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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2020-CA-1598-MR

MARY JONES AND DANNY JONES — APPELLANTS

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 19-CI-00128

WAL-MART STORES EAST, LIMITED; HAZEL SCHAEFFER; AND WILLIAM STERLING — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CETRULO, AND TAYLOR, JUDGES.

ACREE, JUDGE: Appellants Mary and Danny Jones appeal the Muhlenberg Circuit Court's order granting summary judgment in favor of Appellees Wal-Mart Stores East, Limited (Wal-Mart), Hazel Schaeffer, and William Sterling. We affirm.

On October 19, 2018, Jones fell just outside the entrance to a Wal-Mart store in Central City, Kentucky. She fell as she voluntarily reached for a runaway cart that rolled away from a Wal-Mart employee. In March 2019, Jones filed suit claiming her fall was caused by a dangerous defect or foreign substance allowed to be there by the negligence of Wal-Mart and its co-defendants. Specifically, she claimed "her shoe got caught in one of the many gaping holes present in the yellow line outside of the entryway." (Record (R.) at 2.)

In October 2020, Wal-Mart moved for summary judgment and presented evidence that no hole or other defect existed in the vicinity of Jones's fall. After Jones responded, the circuit court granted summary judgment in favor of Wal-Mart. This appeal followed.

A circuit court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[1] 56.03. "An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exist[ed] and the moving party was entitled to judgment as a matter of law."

[1] Kentucky Rules of Civil Procedure.

Feltner v. PJ Operations, LLC, 568 S.W.3d 1, 3 (Ky. App. 2018). Thus, appellate courts review a circuit court's summary judgment *de novo*. *Cmty. Fin. Servs. Bank v. Stamper*, 586 S.W.3d 737, 741 (Ky. 2019). However, "where the movant shows that the adverse party could not prevail under any circumstances" summary judgment is appropriate. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "[A] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) (citing *Steelvest*, 807 S.W.2d at 480).

Jones's claim against Wal-Mart alleged negligence under a theory of premises liability. Under Kentucky law, a plaintiff must prove the following to establish a *prima facie* negligence claim: "(1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003). Additionally, when pursuing a claim of negligence under a theory of premises liability, the plaintiff must prove:

> (1) . . . she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business

> premises were not in a reasonably safe condition for the use of business invitees.

Martin v. Mekanhart Corp., 113 S.W.3d 95, 98 (Ky. 2003).

A defendant pursuing summary judgment does not need to disprove every element of a plaintiff's claim to succeed. If even a single material fact necessary to prove the claim can be shown to have no evidentiary support, summary judgment is appropriate.

Wal-Mart focused on the material fact of whether a foreign substance or dangerous condition existed where Jones fell. Supporting its summary judgment motion, Wal-Mart presented Jones's own deposition testimony in which she states she has no knowledge of anything that caused her fall. During that deposition, she viewed the store's surveillance videotape recording of the entire incident, but she could not identify anything in the video or still photographs that caused her to fall.[2] To the contrary, the video and photograph of the area where she fell shows she was standing on smooth concrete at the moment of the incident.

Responding to Wal-Mart's summary judgment motion, Jones did little more than reiterate her allegations that something – albeit something she could not identify – caused her to fall. We know, of course, "the opposing party has an obligation to do something more than rely upon the allegations of his pleading."

[2] The video and photographic evidence is also in the record.

Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914, 916 (Ky. 1955). Consequently, Jones said her "strongest evidence" for what caused her fall was the deposition testimony of Wal-Mart's general manager, Hazel Schaeffer.

Schaeffer testified that after Jones's fall, she issued a work order "to have some of the divots[3] in the sidewalk repaired." Without more, however, this is an irrelevant fact with nothing to connect the divot repair to the situs of Jones's mishap. Wal-Mart presented proof the area had no divots. Consequently, Schaeffer's testimony cannot be considered countervailing evidence sufficient to create a genuine issue regarding this material fact.

A plaintiff responding to a defendant's properly supported summary judgment motion is obliged "to show that evidence is available justifying a trial of the issue involved." *Belknap*, 281 S.W.2d at 916; *see also Benningfield v. Pettit Env't, Inc.*, 183 S.W.3d 567, 573 (Ky. App. 2005) (quoting *Neal v. Welker*, 426 S.W.2d 476, 479 (Ky. 1968)) (it is incumbent upon a party opposing a summary judgment motion to counter it by "some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact"). Jones was unable to satisfy that legal requirement. As our jurisprudence says:

> "The party opposing summary judgment cannot rely on their own claims or arguments without significant

[3] We understand this word to mean "a small dent : a small depression or hollow" as defined in Merriam-Webster online dictionary: https://www.merriam-webster.com/dictionary/divot (last visited May 13, 2022).

> evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc*., 50 S.W.3d 195, 199 (Ky. 2001). Accordingly, "speculation and supposition" are not enough to survive a motion for summary judgment. *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006), *quoting Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951).

Jones v. Abner, 335 S.W.3d 471, 476 (Ky. App. 2011).

We agree with the circuit court that Wal-Mart established there is no genuine issue regarding the material fact that no evidence supports Jones's claim that some dangerous condition on the business premises was a substantial factor in causing Jones to fall.

For the foregoing reasons, we affirm.

ALL CONCUR.

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