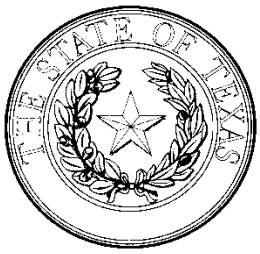
Opinion issued February 3, 2011



In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00292-CV

ANGELA COOPER, Appellant

V.

ROSS LEWIS D/B/A LEWIS FOOD TOWN, INC., Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Case No. 51012

MEMORANDUM OPINION

Appellant, Angela Cooper, appeals from a no-evidence summary judgment denying her relief in her premises liability suit to recover personal injury damages from appellee, Ross Lewis d/b/a Lewis Food Town, Inc. (herein "Food Town"). In four issues, Cooper contends that the summary judgment evidence raised issues of

material fact as to Food Town's knowledge of the dangerous condition, its breach of a duty of care, and proximate causation of her injuries. Because Cooper failed to negate a ground asserted in Food Town's motion, which asserted that there was no evidence of the existence of a premises condition posing an unreasonable risk of harm, we conclude that the trial court properly granted summary judgment. We affirm.

Background

Late one afternoon in May 2008, Cooper entered a Food Town grocery store in Pearland, Texas. Cooper saw a metal, collapsible, multi-use cart that she wanted to buy. A Food Town employee had placed the cart along with a few other similar carts on top of an open-air shelving cooler. The top of the cooler was about 6 feet, 6 inches above the floor. A front-facing metal panel ran along the length of the top edge of the cooler. The panel extended above the top of the cooler, forming a small barrier such that a cart would have to be lifted over the barrier before it could be taken down. Three signs were affixed to the panel: two yellow price signs with a white sign in-between. The white sign had black text that read, "Please ask store personnel for assistance for all items on top of the coolers."

Although Cooper noticed the yellow sign listing the cart's price, she did not notice the white sign, and it did not occur to her to ask for assistance. Instead, Cooper, who is 5 feet, 3 inches tall, stood on her tiptoes and extended her arms up,

putting her hands on one of the carts. Two or three carts then fell on top of her, causing injuries to her head, neck, shoulders, and left thumb. Cooper later stated in deposition that she is capable of retrieving a cart, even one placed above her head, without assistance.

Cooper sued Food Town, asserting a premises liability claim to recover personal injury damages. Food Town filed a motion for summary judgment on the grounds that there was no evidence that (1) a condition posing an unreasonable risk of harm existed on its premises prior to the incident in question, (2) it had actual or constructive knowledge of the condition, (3) it failed to exercise reasonable care to reduce or eliminate the risk of harm posed by the condition, or (4) its failure to exercise such care proximately caused Cooper's injuries and damages. In support of its assertion that there was no evidence of constructive knowledge, Food Town also asserted that there was no evidence that it would have discovered the condition by the exercise of reasonable care and no evidence of how long the condition existed prior to the incident. The trial court granted summary judgment against Cooper without stating on which ground or grounds it based its ruling.

Summary Judgment

In her four issues, Cooper contends that the trial court erred in granting summary judgment because the summary judgment evidence raised issues of material fact. She asserts that Food Town had knowledge of the dangerous

condition because it created the display, that it breached its duty of care in that the white sign was inadequate and the cart was not secured, and that the breach proximately caused her injuries.

A. Standard of Review

After an adequate time for discovery, a party may move for no-evidence summary judgment on the ground that no evidence exists of one or more essential elements of a claim on which the adverse party bears the burden of proof at trial. TEX. R. CIV. P. 166a(i); *see Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The burden then shifts to the nonmovant to produce evidence raising a genuine issue of material fact on the elements specified in the motion. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The trial court must grant the motion unless the nonmovant presents more than a scintilla of evidence raising a fact issue on each of the challenged elements. *Flameout Design & Fabrication*, 994 S.W.2d at 834; *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) ("More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'") (quoting *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995)).

An appellate court reviews de novo a trial court's ruling on a summary-judgment motion. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "When there are multiple grounds for summary judgment and the order does not specify the ground on which the summary judgment was rendered, the appealing party must negate all grounds on appeal." *Ellis v. Precision Engine Rebuilders, Inc.*, 68 S.W.3d 894, 898 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (citing *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 381 (Tex. 1993)).

B. Applicable Law

The elements of a premises liability claim are: (1) defendant had actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) defendant did not exercise reasonable care to reduce or eliminate the unreasonable risk of harm; and (4) defendant's failure to use reasonable care to reduce or eliminate the unreasonable risk of harm proximately caused plaintiff's injuries. *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006). "A condition presenting an unreasonable risk of harm is defined as one in which there is a sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex. 1970)

C. Analysis

In its motion, Food Town asserted that there was no evidence that the cart display posed an unreasonable risk of harm. In response and again on appeal, Cooper fails to identify any evidence that the cart display posed an unreasonable risk of harm. Specifically, none of Cooper's four issues challenges the trial court's ruling on her failure to raise a factual issue on whether the cart posed an unreasonable risk of harm.

Within her four issues addressing the other elements of premises liability, Cooper suggests that the white sign that requested customers to ask for assistance in retrieving all items placed on the tops of coolers is evidence that the cart display was unreasonably dangerous. However, as Cooper argues elsewhere in her brief, the white sign was a generic notice placed on all coolers on which items were placed atop, regardless of whether those items were heavy metal carts or light Styrofoam cups. The sign, which requests that customers ask for assistance, is not evidence that the cart display was unreasonably dangerous.

Cooper also suggests that a customer might not realize that the front-facing panel on the top edge of the cooler, which formed a small barrier, was there and consequently, the consumer would not know to lift the cart up over the lip or that this lip would cause the cart or carts to tumble over when moving them. However, other than her accident, Cooper presents no evidence to support this argument, either as to the likelihood that consumers would not notice this barrier or that this

would cause the cart or carts to tumble. Cooper suggests that a display of unsecured carts might tempt a customer to try to take one down and that a customer might not do so successfully, but she fails to present any evidence to support these assertions other than her own accident.

Cooper has failed to produce any evidence of an unreasonable risk that harm would result from the cart display. *See Seideneck*, 451 S.W.2d at 754. Specifically Cooper has failed to produce any evidence indicating that anyone else had been injured, that the cart display presented any hidden danger, that the type of display was unusual, or that its particular setup presented a prohibited degree of danger. *Cf. Lofton v. Marmaxx Operating Corp.*, No. 01-06-01109-CV, 2008 WL 525678, at *3 (Tex. App.—Houston [1st Dist.] Feb. 28, 2008, no pet.) (finding no evidence of unreasonably risk of harm where plaintiff offered no evidence that anyone else had tripped on floor mat, that the mat was defective, that the mat was of unusual type, or that mat's particular construction presented prohibitive degree of danger). Moreover, Food Town presented evidence that there have been no other reports of similar incidents in the past 13 years. We conclude that the trial court would have properly determined Cooper presented no evidence of that the cart display posed an unreasonable risk of harm. *See LMB*, 201 S.W.3d at 688; *Lofton*, 2008 WL 525678, at *3; *Ellis*, 68 S.W.3d at 898. We hold the trial court properly granted summary judgment.

We overrule Cooper's four issues.

Conclusion

We affirm.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.