United States Court of Appeals for the Fifth Circuit

No. 22-10985
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
March 17, 2023
Lyle W. Cayce
Clerk

ANITA D. ANDERSON-BROWN,

Plaintiff—Appellant,

versus

KROGER TEXAS LIMITED PARTNERSHIP; THE KROGER COMPANY,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:21-CV-2094

Before KING, HIGGINSON, and WILLETT, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:*

Plaintiff Anita Anderson-Brown sustained injuries when she slipped on a puddle and fell in an aisle of a Duncanville, Texas Kroger store the morning of May 10, 2020. She brought suit against Kroger Texas LP and the Kroger Company alleging negligent activity and respondeat superior, premises liability, and gross negligence. Defendants moved for summary

* This opinion is not designated for publication. See 5TH CIR. R. 47.5.

judgment, which the district court granted. Anderson-Brown timely appeals, and we AFFIRM.

In Texas, "[r]ecovery on a negligent activity theory requires that the person [was] injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity." *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). Plaintiff alleges she was injured due to a hazardous condition, not by an activity. Her negligent activity claim therefore fails. *Id.*

Premises liability, under Texas law, requires a plaintiff to show that the owner or operator had actual or constructive knowledge of injury-causing condition. *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 471 (Tex. 2017). Plaintiff does not allege actual knowledge. Instead, she argues that she has put forward sufficient circumstantial evidence of constructive knowledge to create a genuine issue of material fact. Plaintiff can establish constructive knowledge by showing "some proof of how long the hazard was there" to indicate whether a defendant "had a reasonable opportunity to discover and remedy [the] dangerous condition." *Wal-Mart Stores v. Reece*, 81 S.W.3d 812, 815-16 (Tex. 2002). But none of the evidence Plaintiff provides, including a picture of the puddle, a video that partly shows her fall, or the Kroger store hours (which prove the store was open for nearly 3 hours before her fall), is probative of the length of time the puddle was there. Plaintiff therefore does not create a genuine dispute of material fact regarding the Defendants' constructive knowledge, and her premises liability claim fails.

Finally, gross negligence requires evidence of "actual, subjective awareness" of the hazard. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998). Plaintiff puts forward the Duncanville Kroger's policy for cleaning spills or removing hazards as proof of the requisite awareness. This

does not prove awareness of the puddle, and Plaintiff's gross negligence claim fails.

AFFIRMED.