IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01326 COA

MARY SPEIGHT

APPELLANT

v.

WAL-MART STORES, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. C. E. MORGAN III

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

LAUREL G. WEIR

THOMAS L. BOOKER JR.

ATTORNEY FOR APPELLEE:

EDLEY H. JONES, III

NATURE OF THE CASE: PERSONAL INJURY - SLIP AND FALL

TRIAL COURT DISPOSITION: VERDICT FOR APPELLEE

BEFORE THOMAS, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Mary Speight filed a suit against Wal-Mart Stores, Inc. seeking damages for an injury she sustained when she fell on caulking while shopping in Wal-Mart. The jury returned a verdict for Wal-Mart. Speight appeals arguing that the jury was biased in that most of the members of the jury were either close kin to people working for Wal-Mart or disqualified to serve on the jury for other reasons. Speight also argues that the trial court erred in refusing her instructions and giving instructions submitted by Wal-Mart. Finding these arguments without merit, we affirm.

FACTS

On October 12, 1992, Speight went to Wal-Mart shopping. While there, she fell and injured herself. She claims that she fell on a tube of caulking or something similar that was in her path as she pushed a shopping cart down one of the aisles. As a result of this fall, Speight broke one of her ribs, fractured another rib, and hurt her foot. Wal-Mart does not deny that Speight fell while in the store; that a tube of caulking was on the floor; or that Speight sustained some injuries as a result of the fall. Wal-Mart does dispute, however, that the store was the cause of the fall. Although Speight testified at her deposition that she knew of no witnesses to her fall, she named two witnesses at trial. One of those witnesses testified. The jury returned a verdict for Wal-Mart.

DISCUSSION

Speight alleges two points of error. First, she contends that the jury was biased and that the court erred in not granting her an additional jury challenge or make other arrangements for a fair and impartial jury. Next, she contends that the trial court erred in refusing her requested instructions.

1. Jury Selection

Speight claims that the trial court should have excused for cause Jurors James, Crowson, and Ingram. She contends that because Juror Ingram’s son was an employee of Wal-Mart, Juror Crowson had close relatives employed by Wal-Mart, and Juror James’s mother was employed by Wal-Mart, the jury was partial, and the judge should have excused these jurors for cause. Wal-Mart argues that the court was correct in denying the challenges for cause in that Speight failed to establish any bias on behalf of the jurors. Wal-Mart further argues that Speight waived any objection she had to the members of the jury panel because she exercised only three of her four preemptory challenges.

The supreme court has stated that "[g]enerally, a juror removed on a challenge for cause is one against whom a cause for challenge exists that would likely affect his competency at trial." *Woodward v. State*, 533 So. 2d 418, 424 (Miss. 1988). Each of the jurors complained of in this case were asked if they would be influenced by their connection with Wal-Mart. They responded that they would not be so influenced. Furthermore, this assignment of error is barred because Speight fails a threshold test set out by the supreme court. The court has stated that a "[p]rerequisite to presentation to such a claim on appeal is a showing that [appellant] had exhausted all of his peremptory challenges and that the incompetent juror was forced upon him by the trial court's erroneous ruling." *Chisolm v. State*, 529 So. 2d 635, 639 (Miss. 1988). The court stated that the "reason for the rule is that the appellant has the power to cure substantially any error so long as he has remaining unused peremptory challenges." *Davis v. State*, 660 So. 2d 1228, 1243 (Miss. 1995). The court further stated that "[w]e would put the integrity of the trial process at risk were we to allow a litigant to refrain from using his peremptory challenges and, suffering an adverse verdict at trial, secure reversal

on appeal on grounds that the Circuit Court did not do what appellant wholly had power to do." *Id.* Speight failed to exhaust all of her peremptory challenges. Based on case precedent, we find this issue meritless.

2. Refusal of Jury Instructions

Speight argues that the trial court erred in denying instructions submitted by her and erroneously granting instructions submitted by Wal-Mart.

a. Peremptory Instruction

Speight first asserts that the court erred in denying "Instruction P-1" which was an instruction for the jury to find for the appellant. In *Whitley v. City of Meridian*, the court said "[t]he rule for determining whether a peremptory instruction is appropriate requires that all evidence favorable to the party against whom the peremptory instruction is requested must be accepted as true, all evidence in favor of the party requesting the peremptory instruction in conflict with that of the other party must be disregarded, and, if the evidence and the reasonable inferences to be drawn from same will support a verdict for the party against whom it is requested, then the peremptory instruction should be refused." *Whitley v. City of Meridian*, 530 So. 2d 1341, 1347 (Miss. 1988).

There was sufficient evidence presented to support a jury issue on liability. Wal-Mart presented witnesses who testified that they had just checked the aisle on which Speight shopped and found it clean just minutes before the incident. Other witnesses testified that they heard Speight say that she saw the tube of caulk before she fell, and still others testified to the floor safety practices in the store. We find that there was sufficient evidence presented to deny the requested peremptory instruction.

b. Burden of Proof Instruction

Speight further contends that the court erred in granting instructions that she had to prove that the tube of caulking had been on the floor for a sufficient length of time to place someone on notice. The instruction referred to is D-6 which states:

> The court instructs the jury that Wal-Mart is not responsible for the Plaintiff's injuries and damages merely because Wal-Mart merchandise may have been on the floor. Likewise, the mere fact that the Plaintiff was injured while shopping in Wal-Mart does not mean Wal-Mart committed any wrongful act.
>
> There has been no proof that the tube of caulk was placed on the floor by actions of any Wal-Mart employee. Thus for the Plaintiff to prove Wal-Mart breached its duty to her, Mary Speight must establish by a preponderance of the credible evidence that a reasonable person, exercising reasonable care, would have discovered the tube of caulking prior to the Plaintiff's fall. In reaching this determination you may not indulge in any presumptions or speculations as to how long the tube of caulk was present on the floor. Mary Speight bears the burden of proof to establish by a preponderance of the evidence that the tube of caulk was on the floor for a sufficient length of time to place a reasonable person under the same circumstances on notice of its presence.
>
> If you find from a preponderance of the evidence that Mary Speight has failed to meet her

burden of proof, it is your sworn duty to return a verdict in favor of the Defendant Wal-Mart Stores, Inc.

It has been long settled that "[a] business owner or operator owes a duty to the invitee to keep its

premises in a reasonably safe condition and to warn of dangerous conditions which are not readily apparent to the invitee." *Drennan v. Kroger Co.*, 672 So. 2d 1168, 1170 (Miss. 1996) (citing *Munford, Inc. v. Fleming*, 597 So. 2d 1282, 1284 (Miss. 1992); *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So. 2d 293, 295 (Miss. 1988)). "No proof of the operator's knowledge of the condition is necessary where the condition is created by his negligence or the negligence of someone under his authority." *Drennan*, 672 So. 2d at 1170 (citing *Douglas v. Great Atlantic & Pac. Tea Co.*, 405 So. 2d 107, 110 (Miss. 1981); *Mississippi Winn-Dixie Supermarkets v. Hughes*, 247 Miss. 575, 156 So. 2d 734, 736 (1963). Thus, "[t]here are several circumstances in which a store owner may be held liable to an invitee in such a case. Where the dangerous condition on the floor is traceable to the proprietor's own negligence, no knowledge of its existence need be shown." *Millers of Jackson, Inc. v. Newell*, 341 So. 2d 101, 102 (Miss. 1977) (citing *Mississippi Winn-Dixie Supermarkets v. Hughes*, 247 Miss. 575, 584, 156 So. 2d 734, 736 (Miss. 1963)). Another circumstance in which the store owner may be held liable to an invitee is "[w]here the presence of the condition is due to the act of a third party." *Millers of Jackson*, 341 So. 2d at 101. In such a situation, "it must be shown that the defendant had actual or constructive notice of its existence." *Id.*

The instructions granted by the court sufficiently covered the burden of proof necessary to find Wal-Mart negligent in this case. We find that the instructions given were not contrary to the law on this subject and the jury was adequately instructed on what Speight had to prove to succeed on her slip and fall claim.

c. Speight’s Duty of Care

Speight seems to argue that the court ignored the mandate in *Tharp v. Bunge Corp.*, which abolished the open and obvious defense. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 25 (Miss. 1994). Speight contends that instruction D-7 directing the jury that Speight had a duty to maintain a reasonable lookout for her own welfare was a violation of *Tharp.* However, that instruction also informed the jury that should it find that the negligence of Speight proximately caused or contributed to her damages, then the amount of damages to be awarded to her should be reduced in proportion to her own negligence. This comparative negligence instruction complied with the mandates of *Tharp.* Therefore, this issue is without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF WINSTON COUNTY IS AFFIRMED. ALL COSTS ARE ASSESSED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.