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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-230

Filed 21 November 2023

Johnston County, No. 21-CVS-2036

LOIS MCLAMB MILLER, Plaintiff,

v.

TOWN OF CHAPEL HILL, Defendant.

Appeal by plaintiff from order entered 16 September 2022 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 19 September 2023.

Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellant.

Petty & Partrick, L.L.P., by Rodney E. Petty and Alayna M. Poole, for defendant-appellee.

THOMPSON, Judge.

In this appeal in a negligence case, plaintiff presents arguments of error regarding the trial court's grant of a directed verdict to defendant and the trial court's refusal to permit certain testimony proffered by a witness for plaintiff. We find no merit in plaintiff's contentions, and thus, we affirm the trial court.

I. Factual Background and Procedural History

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On 4 January 2020, plaintiff and several of her family members had tickets to attend a University of North Carolina at Chapel Hill (UNC) men's basketball game at the Dean Smith Center on UNC's campus. Plaintiff's family parked their vehicle in the parking lot of the Friday Center, also on UNC's campus, from whence they planned to ride a bus operated by the Tar Heel Express Shuttle Service, operated by defendant, to the Smith Center. On the day in question, a number of shuttle buses were lined up in two parallel rows in the Friday Center parking lot, and as buses at the front of each row filled with passengers, they would pull away and the next buses in line would pull forward for boarding. As plaintiff's party traversed the parking lot and rounded the front of one of the lead buses en route to its entry door, plaintiff tripped over and fell onto an accessibility ramp leading from the adjacent sidewalk to the front door of the bus.

Despite her fall, which caused immediate pain, plaintiff still hoped to be able to attend the basketball game, so she and her family waited for the next available bus and continued on to the Smith Center. Upon their arrival at the Smith Center, however, plaintiff was experiencing sufficient pain to cause her to seek medical assistance. Plaintiff was ultimately transported to a local hospital where an X-ray revealed that her wrist was broken and other injuries were identified. Medical staff put plaintiff in a temporary cast and she was referred to UNC Orthopedics for follow-up care. That evening as plaintiff was being driven home to Benson, she noted aches all over her body and particular pain in her face, back, and leg.

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On 17 June 2021, plaintiff commenced a negligence action by the filing of the complaint that alleged that the bus accessibility ramp created a dangerous condition, and that defendant was negligent in failing to warn passengers, such as plaintiff, about the ramp. In its answer, defendant denied liability, (1) asserting the defense that the wheelchair ramp was an open and obvious condition such that defendant had no duty to warn plaintiff of its existence, and (2) alleging contributory negligence on the part of plaintiff for failing to keep a proper lookout as she was walking around the front of the bus. On 10 August 2022, defendant filed a motion for summary judgment based upon its assertion of the defense that the ramp was an open and obvious condition, and as such, there was no duty to warn plaintiff of its existence. In support of its summary judgment motion, defendant submitted an affidavit from Mark Lowry, the Safety Officer for Chapel Hill Transit, in which Lowry authenticated a videorecording of the incident involving plaintiff and still images taken from the video. Plaintiff's response included, *inter alia*, an affidavit from plaintiff in which she claimed that at the time of her fall "it was completely dark" and "a large group of pedestrians [in front of plaintiff] obstructed [plaintiff's] view as [she] turned the corner in front of the bus." After hearing defendant's motion, the trial court denied summary judgment for defendant in open court on 29 August 2022,¹ and the matter proceeded to trial on the following day.

¹ It appears that the denial of defendant's motion for summary judgment was never reduced to writing. In any event, no written order appears in the record on appeal.

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During the trial, plaintiff acknowledged that neither lighting nor crowds obscured her view as she traversed the parking lot in an attempt to board a bus to the Smith Center. Plaintiff's grandson, Mathew Anderson, was prepared to testify that, immediately after plaintiff's fall, an unidentified woman fell on the same ramp that plaintiff had tripped over. However, following voir dire during which Anderson acknowledged that he had only seen the unidentified woman after she fell and therefore could not testify about how or why she had fallen, the trial court held that Anderson's proffered testimony about the other woman's fall could not be admitted.

At the close of the evidence, defendant moved for a directed verdict in its favor on all of plaintiff's claims, arguing that plaintiff had failed to establish a breach of a duty owed by defendant to plaintiff specifically because the ramp did not constitute a hidden danger and was not in a defective condition. In support of its motion, defendant cited *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 843 S.E.2d 72 (2020)² for the proposition that, while there is a duty to warn of hidden dangers, the ramp here was an open and obvious hazard which plaintiff simply failed to see because she did not "[k]eep a proper lookout." In response, plaintiff agreed that the ramp itself was not defective but argued that "[t]he problem was that they put the ramp out there without directing traffic. There is no traffic control." Plaintiff

² The trial transcript refers to this case as "Drawn," but the parties' discussion of the case makes clear that this was an understandable phonetic misspelling and that the decision being cited was *Draughon*.

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focused on the possibility that plaintiff fell very near to the location where the ramp met the bus, only “one stride or maybe two strides after you turn the corner” of the front of the bus, and further urged the trial court to find the *Draughon* case distinguishable because it dealt with “a piece of real estate . . . [while] here we are dealing with traffic control.” When the trial court asked defendant about the traffic control issue, defendant emphasized that no evidence had been presented either about where along the ramp plaintiff had tripped and fallen or about the traffic control duties of a common carrier such as defendant.

After hearing the arguments of counsel, the trial court first noted that while plaintiff had averred that it was “completely dark” and “a large group of pedestrians” was blocking her view when she tripped over the ramp and fell, the video evidence introduced at trial revealed that it was not dark at the time of plaintiff’s fall and that no crowd impaired plaintiff’s line of sight to the ramp. In regard to the issue of traffic control raised by plaintiff, the trial court also corrected the assertion of plaintiff’s counsel that “the supervisor [of the bus drivers, apparently] was supposed to be posted at the door . . . [but d]id absolutely nothing” by noting that, again, the videorecording in evidence showed that the supervisor was in fact present and actively engaged, specifically by directing a patron in a wheelchair on the ramp, at the time of plaintiff’s fall. The trial court then granted defendant’s motion for directed verdict in open court. This ruling was memorialized in an order entered on 16 September 2022, finding the evidence of a breach of duty by defendant was

insufficient to send the case to the jury. Plaintiff appeals from that order.

II. Analysis

On appeal, plaintiff argues that the trial court erred in two ways: First in granting defendant's motion for a directed verdict, and second, in refusing to admit certain evidence offered by a witness for plaintiff. We are not persuaded by either of plaintiff's contentions.

A. Directed verdict

Plaintiff argues that the trial court erred in allowing defendant's motion for a directed verdict in this matter. We disagree.

"A motion for directed verdict presents the same question for both the trial and appellate courts." *Alston v. Herrick*, 76 N.C. App. 246, 249, 332 S.E.2d 720, 722 (1985) (citations omitted), *affirmed*, 315 N.C. 386, 337 S.E.2d 851 (1986). A motion for a directed verdict must be denied if "the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)); *see also* N.C. Gen. Stat. § 1A-1, Rule 50 (2021).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non[-]movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in

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the non[-]movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

In order to sustain a claim of actionable negligence,³ plaintiff must prove (1) defendant owed a duty to plaintiff, (2) defendant failed to exercise proper care in the performance of that duty, and (3) the breach of that duty was the proximate cause of plaintiff's injury, which a person of ordinary prudence should have foreseen as probable under the conditions as they existed.

Westbrook v. Cobb, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992) (citations omitted). While in negligence actions issues of fact and determinations of the reasonableness of conduct are for the jury and not for the trial court, *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980), if a plaintiff's evidence is merely speculation or conjecture regarding negligence, the case is not sufficient for submission to the jury, *Westbrook*, 105 N.C. App. at 67, 411 S.E.2d at 653 (citation omitted).

Plaintiff argues that the hazard presented by the ramp was hidden such that defendant had a duty to warn or protect plaintiff, citing "[t]he facts in this case a[s] somewhat similar to those presented to the court in *Barber v. Presbyterian Hospital*, 147 NC App. 86, 555 S.E.2d 303 (2001)." In *Barber*, the plaintiff opened a door, walked

³ Although plaintiff vigorously argued the issue of the special duties of common carriers to their passengers in the trial court and cites caselaw on that topic in her appellate brief, she ultimately asserts that whether defendant was a common carrier in operating the shuttle service does not affect the outcome of this appeal because "[t]he evidence . . . shows that . . . defendant failed to exercise even ordinary care for the safety of" plaintiff.

through the doorway, and fell down a step located immediately past the doorway. *Id.* at 91, 555 S.E.2d at 307. In that case, the trial court directed a verdict for the defendant hospital, but on appeal, this Court held that, because the plaintiff's view of the staircase was completely obstructed by the door, "the question of the reasonableness of [the] plaintiff's actions, as well as the question of whether [the] defendant was negligent, [were] both properly answered by a jury. As such, the trial court was in no position to grant a directed verdict in favor of either party." *Id.* We find the facts in *Barber* easily distinguishable from the evidence presented in plaintiff's case.

Generally, there is "no duty to warn anyone of a [hazardous] condition that is open and obvious." *Draughon*, 374 N.C. at 480, 843 S.E.2d at 74 (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 [her] eyes in an ordinary manner." *Id.* at 483, 843 S.E.2d at 76 (quoting *Coleman v. Colonial Stores, Inc.*, 259 N.C. 241, 242 (1963)). In turn, when a condition is deemed to be open and obvious, "a visitor is legally deemed to have equal or superior knowledge to the owner [of the premises], and thus a warning is unnecessary." *Id.* (citing *Branks v. Kern*, 320 N.C. 621, 624, 359 S.E.2d 780, 782 (1987)). Indeed, in *Barber*—the case cited and relied upon by plaintiff—this Court noted that "the use of steps is negligent only when by the steps' character, location or surrounding conditions, a reasonably prudent person would not be likely to see the step or expect

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it.” *Id.* at 92, 555 S.E.2d at 308 (citing *Harrison v. Williams*, 260 N.C. 392, 395, 132 S.E.2d 869, 871 (1963)).

This Court’s decision in *Barber* also noted dispositive distinctions between the facts in that case and those presented in *Grady v. Penney Co.*, 260 N.C. 745, 133 S.E.2d 678 (1963), a case in which the evidence showed that the plaintiff walked towards a dressing room, opened a curtain, took two steps beyond the curtain, and then fell down a flight of steps. *Id.* at 748, 133 S.E.2d at 680. The Supreme Court in *Grady* determined that evidence showed the plaintiff could have seen the steps if she had looked, and therefore, that the grant of nonsuit⁴ in favor of the defendant was proper based in part on the fact that the plaintiff had taken two steps beyond the occluding curtain before her fall, and “because the stair[way] was in plain view and [the plaintiff] was entering the landing at floor level.” *Id.*

Our Supreme Court has also held that the use of a step or ramp to connect two surfaces at different levels does not generally constitute a hazard which would require a warning to the public. *Garner v. Atlantic Greyhound Corp.*, 250 N.C. 151, 157, 108 S.E.2d 461, 466 (1959). In *Garner*, the plaintiff alleged that the location where an entryway met a sidewalk created a dangerous condition because there was no easily perceived change in elevation between the two surfaces. *Id.* at 159, 108

⁴ “A motion for a directed verdict pursuant to Rule 50(a) presents the same question as did a motion for nonsuit prior to the adoption of the New Rules of Civil Procedure.” *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979).

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S.E.2d at 467. Upon its consideration of that circumstance, however, the Court held that even though the plaintiff was unable to discern the differences between the surfaces, the defendant had no duty to warn the plaintiff of the hazard because at the time of plaintiff's fall, the plaintiff had the ability to see the surfaces without obstruction, noting that there was "a difference in material and design[.]" between the two surfaces. *Id.*

We find the facts presented here more analogous to those in *Grady* and *Garner*, rather than to those in *Barber*. Plaintiff alleges that she was injured after she tripped over an accessibility ramp which extended from a bus to a sidewalk. The ramp was not completely occluded by a door as were the steps in *Barber* and further, the surfaces here—the ramp, the paved parking lot, and the sidewalk—were different in material, with the ramp also being marked with bright yellow paint, and thus were visually distinct, like the surfaces at issue in *Garner* and *Grady*. In such a circumstance, our Supreme Court has opined that "the condition that allegedly caused the injury, viewed objectively, [was] open and obvious." *Draughon*, 374 N.C. at 482–83, 843 S.E.2d at 76 (citation omitted).

In light of the cited precedent, the trial court's ruling here is supported by its conclusion that plaintiff's view of the ramp was unobstructed and that she could have avoided tripping on the ramp if she had exercised ordinary care. Accordingly, we hold that plaintiff has not established error by the trial court in its allowance of defendant's motion to dismiss.

B. Denial of admission of certain evidence

Plaintiff next argues that the trial court abused its discretion by excluding proffered testimony from plaintiff's grandson who was with her in the Friday Center parking lot and who was prepared to testify that he saw another woman fall on or near the bus wheelchair ramp shortly after plaintiff fell. Again, we disagree.

Most evidentiary rulings are reviewed for an abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008). "An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation and internal quotation marks omitted).

In a tort case, the admission of evidence showing other incidents or accidents is generally barred. *Karpf v. Adams*, 237 N.C. 106, 112, 74 S.E.2d 325, 329 (1953). An exception exists, however, where there is "[e]vidence of other similar accidents or injuries at or near the same place and at approximately the same time, suffered by persons other than the plaintiff . . . where it appears that all the essential physical conditions on the two occasions were identical." *Id.* at 112–13, 74 S.E.2d at 329 (citations and internal quotation marks omitted). Plaintiff contends that the proffered testimony from Anderson about another woman falling near the ramp just after plaintiff fell should have been admitted under this exception and that the trial court abused its discretion in refusing to do so. Plaintiff's argument on this point is misplaced as the proffered testimony from Anderson was not kept out of evidence

because the other woman's fall was not sufficiently similar or proximate to plaintiff's accident, but rather because on voir dire, plaintiff could not establish a proper foundation for the proposed testimony.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2021). Personal knowledge may consist of what a witness thinks he or she knows based on what the witness has personally perceived. *State v. Mitchell*, 270 N.C. App. 136, 140–41, 840 S.E.2d 276, 281 (2020). Thus, while generally evidence from a lay witness about which he has a basis of personal knowledge is admissible so long as it is relevant, *State v. Anthony*, 354 N.C. 372, 411, 555 S.E.2d 557, 583 (2001), *cert. denied*, 536 U.S. 930 (2002), testimony that amounts to mere speculation is inadmissible, *State v. Garcell*, 363 N.C. 10, 36, 678 S.E.2d 618, 635, *cert. denied*, 558 U.S. 999 (2009). *See, e.g., State v. Oliphant*, 228 N.C. App. 692, 747 S.E.2d 117 (2013) (holding that a witness was properly prohibited from testifying about the contents of a probation violation report that she had not previously seen because the witness did not have personal knowledge of the matter), *disc. rev. denied*, 367 N.C. 289, 753 S.E.2d 677 (2014); *Lee v. Lee*, 93 N.C. App. 584, 378 S.E.2d 554 (1989) (concluding that a husband's testimony that his wife was aware of a corporate loan was improperly admitted where the evidence presented did not support the finding that wife was familiar with the corporation's books).

Here, on voir dire Anderson admitted that he only saw the other woman when

she was already falling, agreeing that he did not see her trip or see what may have caused her fall. The trial court thus properly excluded this testimony pursuant to Rule of Evidence 602.⁵

III. Conclusion

The trial court's order allowing defendant's motion for directed verdict is affirmed.

AFFIRMED.

Judges HAMPSON and STADING concur.

Report per Rule 30(e).

⁵ Although the trial court here did not base its ruling on a lack of similarity between plaintiff's fall and that of the second woman, we observe that incidents other than that at bar are admissible in tort cases only where "all the essential physical conditions on the two occasions were identical," and in the absence of evidence that the second woman's fall was caused by tripping over the ramp, evidence of the second woman's fall would have been inadmissible even under plaintiff's theory. *See Karpf*, 237 N.C. at 113, 74 S.E.2d at 329 (citations omitted).