IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-463

Filed: 6 December 2016

Wake County, No. 14 CVS 13728

JOE E. UTLEY and CHRISTINE UTLEY, Plaintiffs,

v.

KENNETH R. SMITH d/b/a SMITH HARDWARE AND GARDEN, A North Carolina Partnership, Defendant.

Appeal by Plaintiffs from order entered 14 January 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 5 October 2016.

Matthew C. Phillips for Plaintiff-Appellants.

Bailey & Dixon, LLP, by Philip A. Collins, for Defendant-Appellee.

INMAN, Judge.

A retail store owes no duty to warn a customer about a dangerous condition that the customer can see without obstruction or distraction. Therefore, the trial court did not err in entering summary judgment against claims arising when a hardware store customer tripped over crates of tomatoes that were openly stacked and protruding into a shopping aisle.

Joe E. Utley ("Plaintiff") and Christine Utley (collectively "Plaintiffs") appeal from the 14 January 2016 order granting a motion of summary judgment in favor of Kenneth R. Smith doing business as Smith Hardware and Garden ("Defendant"). Plaintiffs argue the trial court erred by allowing summary judgment when there was some evidence showing the condition causing Plaintiff's accident was not open and obvious, was not possible to negotiate with reasonable safety, and that Defendant failed to seek immediate medical assistance for Plaintiff. After careful review, we affirm the trial court's order.

I. Facts and Procedural History

On 5 September 2012, Plaintiff was shopping for collard plants in Defendant's store. Plaintiff asked one of the attendants where he could find collards and was directed outside. While walking toward the collards, Plaintiff tripped over several crates of tomatoes stacked in the aisle. As a result of the accident, Plaintiff suffered injuries to his hip and shoulder.

Plaintiffs filed a complaint against Defendant in Wake County Superior Court on 14 October 2014, alleging claims for negligence and loss of consortium. Defendant answered, and after the parties engaged in discovery, filed a motion for summary judgment. Following a hearing, the trial court entered an order granting Defendant's motion for summary judgment and dismissing Plaintiffs' claims. Plaintiffs timely appealed.

II. Analysis

A. Standard of Review

An appeal from summary judgment is reviewed *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). In our consideration of a trial court's order on a motion for summary judgment, "we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). And "[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

B. Open and Obvious Condition

Plaintiffs argue that the evidence, when viewed in the light most favorable to Plaintiffs, raises a genuine issue of fact regarding whether the condition causing Plaintiff's accident was open and obvious, and therefore Defendant was negligent. We disagree.

To establish a valid negligence claim, a plaintiff must show: "(1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and

(2) that such negligent breach of duty was a proximate cause of the injury." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted).

A real property owner in North Carolina owes a duty of reasonable care to all lawful visitors. *Nelson v. Freeland*, 349 N.C. 615, 631, 507 S.E.2d 882, 892 (1998). A business owner's duty is to "exercise 'ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.' " *Hines v. Wal-Mart Stores East, L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) (citing *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963)). An owner "is under no duty to warn invitees of obvious dangers of which they have equal or superior knowledge." *Jacobs v. Hill's Food Stores, Inc.*, 88 N.C. App. 730, 733, 364 S.E.2d 692, 693-94 (1988).

In *Jacobs*, the plaintiff brought a negligence claim for an injury sustained when she fell over a concrete barrier located in a walkway leading from a store to a parking lot. *Id.* at 730-31, 364 S.E.2d at 692. This Court held that the plaintiff's testimony showed "that the concrete block was an obvious condition and that [the] plaintiff either knew or should have known of the location of the concrete block on the walkway[,]" and that the defendant did not owe the plaintiff a duty to warn of an

obvious condition. *Id.* at 733, 364 S.E.2d at 694. Because the evidence established that the defendant did not breach any duty owed to the plaintiff, this Court affirmed the trial court's allowance of the defendant's motion for summary judgment. *Id.* at 733-734, 364 S.E.2d at 694.

Here, Plaintiff's deposition testimony established that Plaintiff first saw the crates when he walked down the aisle to ask where the collard plants were located, and that when Plaintiff turned around and walked back up the aisle, nothing was blocking his view of the crates and that nothing was distracting him from seeing the crates just before he tripped on them. As in *Jacobs*, the existence of the crates were an obvious condition and Plaintiff knew or should have known of their location in the aisle at the time he fell. Defendant did not have a duty to warn Plaintiff of an obvious condition, and therefore Defendant did not breach any duty owed to Plaintiff.

C. Negotiating With Reasonable Safety

Plaintiffs next assert that even if the crates were open and obvious, Defendant owed Plaintiff a duty to warn of the danger because the aisle was open to the public and could not be negotiated with reasonable safety.

This Court has stated "[w]here the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it. In all such cases the jury may be

permitted to find that obviousness, warning or even knowledge is not enough." *S. Ry. Co. v. ADM Mill. Co.*, 58 N.C. App. 667, 673, 294 S.E.2d 750, 755 (1982) (emphasis removed) (citing W. Prosser, *Handbook of the Law of Torts*, § 61, pp. 394-95 (4th Ed. 1971)).

Here, the undisputed evidence shows the crates could have been negotiated with reasonable safety. Plaintiff testified that he walked down the aisle once without issue, *i.e.*, negotiated the crates with reasonable safety. Unlike the evidence in *Southern Railroad*, neither Plaintiff's testimony nor any other evidence in the record indicates the crates were a dangerous condition that could not be negotiated with reasonable safety.

D. Delay of Medical Assistance

Plaintiffs assert for the first time on appeal that Defendant was negligent by failing to immediately seek medical attention following Plaintiff's accident. "This Court has long held that issues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). Here, Plaintiffs presented no evidence or argument below suggesting Defendant was negligent in failing to seek medical assistance for Plaintiff before cleaning up the hazard—tomatoes and crates strewn across the aisle—created by Plaintiff's accident. Nor does Plaintiffs' argument on appeal address the essential element of causation, *i.e.*, how the delayed medical

treatment harmed Plaintiff. Because Plaintiffs present a fatally incomplete argument and failed to preserve the issue for review, this challenge is overruled.

III. Conclusion

Because Plaintiff's accident involved an open and obvious danger that could be negotiated with reasonable safety, we hold the trial court did not err in granting Defendant's motion for summary judgment.

AFFIRMED.

Judges DAVIS and ENOCHS concur.

Report per Rule 30(e).