of a customer's cart. In addition, the banana was found in the meat department, and not the produce section, where the rest of defendant's bananas were located. Thus, plaintiff failed to present any direct or circumstantial evidence that it was more likely that defendant or its employees, rather

than a customer, caused the banana to be on the floor. Thompson, 221 Ill. App. 3d at 266.

Plaintiff next contends that she has presented sufficient evidence to establish a genuine issue of material fact as to whether defendant had actual notice that the banana was on the floor. Plaintiff argues that security guards monitored the store through the use of surveillance cameras 24 hours a day, and it is therefore reasonable to infer that a security guard must have seen the dangerous condition. However, plaintiff has presented no evidence showing that a security guard, or anyone else, actually saw the banana prior to her fall. In addition, Salamone stated that the security guards were on the lookout for retail theft, and not fallen debris, thus diminishing the chances that one of them observed the fallen banana and failed to act.

Plaintiff contends, in the alternative, that she has presented sufficient evidence to establish a genuine issue of material fact as to whether defendant had constructive notice of the dangerous condition. Plaintiff argues that Reece's testimony, that plaintiff fell during the store's peak period, shows that the accident occurred at a time when many shoppers, and especially elderly shoppers, were present. Plaintiff further claims that defendant's employees did not follow the inspection policy on the day of her fall, where no sweep had been logged between 2:10 p.m. and 6:56 p.m. In addition, Arbutina testified

that in her opinion five minutes was too long a period of time for a banana to be on the floor, and Reece testified that she believed it was the security guards' job to inform someone if an object was detected on the floor.

Where plaintiff was injured in an accident involving a foreign substance on defendant's premises, liability may be imposed if the substance was present for a sufficient period of time so that defendant's employees should have discovered its presence. Hresil v. Sears, Roebuck & Co., 82 Ill. App. 3d 1000, 1001-02 (1980). In Hresil, the court concluded as a matter of law that 10 minutes was an insufficient period of time to establish constructive notice where the accident occurred at a time when few shoppers were present and salespersons were located at the store's exit. Hresil, 82 Ill. App. 3d at 1002. Here, the record shows that at 4:21 p.m., Reece walked through the area in which plaintiff fell and did not see the banana, and at 4:30 p.m. plaintiff slipped and fell on that banana.

Plaintiff, however, relying on Peterson v. Wal-Mart Stores, Inc., 241 F.3d 603, 605 (7th Cir. 2001), argues that there is no bright-line rule stating that 10 minutes is always too short a period of time for a duty of inspection and clean up to arise, and therefore a jury should make that determination in this case. We note that lower federal decisions are not binding on this court and can be held to be no more than persuasive. People v.

Miller, 107 Ill. App. 3d 1078, 1086 (1982). In this case, we find no reason to rely on foreign authority where decisions of precedential value are dispositive.

The record shows that Reece saw nothing in the area at 4:21 p.m., that the banana was dropped from the customer's basket at 4:23 p.m. and that plaintiff fell at 4:30 p.m. The conflicting testimony regarding the failure to conduct or log a sweep of the store, and opinions as to who should have discovered the banana sooner, or how many people were in the store at the time do not excuse her failure to present evidence from which defendant can be charged with constructive notice. To do so where the lapse of time was less than 10 minutes, and the condition was not created by an employee or an inherent structural defect in the store, would place upon defendant an unfair requirement of the constant patrolling of its aisles. Hresil, 82 Ill. App. 3d at 1002. Based on this evidence, we see no reason to depart from the holding in Hresil, and conclude that defendant did not have constructive notice of the dangerous condition prior to plaintiff's fall.

Accordingly, there being no issue of material fact, we find that summary judgment was proper as a matter of law and affirm the order of the circuit court of Cook County.

Affirmed.

SOUTH, J., with HOFFMAN and CUNNINGHAM, JJ., concurring.