IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-169

Filed: 6 October 2020

Davidson County, No. 18 CVS 2014

BARBARA ODOM and husband, TOMMY SHELTON ODOM, Plaintiffs-Appellants,

v.

NO. 8 ENTERTAINMENT, LLC, and FRANK MYERS INVESTMENTS, LLC, Defendants-Appellees.

Appeal by plaintiffs-appellants from judgment entered 19 November 2019 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 26 August 2020.

Biesecker, Tripp, Sink & Fritts, LLP, by Christopher Alan Raines, for plaintiffs-appellants.

Brotherton Ford Berry & Weaver, PLLC, by Steven P. Weaver and Daniel J. Burke, for No. 8 Entertainment, LLC.

Yates, McLamb & Weyher, L.L.P., by Christopher J. Skinner and Robin A. Seelbach, for Frank Myers Investments, LLC.

BERGER, Judge.

On September 13, 2018, Barbara Odom ("Plaintiff") filed a complaint against No. 8 Entertainment, LLC and Frank Myers Investments, LLC ("Defendants"),

alleging that she injured her foot when she fell due to an unsafe condition in Defendants' parking lot. On November 19, 2019, the trial court granted Defendants' motions for summary judgment. Plaintiff appeals, arguing that genuine issues of material fact exist concerning (1) Defendants' duty to warn about an open and obvious condition on the property, and (2) contributory negligence. For the reasons stated herein, we affirm.

Factual and Procedural Background

On September 22, 2015, Plaintiff Barbara Odom rolled her ankle when she stepped from a sidewalk onto the edge of a tire rut in the parking lot of No. 8 Bingo. At all relevant times, Defendant Frank Myers Investments, LLC owned the property, which was leased to Defendant No. 8 Entertainment, LLC.

Plaintiff arrived at the property in the afternoon. The weather was "nice" and "sunny," it was not raining, and no other people were in the parking lot. Plaintiff had been to the property approximately ten to twenty times before, but had never parked "on the right-hand side . . . in front of the dumpsters" like she did that day. Plaintiff exited her vehicle and walked towards the business.

As she walked, she was not looking at the pavement, but "was just looking straight ahead." She stepped up onto the sidewalk and walked into the building. Plaintiff testified at her deposition that had she looked down, she would have seen the tire rut because nothing obstructed her view.

According to Plaintiff, when she left the building that night, she took "the same path on the sidewalk that [she] took when going into" the building and "stepped down from the sidewalk onto the asphalt parking lot . . . at the same location where [she] had stepped up . . . when [she was] going into the building." Plaintiff stated that even though the area around her car was dark, she was able to see the vehicles on either side of her car, that she could see where she was walking on the sidewalk, and that once she was within 10 feet of her vehicle, she was "able to see where [she] [was] going." As she approached her car, Plaintiff "wasn't looking at the ground," did not ask for assistance, and had not taken any specific precautions as she walked.

When Plaintiff stepped down from the sidewalk onto the parking lot surface near the dumpsters, she stepped on the edge of a tire rut and injured her foot. Plaintiff only saw the tire rut after she fell when an employee shined a phone flashlight on the area. The tire rut "was on the driver's side" of her vehicle and appeared to be "three feet long" and "as wide as a commercial dumpster truck tire."

On September 13, 2018, Plaintiff filed an action against Defendants for negligence. Tommy Odom, Plaintiff's husband, alleged a claim for loss of consortium. On November 12, 2019, Defendants filed motions for summary judgment. On November 19, 2019, the trial court granted Defendants' motions for summary judgment.

Plaintiff timely appeals, arguing the trial court erred when it granted summary judgment because genuine issues of material fact exist concerning (1) Defendants' duty to warn about an open and obvious condition on the property, and (2) contributory negligence.

We affirm the trial court's judgment.

Standard of Review

> [S]ummary judgment is properly entered 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. In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, and must be viewed in a light most favorable to the non-moving party. We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.
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> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.

Patterson v. Worley, ___ N.C. App. ___, ___, 828 S.E.2d 744, 747 (2019) (*purgandum*).

To survive a motion for summary judgment, a plaintiff must prove the essential elements of negligence: "(1) that the defendant owed a duty of care toward the plaintiff, (2) that the defendant breached that duty, (3) that the defendant's breach proximately caused harm to the plaintiff, and (4) that the plaintiff has thereby suffered damages." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 482, 843 S.E.2d 72, 76 (2020).

"[N]egligence claims and allegations of contributory negligence should rarely be disposed of by summary judgment . . . [y]et, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant" or "establishes contributory negligence on the part of plaintiff." *Patterson*, ___ N.C. App. at ___, 828 S.E.2d at 747 (citation omitted).

Analysis

I. Open and Obvious Condition

Plaintiff first argues that summary judgment was improperly granted because genuine issues of material fact exist concerning whether Defendants had a duty to warn visitors about the open and obvious condition. We disagree.

"In North Carolina, a landowner has a duty to warn visitors of any hidden danger on its property of which the landowner should be aware. A landowner does not, however, have a duty to warn anyone of a condition that is open and obvious." *Draughon*, 374 N.C. at 483, 843 S.E.2d at 74 (citations omitted). "A condition is open

and obvious if it would be detected by any ordinarily intelligent person using his [or her] eyes in an ordinary manner." *Id.* at 483, 843 S.E.2d at 76. "If the condition is open and obvious, a visitor is legally deemed to have equal or superior knowledge to the owner, and thus a warning is unnecessary." *Id.* at 483, 843 S.E.2d at 76.

Open and obvious conditions may include "[s]light depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets" because they "are so common that their presence is to be anticipated by prudent persons." *Evans v. Batten*, 262 N.C. 601, 602, 138 S.E.2d 213, 214 (1964). We review the evidence surrounding a landowner's duty to warn "in their totality to determine if there are factors which make the existence of a defect, in light of the surrounding conditions, a breach of the defendant's duty and less than obvious to the plaintiff." *Draughon*, 374 N.C. at 499, 843 S.E.2d at 86 (*purgandum*).

Here, Plaintiff stated that she would have observed the depression in the pavement had she looked down. In addition, the location of the depression near the dumpsters, her presence on the premises on multiple prior occasions, and the other facts established through Plaintiff's deposition testimony, support the conclusion that the tire rut was an open and obvious condition for which Defendants had no duty to warn. *See Draughon*, 374 N.C. at 486, 843 S.E.2d at 78 (When "[v]iewed objectively, the condition was open and obvious, visible to a reasonable person in [P]laintiff's situation. Thus, [Defendants] had no duty to warn [P]laintiff of the condition[.]"); s*ee*

also Welling v. City of Charlotte, 241 N.C. 312, 85 S.E.2d 379 (1955) (holding a hole 4 inches long, 4 inches wide, and 1 inch deep was open and obvious).

Accordingly, the trial court did not err when it granted Defendants' motions for summary judgment.

II. Contributory Negligence

Plaintiff next argues that summary judgment was improperly granted because genuine issues of material fact exist on the issue of contributory negligence. We disagree.

> North Carolina common law [ ] recognizes the defense of contributory negligence; thus, a plaintiff cannot recover for injuries resulting from a defendant's negligence if the plaintiff's own negligence contributed to his injury. This rule is closely related to the principle that a defendant has no duty to warn of an open and obvious condition because a plaintiff is negligent if he fails to reasonably adjust his behavior in light of an obvious risk. Contributory negligence also implicates proximate cause if a visitor's own lack of ordinary care is a cause of the accident. With contributory negligence, a plaintiff's actual behavior is compared to that of a reasonable person under similar circumstances.

Draughon, 374 N.C. at 483-84, 843 S.E.2d at 76-77 (citations and quotation marks omitted).

In a similar case, the plaintiff was injured when she tripped and fell on a "hole" in a parking lot that was "three-quarters of an inch to an inch deep, eight to twelve inches wide, and several feet long." *Swinson v. Lejeune Motor Co.*, 356 N.C. 286, 287, 569 S.E.2d 646, 647 (2002) (adopting the dissenting opinion from *Swinson v. Lejeune*

Motor Co., 147 N.C. App. 610, 616-19, 557 S.E.2d 112, 118-19 (2001)). The plaintiff testified that she "had been to the dealership on numerous occasions," the weather was "pretty," she was not "talking to anybody," and she was not prevented from looking down. *Swinson*, 147 N.C. App. at 617-18, 557 S.E.2d at 118. On appeal, our Supreme Court adopted Judge McCullough's dissent and held that, based on the totality of the evidence, the plaintiff was contributorily negligent because the hole was "in plain view and obvious" and she "was inattentive to where she was walking at the time she fell." *Id.* at 618-19, 557 S.E.2d at 118-19.

Here, Plaintiff argues that the open and obvious nature of the tire rut was difficult to notice because the parking lot was dark when she exited the building with a group of people. As in *Swinson*, Plaintiff had been to the property many times before. Plaintiff stated that she stopped talking to other patrons before she got to her vehicle. Plaintiff further stated that nothing obstructed her vision when she walked to her vehicle. By her own admission, Plaintiff did not look at the pavement as she walked to her vehicle.

As in *Swinson*, Plaintiff failed to "to discern and appreciate the obvious" condition, *Penland v. S. Ry. Co.*, 228 N.C. 528, 530, 46 S.E.2d 303, 304 (1948), because she was inattentive when walking to and from her vehicle. Thus, Plaintiff was contributorily negligent, and the trial court did not err when it granted summary judgment in favor of Defendants.

Conclusion

For the foregoing reasons, we affirm the trial court's entry of summary judgment in favor of Defendants.

AFFIRMED.

Judge INMAN concurs in result only.

Judge COLLINS concurs.

Report per Rule 30(e).