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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROSEMARIE LOWELL, Plaintiff and Appellant, v. ALBERTSON'S LLC et al., Defendants and Respondents.	B294107 (Los Angeles County Super. Ct. No. BC675830)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher K. Lui, Judge. Affirmed.

Weinreb Law, P.C., Michael D. Weinreb, and Kenneth King for Plaintiff and Appellant.

Stone | Dean, LLP, Gregory E. Stone, and Amy W. Lewis for Defendant and Respondent Albertson's LLC.

Plaintiff Rosemarie Lowell slipped and fell after stepping in a puddle at an Albertson's grocery store. She sued Albertson's for negligence and premises liability. The trial court granted summary judgment, concluding Albertson's did not have notice of the spill because Lowell did not provide evidence the liquid was on the floor long enough to allow the store to remedy the problem by a reasonable inspection policy.

On appeal, Lowell argues the trial court erroneously sustained Albertson's evidentiary objections to Lowell's expert's declaration. Lowell further contends summary judgment was improper because there were triable issues of material fact as to whether Albertson's created the dangerous condition and had notice of it. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 25, 2017, Lowell slipped on a bright, orange puddle in an aisle of an Albertson's store. After she sued for premises liability and negligence, Albertson's moved for summary judgment. Albertson's argued the evidence established the puddle was created by a third party, a child eating a popsicle in the aisle where Lowell fell. Albertson's further argued it had no actual or constructive notice of the melted popsicle drops on the floor because the eyewitness testimony showed the drops had been on the floor for only a minute. Lastly, Albertson's argued it exercised reasonable care because its employees swept and inspected the aisles every hour.

Albertson's separate statement of undisputed material facts cited evidence showing that, on the day Lowell fell, an Albertson's employee completed a sweep and inspection of the sales floor at 2:17 p.m. The employee pushed a large, dry mop

through the sales floor while inspecting for any debris or spills. If she had observed a spill, she would have cleaned it up.

At approximately 2:39 p.m., a customer, Susan Nordberg, entered aisle 15 and observed a three-year-old boy holding a popsicle stick with "orange stuff" on it. The boy had orange coloring around his mouth and on his hand. Nordberg did not notice any orange drops on the floor when she walked into the aisle, but when the boy walked across the aisle, Nordberg saw orange droplets on the floor where the young boy had walked. A minute after Nordberg entered the aisle, at 2:40 p.m., Lowell slipped on a small orange puddle in that aisle. At 2:45 p.m., an Albertson's employee was notified that Lowell had fallen in aisle 15. The employee observed Lowell on the floor and a couple of orange droplets nearby.

Lowell opposed summary judgment, arguing that issues of fact existed as to whether Albertson's had actual or constructive notice of the puddle. Lowell asserted there was a dispute of material fact as to whether the popsicle liquid was on the floor for more than a minute because Albertson's had not inspected that aisle for at least 23 minutes.

Lowell further argued that an issue of material fact existed as to whether Albertson's breached its duty of care by maintaining an inherently slippery floor. She submitted the declaration of a civil engineer, Brad Avrit, who opined that Albertson's had created the hazardous condition through its use of "smooth vinyl tile floor surfaces." Avrit had not been to the store where Lowell fell, but concluded that the kind of flooring that is "typical of floor surfaces at Albertson's" is "slippery and dangerous when there are containments [sic] present," and it was "foreseeable that liquid spills would be present on the floor

surface . . . during normal store operation . . . ." Avrit further opined that Albertson's failure "to perform more than one sweep per hour falls dramatically below the industry standard of care."

In reply, Albertson's argued that Avrit's opinions about the reasonableness of its inspection policy and flooring were unfounded, and that Lowell had not raised a triable issue as to notice because the evidence established that the orange droplets were on the floor for approximately a minute.

The trial court sustained nine of Albertson's evidentiary objections to Avrit's declaration, and granted summary judgment. It concluded that the evidence established a young child had created the dangerous condition, and "the condition did not exist for a sufficient period of time before the incident to charge [Albertson's] with constructive notice . . . ." Lowell appealed.

DISCUSSION

Lowell argues that trial court abused its discretion when it sustained Albertson's evidentiary objections to Avrit's declaration because the court did not state the reasons for its ruling. She further contends summary judgment was improper because there were triable issues of material fact as to whether Albertson's created the dangerous condition and had actual or constructive notice of it. We find no error.

A. The Trial Court Did Not Err in Sustaining Albertson's Objections to the Declaration of Lowell's Expert

1. The Trial Court Proceedings

In his declaration supporting Lowell's opposition, Avrit claimed that he had "personally conducted investigations and analyzed more than 11,000 accident cases" including thousands of incidents where an individual "slipped and fell on substances

on the floors of retail establishments." Citing to his "experience and familiarity with industry standards and review[] [of] the policies and procedures of all major chain grocery stores," Avrit concluded that grocery stores "like Albertson's store [] should perform sweeps of the store 2–6 times per hour." He further opined that the "subject area was in an unsafe condition" because the kind of flooring typically used in Albertson's stores was slippery when liquid was present.

Albertson's asserted 10 evidentiary objections to Avrit's declaration based on lack of foundation, speculation, lack of personal knowledge, and other grounds. Albertson's argued, among other things, that (1) Avrit's opinion that the store's and its employees' conduct fell "dramatically below" the industry standard of care was without foundation because Avrit lacked expertise in the grocery industry, (2) Avrit's opinion that "several minutes" "passed between the completion of" the Albertson's employee's "sweeping process and the actual logging of the completion of the sweep" was speculative given that Avrit did not know where the employee completed her sweep or the distance from that location to where she logged in at the end of her inspection, and (3) Avrit's opinion that the "subject area" was "dangerous" due to the "smooth vinyl tile" was made without personal knowledge because Avrit "offered no evidence that he has even personally seen the floor where the incident occurred."

The trial court issued a tentative ruling sustaining the first nine evidentiary objections to Avrit's declaration and granting summary judgment. Although Lowell's counsel addressed the tentative at the hearing, he did not specifically address any of the evidentiary objections. At the end of the hearing, the court adopted the tentative order.

2. Standard of Review

"We apply the abuse of discretion standard when reviewing the trial court's rulings on evidentiary objections." (*Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1447 (*Palms*).) An "erroneous evidentiary ruling requires reversal only if 'there is a reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error. [Citation.]' [Citation.]" (*Id.* at p. 1449.)

3. The Court Did Not Abuse its Discretion

Lowell argues the court abused its discretion in sustaining nine of the evidentiary objections to her expert's declaration "without analysis or explanation." In support of this argument, she cites to two cases where trial courts made "blanket" rulings sustaining evidentiary objections. (See *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255 (*Nazir*); *Palms*, *supra*, 210 Cal.App.4th at p. 1449.)

In *Nazir*, the defendants raised 764 evidentiary objections set forth in 324 pages. (*Nazir*, *supra*, 178 Cal.App.4th at p. 254.) In a one-sentence ruling, the trial court sustained all but one of the objections. (*Id.* at p. 255.) The Court of Appeal reversed, finding "there is no way that the trial court could properly have sustained 763 objections 'guided and controlled . . . by fixed legal principles.' [Citation.]" (*Ibid.*, citations omitted.) The court set forth several reasons for its reversal: (1) some of the sustained objections "did not even assert any basis for the objection," (2) "[s]ome of the sustained objections were to plaintiff's testimony about his dates of employment, his religion, his skin color, and his national origin," (3) "[o]ver 250 of the sustained objections failed to quote the evidence objected to," (4) "[t]wenty-

seven of the sustained objections were to plaintiff's brief," and (5) "many of the objections were frivolous." (*Id.* at pp. 255–256.) "In sum, the trial court's order sustaining all but one of defendants' objections was a manifest abuse of discretion." (*Id.* at p. 257.)

In *Palms*, the Court of Appeal found "the trial court erred by summarily sustaining all of [the plaintiff's] 39 evidentiary objections, because some of the objections were unreasonable and it appears the trial court did not consider the individual objections." (*Palms*, *supra*, 210 Cal.App.4th at p. 1447.) The court reasoned: "Although summarily ruling on numerous evidentiary rulings is a common labor-saving practice in law and motion courts, the objections in this case needed individual attention. [Citation.] [The defendant] submitted a seven-page declaration, excluding the signature and proof of service pages. [The plaintiff] submitted 33 objections to that seven-page declaration, and the 33 objections were 48 pages in length. The objections were often to large sections of the deposition—multiple lines long—and were based on a variety of alleged problems, such as lack of foundation, vagueness, speculation, and lack of personal knowledge. . . . Given the sweeping nature of the objections (48 pages of objections to a seven-page declaration, numerous lines of the declaration being used in almost every objection, and multiple bases for each objection), and the problematic nature of some of the objections . . . we conclude the trial court's blanket ruling sustaining all the objections, without reasoning, was an abuse of discretion." (*Id.* at pp. 1447–1449.)

Lowell argues that, like the *Nazir* court's blanket ruling sustaining 763 objections and like the *Palms* court's summary ruling on 33 objections, here, the trial court's ruling sustaining

nine objections was an abuse of discretion because the court did not explain its reasoning. Lowell does not cite to any particular objection that she believes was problematic, but rather generally argues that Avrit was "qualified to serve as an expert," "an expert need not have personal knowledge of matters," Avrit's opinions were not "speculative as he provided a detailed analysis" for each of his opinions, and the opinions were both relevant and did not constitute hearsay.

The trial court's ruling here was not analogous to those in *Nazir* and *Palms*: far fewer objections were asserted here, they were in proper form, and no objection was patently problematic or obviously meritless. The trial court was not required to issue a written explanation for its ruling on the evidentiary objections, and Lowell's counsel missed his opportunity to ask for an oral explanation at the hearing. Nor has Lowell met her burden on appeal of showing error through her arguments generally touting the merits of her expert's declaration. She has not attempted to argue error as to any individual objection, and has not addressed why she was prejudiced by any of the rulings such that it changed the outcome on the summary judgment motion. We find no abuse of discretion.

B. The Trial Court Did Not Err in Granting Summary Judgment

Lowell makes two arguments as to why the court erred in granting summary judgment. First, she argues there was a triable issue of material fact as to whether the store created a dangerous condition by allowing a child to eat a popsicle in the store. Second, Lowell argues that evidence of a "23–40 minute lapse of time between inspection and incident" raised "a triable issue of material fact as to the inference of constructive notice."

We conclude Albertson's proved the nonexistence of a triable issue of material fact, and summary judgment was proper.

1. Standard of Review

" 'A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.' [Citations.] If a defendant establishes that one or more elements of a cause of action cannot be established or that there is a complete defense to that cause of action, the burden shifts to the plaintiff to show that a triable issue exists as to one or more material facts. [Citation.] If the trial court finds that no triable issue of fact exists, it then has the duty to determine the issue of law. [Citations.]" (*Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381, 385 (*Getchell*).)

We review a trial court's decision on summary judgment de novo, "considering all of the evidence the parties offered in connection with the motion (except that which the [trial] court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

2. Liability for the Safety of Customers

"[A]lthough a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe. [Citations.] In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages. [Citations.] A plaintiff meets the causation element by showing that (1) the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about plaintiff's harm, and (2) there is no rule of law relieving the defendant of liability.

[Citation.] These are factual questions for the jury to decide, except in cases in which the facts as to causation are undisputed. [Citation.]" (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 (*Ortega*).)

"Because the owner is not the insurer of the visitor's personal safety [citation], the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability. Although the owner's lack of knowledge is not a defense, '[t]o impose liability for injuries suffered by an invitee due to [a] defective condition of the premises, the owner or occupier "must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises . . . ." ' [Citation.]" (*Ortega*, *supra*, 26 Cal.4th at p. 1206.)

"On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Ortega*, *supra*, 26 Cal.4th at pp. 1205–1206.)

"The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence. Knowledge may be shown by

circumstantial evidence 'which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts.' [Citation.]." (*Ortega*, *supra*, 26 Cal.4th pp. 1206–1207.) This is a fact-dependent inquiry. Owners are required to inspect their premises for hazards and, "if, by the exercise of reasonable care, the owner would have discovered the condition, he is liable for failing to correct it." (*Id.* at p. 1207.)

3. Lowell Did Not Raise a Triable Issue of Material Fact as to Whether Albertson's Created the Dangerous Condition

We first address Lowell's contention that there was a triable issue of material fact as to whether Albertson's conduct in allowing the child to eat and drink in the store created a dangerous condition that caused her injury. In moving for summary judgment, Albertson's argued the facts were undisputed that it did not create the puddle on which Lowell slipped because the liquid came from a child's popsicle. In opposition, Lowell argued that Albertson's use of "smooth vinyl tile floor surfaces" created the dangerous condition. The trial court then sustained objections to Lowell's expert's statements regarding the use of defective flooring, and concluded Lowell could not show that Albertson's had created the dangerous condition.

On appeal, Lowell argues the trial court erred by narrowly construing " 'dangerous condition' to mean only the condition of the water on the floor." Lowell now contends that there were triable issues of material fact as to whether Albertson's negligence in allowing a child to eat a popsicle in its store created the dangerous condition.

We first observe that the trial court's ruling corresponded directly to Lowell's argument in its opposition below: that Albertson's use of smooth flooring created the dangerous condition. At the hearing on the summary judgment motion, Lowell's counsel did not address this contention, but rather argued that Lowell had raised a triable issue as to "whether defendant Albertson's was unreasonable, and negligent . . . in allowing customers to eat and drink while shopping on the premises knowing the foreseeability that allowing customers and children to eat and drink while shopping could lead to spills and dangerous conditions." However, counsel did not develop this argument further, and the trial court then adopted its tentative ruling.

Even assuming Lowell had properly raised this argument below, and we agreed there was evidence that Albertson's choice to allow a customer to consume foods and liquids in the store created a dangerous condition, Lowell must still prove that Albertson's had actual or constructive knowledge of the dangerous condition. (See *Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 479 ["Under current California law, a store owner's choice of a particular 'mode of operation' does not eliminate a slip-and-fall plaintiff's burden of proving the owner had knowledge of the dangerous condition that caused the accident."]; cf. *Getchell*, *supra*, 203 Cal.App.4th at p. 385 [where an employee directly created the dangerous condition, the defendant is charged with notice of the condition].) As explained below, she failed to raise a triable issue of material fact on this front.

4. Lowell Failed to Raise a Triable Issue of Material Fact as to Whether Albertson's Had Constructive Notice of the Melted Popsicle

The trial court concluded that Lowell had not raised a triable issue of material fact as to whether Albertson's had actual or constructive notice of the popsicle drops on the floor. Albertson's presented eyewitness testimony that the melted popsicle had been on the floor for approximately a minute which was a sufficient prima facie showing that it did not have actual or constructive notice of the spill. In opposition, Lowell did not present any evidence to the contrary, but only argued that Albertson's failure to conduct a store inspection for at least 23 minutes before the accident created a triable issue of material fact as to whether it had constructive notice of the dangerous condition. Lowell now repeats that argument. We are not persuaded.

A business owner's constructive knowledge of a dangerous condition may be inferred from the failure to inspect the premises within a reasonable time *when* there is no direct evidence of how long the condition existed. Here, there was evidence of a three-year-old boy walking through aisle 15, leaving behind popsicle drips as he walked. He was holding the popsicle stick and had melted popsicle on his hand and mouth when another customer, witness Nordberg, walked into the aisle. She did not notice any popsicle drippings on the floor. The boy then crossed the aisle, and Nordberg saw bright, orange popsicle drops where he had been walking. A minute later, Lowell slipped on those drops. From this evidence, the only reasonable inference was that the popsicle drops were on the floor for approximately a minute.

Lowell challenges this evidence by arguing that Nordberg never saw the orange liquid actually drop to the floor, and did not know how long the child had been in the aisle. In other words, Lowell's argument emphasizes that Nordberg did not see drops on the floor when she entered the aisle and then, within a minute's time, noticed orange drops when the child walked away from the accident area. The argument then continues, the "only way that Nordberg could affirmatively establish" a one-minute timeline between the liquid dropping and the fall is if Nordberg "saw orange liquid drop to the floor or fall from the toddler's hand." We disagree. The only reasonable inference from Nordberg's account of the events is that the popsicle liquid fell to the floor while the child was walking through that area—she did not see drops on the floor when she entered the aisle, but when the child walked away from the spot, he had left drops behind him. It is not "pure speculation or conjecture," but rather valid circumstantial evidence of when the dangerous condition was created. (*Ortega*, *supra*, 26 Cal.4th at p. 1205.)

Nor does Lowell's reliance on *Ortega* assist her. In *Ortega*, the Supreme court concluded that a plaintiff may prove a dangerous condition existed for an unreasonable amount of time based on circumstantial evidence. (*Ortega*, *supra*, 26 Cal.4th p. 1210.) In *Ortega*, the plaintiff, who had slipped on a puddle of milk, lacked direct proof about how long the milk had been on the floor. (*Ibid.*) The Court held that evidence an inspection had not been made within at least 15 to 30 minutes before the accident could give rise to an inference the spilled milk remained on the floor long enough to enable the defendant, in the exercise of reasonable care, to discover and remove it. (*Ibid.*.)

Citing to *Ortega*, Lowell argues that it was a disputed issue of material fact whether the melted popsicle had "existed long enough for a reasonably prudent person to have discovered it" because the evidence showed the store had not inspected the aisle for at least 23 minutes. But here there was direct proof of how long the melted popsicle had been on the floor: Nordberg's testimony that the popsicle drops appeared within a minute of the accident.

Lowell does not argue that Albertson's should have inspected its aisles every few minutes for spills. Even if she had, we would have concluded that such a short time was insufficient as a matter of law to establish constructive notice. (See *Girvetz v. Boys' Market, Inc.* (1949) 91 Cal.App.2d 827[1] [that a dangerous condition existed for one and a half minutes was insufficient to show the defendant store owner had constructive notice of it].) Albertson's, thus, established that Lowell could not prove it had actual or constructive notice of the melted popsicle on the floor, and Lowell did not raise a triable issue as to this fact. Summary judgment was proper.

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[1] At oral argument, Lowell's counsel argued *Girvetz v. Boys' Market* was distinguishable because it involved a banana that fell to the floor, and not a popsicle that "could have been dripping throughout the entire store." However, counsel acknowledged there was no evidence the popsicle had dripped elsewhere in the store.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

MOOR, J.