NO. COA09-26

NORTH CAROLINA COURT OF APPEALS

Filed: 7 July 2009

CAROL MACDONALD,
Plaintiff-Appellant,

v. Guilford County
No. 07 CVS 9274

BANK OF AMERICA CORPORATION;
STARMOUNT COMPANY,
Defendants-Appellees.

Appeal by Plaintiff from order entered 16 October 2008 by Judge Ronald E. Spivey in Superior Court, Guilford County. Heard in the Court of Appeals 10 June 2009.

Benson & Brown, PLLC, by Drew Brown; and Clifford, Clendenin, & O'Hale, by Harry H. Clendenin, III, for Plaintiff-Appellant.

McAngus, Goudelock, & Courie, P.L.L.C., by John T. Jeffries and Jennifer M. Arno, for Defendants-Appellees.

McGEE, Judge.

Carol MacDonald (Plaintiff) filed a premises liability negligence action against Bank of America Corporation and Starmount Company (Defendants) on 21 August 2007. In her complaint, Plaintiff alleged she went to Bank of America, located on real property owned by Starmount Company, to withdraw money from the ATM on 20 January 2007. Plaintiff alleged that she fell and was permanently injured when she stepped "onto a concealed area near a drainage fixture embedded in the concrete." Plaintiff

alleged Defendants had superior knowledge of the fixture or should have known that the fixture and surrounding area were concealed hazardous conditions. Plaintiff also alleged Defendants were negligent by failing to: (1) maintain the property in a reasonably safe condition, (2) warn pedestrians of hidden perils and unsafe conditions, and (3) make a reasonable inspection of the walkway and parking area and correct unsafe conditions.

Defendants filed a motion for summary judgment on 22 August 2008, which was heard by the trial court on 7 October 2008. The trial court granted Defendants' motion, and held that: "Plaintiff has failed to forecast evidence of the essential elements of her claim against [] Defendants and that there are no genuine issues of any material fact as to [] Plaintiff's contributory negligence as a matter of law." Plaintiff filed notice of appeal on 14 November 2008. Defendants cross-assigned error to the trial court's consideration of an affidavit submitted by Plaintiff in support of Plaintiff's opposition to Defendants' motion for summary judgment.

In her sole assignment of error, Plaintiff argues the trial court committed reversible error in granting Defendants' motion for summary judgment as there were genuine issues of material fact as to whether Defendants were negligent and whether Plaintiff was contributorily negligent.

Summary judgment is properly granted "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). We review an order allowing summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)).

Landowners have no duty to protect visitors "against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered" or dangers for which the visitor has "equal or superior knowledge." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430-31, 562 S.E.2d 602, 604 (internal citations omitted), *disc. review denied*, 356 N.C. 297, 570 S.E.2d 498 (2002). However, Plaintiff contends there was an issue of material fact as to whether the drainage fixture and surrounding slope were "open and obvious." Plaintiff cites *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 91-92, 555 S.E.2d 303, 307-08 (2001), in arguing that "even an 'open and obvious' condition does not result in judgment as a matter of law where the surrounding conditions make not noticing the condition a potential [hazard] for the permissive user of the property." In *Barber*, our Court reversed the trial court's directed verdict for the defendant because the plaintiff's view of the "step-down" was obstructed by a door. *Id.* at 92, 555 S.E.2d at 308. However, in the present case, Plaintiff testified that nothing was blocking her view of the slope or drainage fixture.

We find the present case more analogous to *Frendlich v. Vaughan's Foods*, 64 N.C. App. 332, 307 S.E.2d 412 (1983). In *Frendlich*, the plaintiff fell outside the defendant's store after

failing to see a step-down from the curb. *Id.* at 337, 307 S.E.2d at 415. Our Court affirmed the trial court's grant of summary judgment, holding the defendant did not owe or breach a duty to the plaintiff because (1) the curb was in plain view in broad daylight, (2) the plaintiff's view was unobstructed, and (3) the defendant did nothing to distract the plaintiff's attention. *Id.*

In the present case, Plaintiff testified she had visited Defendant's property every week or two since 1990. She stated the parking lot had not changed or been altered during that time. On the day in question, Plaintiff testified she exited her vehicle by placing both feet on the ground in the parking lot. Plaintiff then stepped up onto the curb and walked to the ATM. To reach the ATM, Plaintiff had to step directly on or over the slope and drainage fixture in question; however, Plaintiff stated she was able to do so without incident. Plaintiff testified she took the same path back to her car as she took walking to the ATM. Plaintiff stepped down into the parking lot with her right foot and fell. She testified nothing was blocking her view of the slope or drainage fixture at the time. Plaintiff said it was a clear, sunny day and nothing was distracting her at the time.

Pursuant to *Frendlich*, and taking the evidence in the light most favorable to Plaintiff, there are no issues of material fact as to Defendants' alleged negligence. Because we determine Defendants had no duty to warn Plaintiff of an open and obvious danger of which Plaintiff had at least equal knowledge prior to her injury, we do not reach Plaintiff's remaining argument regarding

whether she was contributorily negligent as a matter of law. Further, because we affirm the trial court's grant of summary judgment for Defendants, we need not address Defendants' assignment of error.

Affirmed.

Judges JACKSON and ERVIN concur.

Report per Rule 30(e).