IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-243

No. COA20-664

Filed 1 June 2021

Lee County, No. 18 CVS 431

DEBORAH LEE FRENCH-DAVIS, Plaintiff,

v.

THE SHOPS AT CAMERON PLACE, LLC, Defendant.

Appeal by plaintiff from order entered 28 February 2020 by Judge Andrew T. Heath in Lee County Superior Court. Heard in the Court of Appeals 28 April 2021.

Brent Adams & Associates, by Diana E. Devine, for plaintiff.

McAngus Goudelock & Courie, LLC, by Elizabeth H. Overmann and Jonathan W. Martin, for defendant.

ARROWOOD, Judge.

¶ 1 Deborah Lee French-Davis ("plaintiff") appeals from a summary judgment order entered 28 February 2020. Plaintiff contends that the trial court erred in granting defendant's motion for summary judgment on the grounds that plaintiff forecasted sufficient evidence to raise a genuine issue of material fact. For the

following reasons, we hold that the trial court did not err in granting defendant's motion for summary judgment and affirm the trial court's order.

I. Background

¶ 2 On 28 November 2015, plaintiff visited a shopping center located at 3052 South Horner Boulevard in Sanford, North Carolina. The shopping center premises is owned, occupied, and operated by defendant. The shopping center features a curb running the length of the shopping center that separates the parking lot and the storefronts. As plaintiff was approaching the shops from the parking lot, she tripped on the curb and fell onto the sidewalk in front of the Ross Store. Upon falling to the ground, plaintiff suffered injuries to her left knee, left wrist, and left index finger.

¶ 3 On 15 May 2018, plaintiff filed a complaint against defendant, alleging a failure to correct an unsafe condition after actual or constructive notice of its existence, negligence in reasonable care, supervision, and maintenance of the premises, and failure to warn plaintiff of a dangerous and defective condition. On 11 November 2018, plaintiff filed a consent order to amend her complaint to add additional defendants. On 19 November 2018, plaintiff filed her amended complaint. On 11 February 2019, defendant filed an answer to the amended complaint, raising the affirmative defense of contributory negligence.

¶ 4 On 11 October 2019, defendant filed a motion for summary judgment against all claims asserted by plaintiff, alleging that there were no genuine issues of material

fact regarding the defendant's alleged negligence. On 24 February 2020, plaintiff filed a response arguing that there were numerous genuine issues of material fact. Plaintiff's response included an affidavit from plaintiff as well as an affidavit and resume from Dr. Rolin F. Barrett, Sr. ("Dr. Barrett").

¶ 5 In Dr. Barrett's affidavit, Dr. Barrett stated that the curb ramp "was not centered on the symmetrical window-exit door-entrance door-window combination, but nearly centered on the Ross store's exit door when facing the store from the parking lot." Dr. Barrett also cited Americans with Disabilities Act Section 4.29, observing that there were "[n]o markings or detectable warnings" on the ramp.

¶ 6 Defendant provided the trial court with a video recording of the incident. The video shows that plaintiff's fall occurred in clear daylight, that there were no obstacles placed at or near the sidewalk to interfere with plaintiff's walking path, and that plaintiff was not carrying anything to block her view downward. The video also shows a marked crosswalk in white paint in front of the entrance of the Ross Store, as well as several yellow painted lines several feet away from the sidewalk.

¶ 7 On 28 February 2020, the trial court granted defendant's motion for summary judgment. Plaintiff filed notice of appeal on 9 March 2020.

II. Discussion

¶ 8 Plaintiff contends the trial court erred in granting defendant's motion for summary judgment on the grounds that there were genuine issues of material fact.

We disagree.

A. Standard of Review

¶ 9 The standard of review on appeal from summary judgment "is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). Summary judgment "shall be rendered forthwith 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, 56(c) (2019).

¶ 10 "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citation omitted). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). This requires the non-moving party to "set forth *specific facts* showing that there is a genuine issue for trial[,]" and does not allow the non-moving party to "rest upon the mere allegations of his pleadings." *Id.* at 369-70, 289 S.E.2d at 366 (emphasis in original); *see also* N.C. Gen. Stat. § 1A-1, 56(e). Evidence presented by the parties "must be viewed in

the light most favorable to the non-movant." *Bruce-Terminix Co.*, 130 N.C. App. at 733, 504 S.E.2d at 577. Summary judgment is seldom allowed in negligence cases, but "it may be granted where the evidence shows 'a lack of any negligence on the part of the defendant.' " *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 353, 595 S.E.2d 778, 781-82 (2004) (citing *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 650, 338 S.E.2d 129, 131 (1986)).

B. Motion for Summary Judgment

¶ 11 Under North Carolina premises liability law, a landowner has the duty to "exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998), *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). Therefore, the central question is whether defendant "acted as a reasonable person would under the circumstances." *Williams v. 100 Block Assocs., Ltd. P'ship*, 132 N.C. App. 655, 659, 513 S.E.2d 582, 584 (1999) (citing *Nelson*, 349 N.C. at 632, 507 S.E.2d at 892).

¶ 12 Although the trial court is required to construe evidence in the light most favorable to the nonmoving party, "our case law has made it clear that when the condition that allegedly caused the injury, viewed objectively, is open and obvious, judgment as a matter of law is appropriate." *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 482-83, 843 S.E.2d 72, 76 (2020) (citation omitted). A landowner does not have a duty to warn anyone of a condition that is open and

obvious. *Id.* at 483, 843 S.E.2d at 76 (citing *Garner v. Atl. Greyhound Corp.*, 250 N.C. 151, 161, 108 S.E.2d 461, 468 (1959)). A condition is open and obvious if it would be detected by "any ordinarily intelligent person using his eyes in an ordinary manner." *Id.* (citing *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 242, 130 S.E.2d 338, 340 (1963)). 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.* (citation omitted).

¶ 13 In *Coleman v. Colonial Stores, Inc.*, our Supreme Court upheld summary judgment where a customer tripped on a metal screen jutting out at a right angle from an exit door at a grocery store. 259 N.C. 241, 130 S.E.2d 338 (1963). The metal screen had a base width of about thirty-four inches, a top width of about eight inches, and a height between four-and-a-half and five feet. *Id.* at 242, 130 S.E.2d at 339. The Supreme Court held that although "[t]here was nothing there to call [the customer's] attention to the metal screen," the screen would have been obvious to the ordinary person, and therefore judgment in favor of the defendant was appropriate. *Id.* at 242-43, 130 S.E.2d at 339-40.

¶ 14 Similarly in *Garner v. Atl. Greyhound Corp.*, our Supreme Court upheld summary judgment after a plaintiff was injured by falling outside of a store. 250 N.C. 151, 108 S.E.2d 461 (1959). The plaintiff had entered the defendant's store at an area where the sidewalk and floor of the store entryway sat at nearly the same level but

exited at an area where there was a significant drop-off—about six inches—from the floor of the store to the sidewalk. *Id.* at 153, 108 S.E.2d at 463. The plaintiff contended that the sidewalk and entryway created a "camouflaging effect" that hid the drop-off. *Id.* at 159, 108 S.E.2d at 467. The Supreme Court held that "[g]enerally, in the absence of some unusual condition, the employment of a step by the owner of a building because of a difference between levels is not a violation of any duty to invitees[.]" It further held that there was no duty to warn of the drop-off because the drop-off was obvious. *Id.* at 157-61, 108 S.E.2d at 466-68.

¶ 15 Plaintiff relies on *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990). In *Lamm*, the plaintiff was injured after falling on the bottom step of a porch while exiting an office building. *Id.* at 413, 395 S.E.2d at 113. The building, porch, and steps were constructed of brick, with the steps leading to an asphalt parking lot by way of an asphalt ramp. *Id.* at 414, 395 S.E.2d at 114. The first two steps coming down from the porch were six and a half inches high, and the last step down featured an upward sloping of the asphalt that created an effective height of eight and a half inches. *Id.* Our Supreme Court held that the two-inch variation in riser height as compared to the other steps, combined with the sloping at the bottom of the step, "cannot be said as a matter of law to be an open and obvious defect of which plaintiff, an invitee, should have been aware." *Id.* at 417, 395 S.E.2d at 115.

¶ 16 In the present case, plaintiff was injured when she tripped and fell over the

curb as she approached the shopping center. The parking lot featured a white crosswalk that extended from the sidewalk and curb into the parking lot, as well as yellow lines marking the edge of the curb. Although the curb, gutter, and sidewalk were all comprised of the same, similarly colored concrete material, the parking lot was a significantly darker asphalt material. The sidewalk and curb were elevated at a standard height above the parking lot with a single step up or down, and there were no other obstacles or hazards present along the curb. There is nothing in the record to support plaintiff's contention that the curb was not apparent or easily visible.

¶ 17 Although plaintiff contends that the facts in this case are "strikingly similar" to the facts in *Lamm*, we find this case to be distinguishable from *Lamm*. Here, plaintiff was approaching a storefront sidewalk and curb to take one step up, while the plaintiff in *Lamm* was descending a set of three stairs. Additionally, plaintiff was faced with a single change in elevation, while the plaintiff in *Lamm* was injured when stepping to a bottom step that was effectively two inches deeper than the previous two steps. Because the hazards faced by the plaintiff in *Lamm* are considerably different than those in this case, the holding in *Lamm* is inapposite to this case.

¶ 18 Even when construing the evidence in the light most favorable to plaintiff, we conclude that the sidewalk and curb in this case was an open and obvious condition that plaintiff should have been aware of, and that defendant did not breach any duty to warn plaintiff of the curb.

III. Conclusion

¶ 19 For the forgoing reasons, we hold that there was no genuine issue of material fact and the trial court did not err in granting defendant's motion for summary judgment. We affirm the trial court's order.

AFFIRMED.

Judges DILLON and WOOD concur.

Report per Rule 30(e).