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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-570

Filed 07 March 2023

Mecklenburg County, No. 20CVS8390

DANIELLE WHEELER, Plaintiff,

v.

CITY OF CHARLOTTE, A NORTH CAROLINA MUNICIPAL CORPORATION,
AND 300 PARK AVENUE HOMEOWNERS' ASSOCIATION, INC., Defendants.

Appeal by plaintiff from judgment entered 18 November 2021 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2023.

Villmer Caudill, PLLC, by Bo Caudill, for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by James D. McAlister, for defendant-appellee.

GORE, Judge.

Plaintiff Danielle Wheeler appeals summary judgment in favor of defendant 300 Park Avenue Homeowners' Association, Inc. The City of Charlotte, a North Carolina Municipal Corporation, was voluntarily dismissed at the trial level and plaintiff does not raise any issues against the City, nor does the City of Charlotte take part in this appeal. Upon review of the record and the parties' briefs, we affirm.

I.

Plaintiff is a California resident who was visiting a friend in Charlotte, North Carolina the night of the injury. Plaintiff went to a concert with her friend, Jennette, and Jennette's friend, Sarah. After the concert, plaintiff and the two friends drove to 300 Park Avenue condominiums because Sarah was housesitting for one of the condominium owners. They arrived around 1:00 A.M. when it was very dark outside and they parked their vehicle on East Park Avenue. The main entrance to 300 Park Avenue was under construction and was blocked off with caution tape and traffic cones to prevent access while repairs were made. Sarah invited plaintiff and Jennette into the condominium for a short visit. Plaintiff alleges defendant failed to post signs to redirect traffic to access the condominiums a different route. Plaintiff followed Jennette and Sarah as they used the main entrance by going under the caution tape, around the cones, and through the scaffolding to get to the interior side of the condominiums.

Upon leaving the condominium, plaintiff then followed Jennette and Sarah back out of the main entrance under the caution tape and scaffolding, but prior to going over or under the final caution tape to access the street and their car, they turned right on a sidewalk. The sidewalk ended, and they chose to cross over a flowerbed in what appeared to be a break in the bushes to get to the street. Plaintiff stated the flowerbed was dark enough she could not see what was in that area.

Jennette and Sarah both crossed through the flowerbed successfully, but plaintiff stepped on the water utility box situated within the flowerbed and her foot went down into the hole, which was deep enough it required Jennette and Sarah to assist her in getting out of the hole. Plaintiff was diagnosed with a heel fracture and underwent surgery which then resulted in an infection and extensive therapy; the fracture did not fully heal from the injuries sustained. On or about 22 June 2020, plaintiff filed a complaint against defendant and the City of Charlotte and amended her complaint on 12 August 2020. The parties engaged in extensive discovery, including the deposition and report by an expert witness who is a licensed professional engineer. Defendant filed a motion for summary judgment and, on 18 November 2021, the trial court granted the motion. Plaintiff filed a timely notice of appeal.

II.

On appeal, plaintiff argues the trial court erred by granting defendant's motion for summary judgment. Plaintiff claims there are genuine issues of material fact to advance the case before a jury to determine whether defendant is liable for negligence. In support of this claim, plaintiff argues there was sufficient evidence presented to support prima facie common law negligence, or to support the doctrine of *res ipsa loquitor*. Plaintiff also argues she was not contributorily negligent and that such an affirmative defense should be determined by a jury.

We review the granting of a motion for summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007); *Craig ex rel. Craig v. New*

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Hanover Cnty. Bd. of Educ., 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (“Under a [de novo] review, the court considers the matter anew and freely substitutes its own judgment. . . .”). The trial court should only grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . 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. R. Civ. P. 56(c). “[T]he burden is upon the [movant]” to demonstrate “there is no genuine issue of fact.” *First Fed. Sav. & Loan Assoc’n of New Bern v. BB&T*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972). The evidence must be considered “in a light most favorable to the nonmoving party.” *Belmont Ass’n, Inc. v. Farwig*, 381 N.C. 306, 310, 873 S.E.2d 486, 489 (2022).

The following actions are sufficient for a defendant to prove summary judgment is proper: “(1) proving that an essential element of the plaintiff’s case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.” *Frank v. Funkhouser*, 169 N.C. App. 108, 113, 609 S.E.2d 788, 793 (2005). “[A] [p]laintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper.” *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (alteration in original) (citation omitted).

A.

Plaintiff first argues she raised genuine issues of material fact on her claim for negligence. When a “common law negligence claim” is scrutinized at a summary judgment proceeding,

plaintiff must establish a prima facie case . . . by showing: (1) that [the] defendant failed to exercise proper care in the performance of a duty owed [to the] plaintiff; (2) the negligent breach of that duty was a proximate cause of [the] plaintiff’s injury; and (3) a person of ordinary prudence should have foreseen that [the] plaintiff’s injury was probable under the circumstances.

Asher v. Huneycutt, 284 N.C. App. 583, 591, 876 S.E.2d 660, 667 (2022) (alteration in original) (citation omitted). A landowner’s duty is “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). This means the landowner must not “expose [visitors] unnecessarily to danger, . . . and [must] give warning of hidden dangers or unsafe conditions of which he has knowledge, express or implied.” *Shepard v. Catawba Coll.*, 270 N.C. App. 53, 60, 838 S.E.2d 478, 484 (2020) (citation omitted).

Important to whether a landowner breaches its duty, is whether the landowner has actual or constructive knowledge. We have previously stated, “[t]o show that a store owner breached its duty of care, a plaintiff must show that the store owner either negligently created the condition causing her injury or negligently failed to

correct the condition after actual or constructive knowledge of its existence.” *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 653–54, 547 S.E.2d 48, 50 (2000). Further, we have previously explained how a plaintiff may show “constructive knowledge of a dangerous condition.” *Id.* at 654, 547 S.E.2d at 50. “[T]he plaintiff can present direct evidence of the duration of the dangerous condition, or . . . present circumstantial evidence from which the fact finder could infer that the dangerous condition existed for some time.” *Id.*

Plaintiff establishes defendant owed her a duty of care because she was invited onto the land as a guest of Sarah, who was a guest of the condominium owner. *See Nelson*, 349 N.C. at 631, 507 S.E.2d at 892 (“[W]e should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors.”). Plaintiff then argues defendant breached its duty to her in multiple ways such as the lighting of the sidewalks, the lack of signs to redirect foot traffic at the construction area, by not keeping the water utility box in a “reasonably safe condition,” and that defendant did not take the proper steps to identify the utility box’s dangerous condition.

Plaintiff points to the expert engineer’s report in which the expert analyzed the various ways plaintiff contends defendant breached its duty. Plaintiff is unable to state whether the utility box was open or closed when she fell through, but the expert’s report states a properly covered utility box would support her, thus, she claims defendant did not inspect and maintain the water utility box, which was

defendant's improvement. Additionally, to support this argument, plaintiff states the utility box was last serviced in November 2018, and no servicing or repair occurred until after the injury in July 2019. Within the expert's report, he explains the possibility of the utility box cover loosening because of the water exposure and how this may compromise the fit of the lid when it is not secured properly.

However, plaintiff fails to show that defendant had any knowledge the utility box cover was open or loose (plaintiff also lacks knowledge of the lid's position at the time of the injury). Nor does plaintiff establish a landowner should have such depth of knowledge for this type of improvement. There is no evidence the water irrigation system should have been serviced more often than it was. Even if we presume the utility box was open, plaintiff lacks evidence that it was open long enough for defendant to have knowledge through the requisite inspection of its property.

Defendant challenges plaintiff's claim by referring to two cases, in which we affirmed the granting of a defendant's summary judgment. *Thompson*, 138 N.C. App. at 654, 547 S.E.2d at 50; *Williamson v. Food Lion Inc.*, 131 N.C. App. 365, 507 S.E.2d 313 (1998). In *Thompson* and *Williamson*, we reasoned there was no constructive knowledge proved because the length of time sufficient to establish knowledge on the defendant's part was not factually shown. *Thompson*, 138 N.C. App. at 655, 547 S.E.2d at 50; *Williamson*, 131 N.C. App. at 368, 507 S.E.2d at 315–16. The record established the top of the utility box was lying to the side of the utility box the day after the injury, and there was no damage to it, but plaintiff asks us to impute

knowledge upon defendant because of ownership and the expert's findings of how this type of utility box lid could be loosened if not properly secured. This type of circumstantial evidence would require inference upon inference to establish defendant's knowledge of either situation, since there is no such evidence on the record. Further, the time at which plaintiff fell into the utility box was in the middle of the night, meaning if the lid was removed instead of loose, it would require speculation to determine defendant previously discovered the danger during regular inspection hours.

Plaintiff was unable to establish defendant's knowledge, and defendant denies actual and constructive knowledge of any issue with the utility box cover. Plaintiff asks us to infer the lid was not properly secured and that defendant knew or should have known that. Even if we inferred the lid was improperly secured, it would still require speculation and mere conjecture to establish defendant's knowledge of the danger. Accordingly, plaintiff fails to forecast evidence for the element of breach. Without evidence of breach, plaintiff fails to establish a prima facie case of negligence to overcome summary judgment.

Plaintiff also argues there was insufficient sidewalk lighting and this was a breach of defendant's duty of care. In support, plaintiff relies upon *Cone v. Watson*, 224 N.C. App. 241, 244–45, 736 S.E.2d 210, 212–13 (2012), in which we reversed the trial court's summary judgment when the plaintiff fell on stairs because the lighting was poor. Plaintiff claims her case is no different from *Cone*, yet her injury did not

occur on the sidewalk, it occurred after she left the sidewalk and crossed through the flowerbeds by a construction area blocked off to pedestrians. We do not see the similarity in cases, because in *Cone* the proximate injury occurred on the stairs, whereas in the present case, the proximate injury occurred at the utility box within a flowerbed, which is not meant for foot traffic. *Id.* at 244–45, 736 S.E.2d at 213.

Plaintiff also contends defendant breached its duty by not posting proper signage to redirect foot traffic away from the main entrance under construction. Once again, plaintiff is seeking to establish breach of a duty, which would then require multiple inferences to arrive at the proximate injury at the utility box. While the sign may be a “cost effective” way to redirect foot traffic, caution tape and cones blocking off access to an area satisfies defendant’s legal duty “to give warning of hidden conditions and dangers of which the landowner has express or implied notice.” *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 89, 555 S.E.2d 303, 306 (2001). Defendant acted to comply with its duty to protect the residents of the known danger, which at the time was construction upon the main entrance archway. Plaintiff points to no case law to support this legal theory of a breach of duty by not posting signs to explicitly redirect traffic, and we will not enforce such a theory.

B.

Alternatively, plaintiff argues that under the doctrine of *res ipsa loquitor*, negligence may be inferred from the circumstances surrounding the incident and this should have overcome summary judgment. This doctrine, “permits negligence to be

inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause.” *Williams v. 100 Block Assocs., Ltd. P’ship*, 132 N.C. App. 655, 663, 513 S.E.2d 582, 587 (1999). We previously stated the following:

The rule of *res ipsa loquitur* never applies when the facts of the occurrence, although indicating negligence on the part of some person, do not point to the defendant as the *only* probable tortfeasor. In such a case, unless *additional evidence*, which eliminates negligence on the part of all others who have had control of the instrument causing the plaintiff’s injury is introduced, the court must nonsuit the case.

Id. at 664, 513 S.E.2d at 587 (citation omitted).

Plaintiff refers to *Harris v. Tri-Arc Food Systems, Inc.*, in her discussion of the doctrine. 165 N.C. App. 495, 598 S.E.2d 644 (2004). In *Harris*, the plaintiff was injured by a “latent construction defect in the restaurant’s ceiling.” *Id.* at 500, 598 S.E.2d at 648. We determined the doctrine was inapplicable because the plaintiff was unable to present evidence to eliminate other potential tortfeasors besides the defendant. *Id.* at 502, 598 S.E.2d at 649. In that case, we reasoned the evidence of contractors involved in the construction of the ceiling was enough to raise the question of other tortfeasors. *Id.* Similarly, in the present case, plaintiff refers to the contractors who installed and serviced the irrigation system and utility box. This evidence is enough, according to *Harris*, to determine plaintiff failed to demonstrate defendant had exclusive control of the utility box. *Id.* Therefore, the doctrine of *res ipsa loquitur* does not apply in plaintiff’s case.

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Since plaintiff failed to produce evidence that would support a prima facie case of negligence, the trial court did not err in granting defendant's motion for summary judgment. Considering our resolution of this matter, it is unnecessary to address the remainder of plaintiff's argument.

III.

For the foregoing reasons, the trial court did not err in granting summary judgment.

AFFIRMED.

Judges STADING and RIGGS concur.

Report per Rule 30(e).