NO. COA08-902

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2009

MARY SHEW,
Plaintiff,

v.

Rowan County
No. 07 CVS 2363

WAL-MART STORES EAST, L.P.,
Defendant.

Appeal by Plaintiff from order entered 21 April 2008 by Judge Christopher Collier in Rowan County Superior Court. Heard in the Court of Appeals 29 January 2009.

Doran, Shelby, Pethel and Hudson, P.A., by Michael Doran, for Plaintiff-Appellant.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by K. Neal Davis and Justin N. Davis, for Defendant-Appellee.

STEPHENS, Judge.

On 1 August 2007, Mary Shew ("Plaintiff") filed a Complaint against Wal-Mart Stores, Inc., alleging negligence and seeking damages in excess of $10,000 for personal injuries sustained as a result of a fall. On 14 September 2007, the trial court entered a Consent Order adding Wal-Mart Stores East, L.P., ("Defendant") as a defendant and dismissing Wal-Mart Stores, Inc. On 28 September

2007, Defendant filed an Answer, denying negligence and asserting the affirmative defense of contributory negligence.

On 3 April 2008, Defendant filed a Motion for Summary Judgment. On 21 April 2008, Judge Collier entered an order granting Defendant's Motion for Summary Judgment. From this order, Plaintiff appeals.

I. Facts

The evidence before this Court and considered by the trial court on Defendant's Motion for Summary Judgment establishes the following: On 4 February 2006, Plaintiff and her granddaughter Teresa Shew ("Teresa") went to the Wal-Mart store located on Zelkova Court NW in Conover, North Carolina. They decided to look for razors and upon entering the aisle where the razors were located, Plaintiff and Teresa saw an employee of Defendant ("Employee") stocking a shelf on the opposite side of the aisle from the razors. The Employee walked to the end of the aisle and left the aisle. While Plaintiff and Teresa were looking at the razors, the Employee returned to the aisle and again knelt to stock the shelf on the opposite side of the aisle from the razors. The Employee was positioned close to the shelf that he was stocking.

After selecting some razors, Plaintiff turned to walk back down the aisle. Plaintiff continued to look at the shelves on her right and did not look in front of her as she walked down the aisle toward the Employee. She then tripped over the Employee. The

incident was captured by Defendant's store surveillance system. Plaintiff suffered a fractured elbow that required surgery to repair.

II. Discussion

On appeal, Plaintiff argues that the trial court erred in allowing Defendant's Motion for Summary Judgment. Specifically, Plaintiff claims the evidence raised genuine issues of material fact which could only be resolved at trial. We disagree.

Summary judgment is appropriate "if 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) (2007).

> The moving party has the burden of establishing the absence of any triable issue of fact. *Brenner v. Little Red Schoolhouse, Ltd.*, 302 N.C. 207, 274 S.E.2d 206 (1981). While summary judgment is generally not appropriate in negligence cases, it may be appropriate when it appears that there can be no recovery for plaintiff even if the facts as alleged by plaintiff are taken as true. *Stoltz v. Burton*, 69 N.C. App. 231, 316 S.E.2d 646 (1984); *Frendlich v. Vaughan's Foods of Henderson, Inc.*, 64 N.C. App. 332, 307 S.E.2d 412 (1983).

Jacobs v. Hill's Food Stores, Inc., 88 N.C. App. 730, 732, 364 S.E.2d 692, 693 (1988).

In order to make out a *prima facie* case of negligence, "a plaintiff must present evidence that the defendant had a duty to conform to a certain standard of conduct, the defendant breached that duty, and the breach of duty was the proximate cause of the plaintiff's injury." *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 653, 547 S.E.2d 48, 49-50 (2000).

In North Carolina, a store owner has

> a duty 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."

Harris v. Tri-Arc Food Sys., Inc., 165 N.C. App. 495, 499, 598 S.E.2d 644, 647 (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992)), *disc. review denied*, 359 N.C. 188, 607 S.E.2d 270 (2004). However, a store owner is under no duty to protect a customer against dangers either known or "so obvious and apparent that they reasonably may be expected to be discovered[,]" *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (footnote omitted), *cert. denied*, 351 N.C. 107, 541 S.E.2d 148 (1999), or of which the customer has "equal or superior knowledge." *Jacobs*, 88 N.C. App. at 733, 364 S.E.2d at 694.

In *Jacobs*, plaintiff brought a negligence action for an injury sustained when she fell over a concrete barrier located in a

walkway leading from the store to the parking lot. Plaintiff's testimony at her deposition established that

> she never saw the concrete block, that she had traveled the same route where the walkway was located for a period of ten years, that the parking lot and store were adequately lit and that there was nothing to prevent her from seeing the concrete block at any time.

Id. This Court affirmed the trial court's order of summary judgment in favor of defendant because the evidence established that "the concrete block was an obvious condition[,] . . . that plaintiff either knew or should have known of the location of the concrete block on the walkway[, and that] [d]efendant had no duty to warn plaintiff of an obvious condition." *Id.*

In this case, Plaintiff's deposition testimony and the surveillance video of the incident establish that Plaintiff saw the Employee stocking the shelf, the Employee was kneeling close to the shelf and was not blocking the aisle, and Plaintiff was not watching where she was going when she tripped over him. As in *Jacobs*, the Employee in this case was an "obvious condition[,]" *id.*, and Plaintiff knew or should have known his location in the aisle. As Defendant had no duty to warn Plaintiff of an obvious condition, Defendant did not breach any duty owed to Plaintiff.

The record before this Court reveals no genuine issue of material fact to be determined by a jury, and Defendant is thus entitled to judgment as a matter of law. Accordingly, the trial

court's order granting Defendant's motion for summary judgment is affirmed.

AFFIRMED.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).