NO. 05-1374

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

ANN K. ETHERIDGE,

Plaintiff,

v. Dare County
No. 04 CVS 460

THE ELIZABETHAN GARDENS, INC. A subsidiary of The Garden Club of North Carolina, Incorporated; and THE GARDEN CLUB OF NORTH CAROLINA, INCORPORATED; and ROANOKE ISLAND HISTORICAL ASSOCIATION, INCORPORATED,

Defendants.

Appeal by Plaintiff from orders entered 1 June 2005 and 6 June 2005 by Judge J. Richard Parker in Superior Court, Dare County. Heard in the Court of Appeals 16 May 2006.

Dan L. Merrell & Associates, P.C., by James A. Clark for plaintiff-appellant Ann K. Etheridge.

Baker, Jones, Daly, Murray, Askew, Carter & Daughtry, P.A., by Ronald G. Baker for defendant-appellee Roanoke Island Historical Association, Inc.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Reid Russell for defendant-appellee The Elizabethan Gardens, Inc.

WYNN, Judge.

This appeal arises from the trial court's grant of summary judgment to Defendants The Elizabethan Gardens, Inc., and Roanoake Island Historical Association, Inc. in Plaintiff's action to

recover money damages for personal injuries allegedly sustained when she slipped and fell while providing cleaning services on Defendant The Elizabethan Gardens, Inc.'s premises. After careful review of the evidence, we affirm the trial court's grant of summary judgment.

The evidence before the trial court upon its consideration of the motions for summary judgment tended to show that Plaintiff Ann K. Etheridge worked as a contract laborer at The Elizabethan Gardens. On 24 July 2001, Ms. Etheridge arrived to work at 2:00 a.m., and began cleaning at various locations on the premises. While she was cleaning a toilet in the women's bathroom, Ms. Etheridge slipped and fell. As a result of the fall, Ms. Etheridge suffered injuries to her right arm and pelvic bone, as well as to her right knee.

On 26 July 2004, Ms. Etheridge brought an action against The Garden Club of North Carolina, Inc. and its subsidiary, The Elizabethan Gardens, Inc., and Roanoke Island Historical Association, Inc., as owner of the property. Following their responsive pleadings, Defendants moved for summary judgment, which the trial court granted in June 2006. Ms. Etheridge appeals to this Court.

The sole issue on appeal is whether the trial court erred in granting Defendant The Elizabethan Gardens's[1] motion for summary

[1] Ms. Etheridge only argues in her brief that the trial court erred in granting summary judgment to Defendant The

judgment because there were genuine issues of material fact which should have been decided by a jury. After careful consideration of the evidence, we affirm the trial court's grant of summary judgment.

Summary judgment is appropriate 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) (2005). Specifically, in a slip and fall case, a premises owner is entitled to summary judgment if he can prove that "an essential element of the opposing party's claim is nonexistent, or . . . that the opposing party cannot produce evidence to support an essential element of his claim." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). If the moving party meets its burden for summary judgment, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a *prima facie* case at trial." *Id.* (citing *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). To meet that burden, the non-moving party may not rest upon the allegations or denials of her pleadings but "must set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005). When considering a summary judgment motion, "all

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Elizabethan Gardens, Inc. Thus, her remaining assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(b)(6).

inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342.

To prove that The Elizabethan Gardens was negligent, Ms. Etheridge must show that it 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." *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 238, 488 S.E.2d 608, 611 (1997) (internal quotation marks omitted), *aff'd*, 347 N.C. 666, 496 S.E.2d 379 (1998). On appeal, we must determine whether there is sufficient evidence from the pleadings, affidavits and depositions to create a genuine issue of material fact on Ms. Etheridge's allegations of negligence.

Ms. Etheridge argues that she presented sufficient evidence to show that The Elizabethan Gardens negligently caused, or failed to correct, the dangerous condition, namely the alleged water in the bathroom stall, upon which she fell. Ms. Etheridge alleges that The Elizabethan Gardens caused or contributed to her accident by turning off the de-humidifier in the bathroom "to save money." However, Carleton Woods, manager of The Elizabethan Gardens, Inc., stated in his affidavit that a de-humidifier had never been used in the women's restroom in which Ms. Etheridge allegedly slipped. Woods further stated that while there had been a small de-humidifier used in a storage room for another purpose, whether it was on the day of the accident involving Ms. Etheridge would have had no effect on the humidity levels in the women's restroom. Moreover, Woods said that turning off the de-humidifier in the

storage room would not have saved any significant money. Ms. Etheridge argues these statements create a genuine issue of material fact that must be decided by a jury.

Ms. Etheridge's argument, however, is not based upon facts in evidence but rather upon mere speculation. At deposition, Ms. Etheridge testified that although she did not see any moisture on the floor, she believes that there must have been moisture on the floor in order for her to slip. She further testified that the moisture on the floor would have come from the sweating of the commode, but admitted that she did not remember if the commode was sweating on the morning of the accident. As it relates to the de-humidifier, Ms. Etheridge testified that she did not know what the de-humidifier looked like, or where it was located. In fact, Ms. Etheridge admitted that she had never seen this de-humidifier in the restroom or anywhere else.

To survive a motion for summary judgment, a plaintiff must show that her theory is more than mere speculation. *Williamson v. Food Lion, Inc.*, 131 N.C. App. 365, 369, 507 S.E.2d 313, 316 (1998), *aff'd*, 350 N.C. 305, 513 S.E.2d 561 (1999). While the threshold to overcome summary judgment is not great, "[c]ases are not to be submitted to a jury on speculations, guesses, or conjectures." *Roumillat*, 331 N.C. at 69, 414 S.E.2d at 345. Because there is no evidence that The Elizabethan Gardens negligently created the hazardous condition that resulted in Ms. Etheridge's fall, there is no genuine issue of material fact to submit to a jury and summary judgment is appropriate.

Ms. Etheridge also contends she presented sufficient evidence to create a material issue of fact on the issue of whether The Elizabethan Gardens failed to remedy the dangerous condition after notice of its existence. Ms. Etheridge states in her brief that she notified The Elizabethan Gardens "of the hazardous condition which it then corrected by using a de-humidifier, and then turned off the de-humidifier on the day that she fell." However, Ms. Etheridge fails to cite to any portion of the record to support this assertion in her brief, nor can we find such evidence in the record on appeal. To the contrary, the record reveals that Woods stated in his affidavit that no one from The Elizabethan Gardens, Inc. had received any notice of, or had any knowledge of, any alleged hazardous condition in the women's restroom prior to the morning of the alleged accident. He further states that he had never noticed, and had never received a complaint about, the floor of the women's restroom being slippery prior to the alleged accident. Because Ms. Etheridge offered no evidence that The Elizabethan Gardens had actual knowledge of the presence of water on the floor of the women's restroom, the present issue before this Court is whether The Elizabethan Gardens had constructive knowledge of the dangerous condition.

A plaintiff can establish constructive knowledge of a dangerous condition in two ways: (1) by presenting direct evidence of the dangerous condition's duration; or (2) by presenting circumstantial evidence from which a jury could infer that the dangerous condition existed for a sufficient length of time that

the defendant should have known of its existence. *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000). Where there is a "reasonable inference that a [dangerous] condition had existed for such a period of time as to impute constructive knowledge to the defendant," it is a question for a jury to decide. *Carter v. Food Lion, Inc.* 127 N.C. App. 271, 275, 488 S.E.2d 617, 620, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997). Notwithstanding, any inferences a jury makes must be based upon facts established by the evidence, and not based solely upon other inferences. *See Thompson*, 138 N.C. App. at 654, 547 S.E.2d at 50.

In this case, there is no evidence in the record as to how long the alleged hazardous condition had existed prior to Ms. Etheridge's fall. Although Ms. Etheridge testified that she believes that there was moisture on the floor which caused her to slip, she also testified that she does not know how much moisture was on the floor, or how long the alleged moisture had been on the floor. Ms. Etheridge's evidence, without more, is sufficient only to permit speculation that the condition had existed long enough to impute constructive knowledge of its existence to The Elizabethan Gardens. *See France v. Winn-Dixie Supermarket*, 70 N.C. App. 492, 493, 320 S.E.2d 25 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985) (holding that mere speculation about how long a dangerous condition existed was not enough to create a material issue of fact for a jury). As Ms. Etheridge has failed to present any evidence of actual notice of the alleged hazardous condition

and any evidence as to how long the alleged condition had existed prior to her alleged fall to establish constructive notice, we conclude the trial court properly granted The Elizabethan Gardens's motion for summary judgment.

Because we have concluded the trial court appropriately granted The Elizabethan Gardens's motion for summary judgment on Ms. Etheridge's negligence claim, we need not address Ms. Etheridge's remaining assignments of error concerning contributory negligence. *See Goynias v. Spa Health Clubs, Inc.*, 148 N.C. App. 554, 558, 558 S.E.2d 880, 883, *aff'd*, 356 N.C. 290, 569 S.E.2d 648 (2002).

The judgment of the trial court is

Affirmed.

Judge STEPHENS concurs.

Judge GEER concurs in separate opinion.

Report per Rule 30(e).

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Defendants.

GEER, Judge, concurring in the result.

I agree with the majority opinion that the trial court properly granted summary judgment, but I do so on a narrower basis. While I believe that the evidence is sufficient to give rise to issues of fact as to the existence of the dehumidifier in the bathroom, those issues are immaterial since Ms. Etheridge could not identify what caused her to slip in the bathroom.

The majority opinion holds that Ms. Etheridge's arguments regarding the dehumidifier are unsupported by the record, relying upon Carlton Woods' affidavit. Ms. Etheridge, however, testified in her deposition — in a portion cited in her brief — that when she reported her fall and injury to Mr. Woods, he said: "I'm so sorry. I cut the dehumidifier off to save money. And we'll be glad to pay all your medical expenses because we have plenty of insurance." In another portion of her deposition, she again reported this

conversation: "I did go back up there the following Monday or Tuesday and showed Carlton Woods my arm. And he said, oh, I'm sorry. I cut the dehumidifier off to save money. I said, you knew I was coming in. He said, we'll pay for all of your expenses." Ms. Etheridge's testimony regarding Mr. Woods' statements is admissible under Rule 801(d) of the Rules of Evidence as an admission of a party-opponent. It is sufficient, for summary judgment purposes, to rebut the statements in Mr. Woods' affidavit. *Roberts v. Madison County Realtors Ass'n*, 121 N.C. App. 233, 239, 465 S.E.2d 328, 332 ("That the affiants' knowledge was gathered from . . . communications of party-opponents is not fatal to the averments of the affidavits submitted by plaintiff in opposition to defendants' Motion for Summary Judgment. *See* N.C.R. Evid. 801(d)(C)[,] (D) . . . ."), *rev'd on other grounds*, 344 N.C. 394, 474 S.E.2d 783 (1996).

Nevertheless, Ms. Etheridge's evidence has a more fundamental problem as Ms. Etheridge is unable to identify what caused her to slip and fall. In her deposition, she repeatedly admitted that she does not "remember looking at the floor at any time . . . ." She admitted that before she fell, she "did not notice the floor being wet." After she fell, she acknowledged that she also did not look at the floor: "I didn't give a doodley squat about the floor at that point." Her testimony establishes that she merely assumed that there was something on the floor that caused her to slip:

> Q. So then you cannot tell us exactly what that floor looked like in the stall either before or after you fell; correct?

> A. Not really.
>
> Q. But I understand this part [sic] you think there was something on it because you slipped; is that correct?
>
> A. I know there was something on it or I would not have slipped.

Ms. Etheridge went on to confirm that she could not say whether the commode was sweating on the night of her accident, even though her theory of her fall was that a sweating commode had led to water on the floor. In other words, she offered no evidence, apart from her speculation, that there was in fact water on the floor or even of what caused her to fall at all. Without such evidence, Ms. Etheridge cannot prevail on her claims. *See Pintacuda v. Zuckeberg*, 159 N.C. App. 617, 625-26, 583 S.E.2d 348, 353-54 (2003) (Timmons-Goodson, J., dissenting) (affirming summary judgment when plaintiff could not say what caused his motorcycle to skid), *adopted per curiam*, 358 N.C. 211, 593 S.E.2d 776 (2004); *Byrd v. Arrowood*, 118 N.C. App. 418, 421, 455 S.E.2d 672, 674 (1995) (affirming summary judgment when "plaintiff could not say that the floor was wet when she walked to the bathroom and did not notice water on the floor after she fell," although "her clothes were wet after her fall"). I would, therefore, affirm the trial court's summary judgment on this basis.