

C O R R E C T E D C O P Y

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX: KINGSHILL DIVISION

MARY RICHARDS,	)	
	)	
	)	
Plaintiff,	)	CIVIL NO. 144/1983
	)	
v.	)	
	)	
SUNSHINE SUPERMARKET, INC.,	)	ACTION FOR DAMAGES
	)	
	)	
Defendant.	)	

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PETERSEN, Judge

MEMORANDUM OPINION
May 15, 1986

This matter is before this Court on defendant's motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The Court must note with regret and serious concern that plaintiff's attorney failed to respond to defendant's motion. Several reminders by this

RICHARDS v. SUNSHINE SUPERMARKET, INC.
CIVIL NO. 144/1983
ACTION FOR DAMAGES
Page 2

Court were completely ignored. For the following reasons defendant's motion for a new trial is granted.

FACTS

On March 6, 1986, a jury trial was held in which plaintiff, Mary Richards, alleged that defendant, Sunshine Supermarket, Inc.'s negligence in not maintaining its store in a safe condition caused plaintiff to slip and fall. Plaintiff further alleged that the fall caused the physical injuries which form the basis of this action.

The Court denied defendant's motion for a directed verdict at the close of the plaintiff's case. Defendant then rested and the case went to the jury.

The jury returned a judgment of Eighty-Five Thousand (\$85,000.00) Dollars in favor of the plaintiff.

ISSUES

This Court is asked to determine (1) whether it was prejudicial error to admit hearsay evidence that the "Defendant was too cheap to hire a janitor," (2) whether the evidence presented by the plaintiff was insufficient as a matter of law to prove that the defendant had constructive notice of the dangerous condition which caused plaintiff's fall and (3) whether it abused its discretion by permitting

RICHARDS v. SUNSHINE SUPERMARKET, INC.
CIVIL NO. 144/1983
ACTION FOR DAMAGES
Page 3

the testimony of plaintiff's witness, Dr. Menzies, a chiropractor, who was not listed as an expert witness.

DISCUSSION

I.

Defendant contends that it was prejudicial for the Court to admit hearsay evidence that the defendant was "too cheap to hire a janitor." The Federal Rules of Evidence 803(2) defines as an exception to the hearsay rule "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Such an exception is categorized as an "excited utterance." A statement is said to be an "excited utterance" when the following three conditions exist: (1) a startling event (2) a spontaneous statement made without time for fabrication and (3) the statement refers to the circumstances of the particular event. The facts in the case at bar satisfy the three conditions. The fall of a middle-aged woman is in itself a startling occasion. The declarant, a bagger and an employee of the defendant, witnessed the fall and made the unsolicited statement within seconds thereafter. Aiding in the credibility of the statement is the fact that the declarant, as defendant's employee, presumably had knowledge of the

absence of a janitor. Finally, it is obvious that the statement directly concerned the "circumstance" of the "startling occasion." For these reasons it was not erroneous for this Court to admit the "hearsay" statement into evidence. David v. Pueblo Supermarket, Inc. 740 F.2d, 230, 235. (3d Cir. 1984).

II.

In the absence of direct evidence as to the length of time the "parsley" or "celery" upon which plaintiff slipped and fell remained on the floor, there is no basis to conclude that the defendant had actual notice of any unsafe condition. Absent actual notice the Court must determine whether sufficient evidence was presented to constitute a finding of constructive notice.

To demonstrate constructive notice the plaintiff must prove that defendant by exercise of reasonable care would have known of the dangerous condition; i.e., the "celery" or "parsley" which caused plaintiff's fall. See, generally Restatement (Second) of Torts §343 and comment b.

The defendant relies on a number of cases which suggest that even after establishing the existence of a foreign substance, without further proof of how long it had been present, there is no basis for a finding of negligence.

RICHARDS v. SUNSHINE SUPERMARKET, INC.
CIVIL NO. 144/1983
ACTION FOR DAMAGES
Page 5

McElroy v. S.S. Kresge Co., 244 S.W.2d 425, 428 (1951);
Shannon v. Union Barge Line Company, 194 F.2d 584, 586 (3d
Cir. 1952).

The plaintiff in McElroy, supra, slipped and fell in defendant's place of business on an oily substance. She did not establish how long the substance had been present and made no further description of its nature or composition. In Shannon, supra, plaintiff also slipped and fell on oil and similarly presented no further proof as to either the condition of the oil or the length of time the oil had been present on the deck where she fell. Diller, supra, presents a similar fact pattern. Plaintiff slipped and fell on ice and water in the produce section of defendant's store. Again there was no evidence in the record as to how long the dangerous condition existed prior to plaintiff's fall. In the absence of such evidence there is no basis for a finding of negligence and as a result plaintiff's case fails. This is the general rule "unless there is something unique about the condition of the foreign substance" David, supra at 234 n.3.

The David opinion makes special note of Rumsey v. Great Atlantic and Pacific Tea Company, 408 F.2d 89 (3d Cir. 1969) as an exception to the general proposition that liability does not flow without specific evidence of some time sufficient to infer constructive notice. In Rumsey, supra,

the plaintiff slipped and fell on a piece of lettuce leaf. There was no evidence introduced with respect to the length of time the lettuce had been on the floor. There was also, as in the instant case, no indication that the floor had been swept or inspected recently. The Third Circuit found that there was sufficient evidence to "warrant, though certainly not to compel, an inference that the lettuce had been there for 'some time'." Rumsey, at 90.

Rumsey further notes that "[s]mall differences in the evidence can lead to opposite conclusions as to whether the condition of the foreign substance, alone or with other circumstances, was sufficient to support a rational inference that it had been there long enough for a reasonably careful proprietor to have discovered and removed it." Rumsey, supra, at 90. Ms. James, who witnessed plaintiff Richards' fall, described the condition of the substance upon which she fell alternatively as "stale" and "mushy". The bagger's statement, "You see you all make the lady fell. Too cheap to hire a cleaning man," coupled with the testimony of Ms. James is sufficient to make the question of constructive notice of the unsafe condition a jury issue.

This Court also realizes that plaintiff's case is not overwhelming; however, the probative value of the evidence is such that the jury could reasonably infer that the

"parsley" had been there for some time. The fact that the opposite conclusion could be based on the same evidence does not operate to negate the jury's decision. Circumstantial evidence which indicates that food was left on the floor for some time, unnoticed by management due to a lack of reasonable care is sufficient to constitute negligence and presents a question of fact within the province of the jury. David, supra at 236.

This Court is precluded from granting defendant's motion for judgment notwithstanding the verdict. A judgment notwithstanding the verdict can only be granted when, "without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." Thomas v. E.J. Korvette, Inc., 476 F.2d 471, 474 (3d Cir. 1973), Laltoo v. Bank of Nova Scotia, 18 V.I. 479, 482 (1981), quoting Moore's Fed. Prac. 50.07[2].

III.

Defendant has challenged the competency of Dr. Menzies to testify as an expert witness. This challenge is without merit.

It is well established that a chiropractor is competent to testify as an expert or medical witness concerning matters within the professional purview of

chiropractic practice. Chiropractors are also competent to express opinions as to the probable cause of an injury to or the physical condition of an injured person, again within the scope of their profession. See generally, 52 ALR2d 1384.

Dr. Menzies, a graduate of Logan College of Chiropractic, was licensed to practice in the Virgin Islands in 1984. He had previously practiced for five years in North Carolina, where he has also testified for depositions as well as workmen's compensation proceedings. The opinion evidence of a chiropractor, with background and experience comparable to that of Dr. Menzies, was held admissible in Johnston v. Peairs, 3 P.2d 617, 620 (1931). (Where it was not apparent that a chiropractor was practicing in violation of any law and he was plaintiff's only expert witness, testifying in an effort to establish that the accident was the cause of plaintiff's disability, it was held error to exclude his opinion evidence.) Micciche v. Forest Hill Cemetery, 55 Pa. D&C 620 (1945). See, 52 ALR2d 1384, at 1390.

IV.

Rule 26(e)(1) of the Federal Rules of Civil Procedure provides that

a party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A)... and (B) the identity of each person expected to be called as an expert witness

at trial, the subject matter on which he is expected to testify and the substance of his testimony.

The purpose of this rule is to insure that the parties are not adversely affected by the surprise attendant to the opposition's non-disclosure of expert witness(es). Nissley v. Pennsylvania Railroad Company, 259 A.2d 451 (1969) recognizes that "[E]ach case presents unique problems whose solution rests best in the discretion of the trial court." O'Malley v. Peerless Petroleum, Inc., 423 A.2d 1251, 1258 (1980) quoting Moore v. Howard P. Foley 340 A.2d 519 at 523 (1975).

Although subpoenaed as a witness and listed prior to trial as one of plaintiff's experts', Dr. Henry failed to appear. Plaintiff was left with Dr. Menzies as her only available medical expert. However, that circumstance alone cannot mitigate the unfairness that may have accrued to the defendant due to the non-disclosure of Dr. Menzies as plaintiff's expert.

In Moore, supra at 521, the Court found a willful failure, on the plaintiff's part to file sufficient answers to interrogatories. No such willfull failure exists here. However, plaintiff's attorney did fail to take the requisite care to update the answers to defendant's interrogatories to include Dr. Menzies' name. Moore also held that it was error to allow a witness to testify when opposing counsel was only

RICHARDS v. SUNSHINE SUPERMARKET, INC.
CIVIL NO. 144/1983
ACTION FOR DAMAGES
Page 10

furnished with the witness' name two days prior to trial. In the instant case defendant was not made aware of Dr. Menzies' as a potential witness until the day of trial.

Without ample time to investigate Dr. Menzies' credentials, defendant's argument as to being unable to adequately and effectively cross-examine the expert witness merits serious consideration. Moreover, Dr. Menzies was never called previously as an expert witness in the Court of the Virgin Islands. Additionally, the Court can not overlook the fact that Dr. Menzies' testimony was unrefuted by any other medical expert. In view of the circumstances the prejudicial effect of allowing the testimony of Dr. Menzies cannot be overlooked by this Court.


EILEEN R. PETERSEN
Judge