NO. COA01-799

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

PATTIELYNN WELLS,
Plaintiff-Appellant,

v. Catawba County
No. 00 CVS 2300

BROWN INVESTMENT PROPERTIES, INC., d/b/a/ COLONIAL HOUSE APARTMENTS and FOX RIDGE APARTMENTS,
Defendant-Appellee.

Appeal by plaintiff from order dated 27 March 2001 by Judge Donald Forrest Bridges in Superior Court, Catawba County. Heard in the Court of Appeals 27 March 2002.

Campbell & Taylor, by Jason E. Taylor, for plaintiff-appellant.

Roberts & Stevens, P.A., by Frank P. Graham and Kenneth R. Hunt, for defendant-appellee.

McGEE, Judge.

Pattielynn Wells (plaintiff) appeals from entry of summary judgment in favor of Brown Investment Properties, Inc., d/b/a Colonial House Apartments and Fox Ridge Apartments (defendant), in an action to recover damages for her slip and fall in the parking lot of Fox Ridge Apartments in Hickory, North Carolina on 15 December 1998.

In her complaint, plaintiff alleges that while walking to her

apartment, she slipped and fell on a "smooth and slippery portion of the pavement of the parking lot[.]" As a result of the fall, plaintiff fractured her elbow and sustained other injuries. Plaintiff specifically alleges in her complaint that defendant was negligent by:

> a. failing to warn lawful visitors, including tenants and Plaintiff herein, of the hidden, hazardous and unsafe peril created by the presence of a flat and slippery condition in the parking lot of the Apartment premises;
>
> b. failing to provide a reasonably safe condition at the Apartment for its lawful visitors and tenants;
>
> c. allowing a hazardous condition to exist and remain in the parking lot of the Apartment premises when Defendant knew, or reasonably should have known, that the condition of the parking lot at the location of Plaintiff's slip and fall created a slippery condition which was of danger to lawful visitors, and to Plaintiff in particular, as well as other negligent acts and/or omissions.

Defendant filed an answer denying plaintiff's allegations and alleging plaintiff was contributorily negligent.

After discovery, defendant filed a motion for summary judgment. The evidence before the trial court on defendant's motion for summary judgment included the pleadings, interrogatories, responses to requests for production of documents, and plaintiff's deposition. Following a hearing, the trial court granted defendant's motion for summary judgment. Plaintiff appeals.

Plaintiff argues the trial court erred in granting defendant's motion for summary judgment. We disagree.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1999). In her brief, plaintiff contends there were issues of fact; however, she only argues questions of law and fails to point out issues of fact, except concerning her alleged contributory negligence, which we need not reach. With no genuine issue of material fact at issue, we must determine if the trial court correctly granted summary judgment for defendant as a matter of law.

As the moving party, defendant has the initial burden of showing either that an essential element of plaintiff's claim does not exist as a matter of law or that plaintiff cannot produce evidence to support an essential element of the claim. *Evans v. Appert*, 91 N.C. App. 362, 365, 372 S.E.2d 94, 96, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988). *See also Dowless v. Kroger Co.*, 148 N.C. App. 168, 170, 557 S.E.2d 607, 609 (2001). If defendant carries that burden, plaintiff must then offer a forecast of evidence which shows that there is a genuine issue for trial with respect to the issues raised by defendant. *Evans*, 91 N.C. App. at 365, 372 S.E.2d at 96; N.C. Gen. Stat. § 1A-1, Rule 56(e) (1999). The trial court must consider the evidence in the light most favorable to the non-movant. *See Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997), *aff'd*, 347 N.C. 666, 496 S.E.2d 379 (1998).

"To prevail in a common law negligence action, a plaintiff must establish that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the plaintiff's injury was proximately caused by the breach." *Martishius v. Carolco Studios, Inc.*, ___ N.C. ___, ___, 562 S.E.2d 887, ___ (2002) (citing *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1988)). In the present case, plaintiff has failed to produce any evidence that defendant breached a duty owed to plaintiff.

Property owners have "the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). In order to show actionable negligence by a defendant, a plaintiff must forecast evidence tending to "show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992).

Plaintiff has failed to forecast any evidence to support her claim that defendant was negligent other than the bald assertions in her complaint. Defendant formally inspected the apartment complex quarterly with the last inspection being 18 November 1998, approximately one month before plaintiff's accident. In the inspection report, conditions of areas in the apartment complex are rated on a numerical scale, with numbers representing

classifications ranging from "excellent" to "poor." On the 18 November 1998 inspection, defendant's parking lots received an "excellent" rating overall with the asphalt rating a "good."

Plaintiff has produced no evidence that defendant's inspection was not reasonable or that a reasonable inspection should have revealed that the condition of the asphalt created a hazardous condition. Also, there is no evidence in the record of previous accidents in the parking lot caused by the "smooth and slippery portions" of asphalt, nor is there evidence of any concerns or complaints by other tenants or visitors to the apartment complex due to the "smooth and slippery" spots in the parking lot. In fact, in her deposition, plaintiff stated that she was "sure that [she had] stepped on [the spots] before," but there is no evidence she fell down or reported falling down on any other occasion.

Finally, plaintiff has failed to produce any evidence, other than her injury, that defendant's parking lot created a hazardous condition and "[n]egligence is not presumed from the mere fact of injury." *Roumillat*, 331 N.C. at 68, 414 S.E.2d at 345. There is no evidence tending to show defendant was aware of slippery spots on the asphalt or that defendant should have known the asphalt was hazardous.

Viewing the evidence in a light most favorable to plaintiff and giving her the benefit of all inferences therein, plaintiff has failed to forecast any evidence to prove an essential element of her negligence claim, being that defendant breached a duty owed to plaintiff. The trial court did not err in granting defendant's

motion for summary judgment.

Affirmed.

Judges WALKER and CAMPBELL concur.

Report per Rule 30(e).