United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 20, 2023
Lyle W. Cayce
Clerk

No. 23-30313
Summary Calendar

LORENZO PERKINS, JR.; PAMELA D. BRADLEY PERKINS,

Plaintiffs—Appellants,

versus

SHEFFIELD RENTALS, INCORPORATED; LOVE'S TRAVEL STOPS & COUNTRY STORES, INCORPORATED; EMPLOYERS MUTUAL CASUALTY COMPANY; WILSON JAMAR SMITH; PAUL DILLARD WILLIAMS; REX PIERCE,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:21-CV-1701

Before DENNIS, ELROD, and WILSON, *Circuit Judges*.

PER CURIAM:[*]

In February 2021, Lorenzo Perkins, Jr. injured himself in Tallulah, Louisiana, while exiting a portable restroom at Love's Travel Stops & Country Stores, Inc. ("Love's"). Love's rented the portable restrooms from

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Sheffield Rentals, Inc. ("Sheffield"). Sheffield employees placed the restrooms on an elevated sidewalk outside of the Tallulah Love's location. After Mr. Perkins suffered a fall exiting one of the portable restrooms, plaintiffs sued Love's, Sheffield, and Employers Mutual Casualty Co. ("Employers Mutual"), alleging the elevated location of the restroom created an unreasonable risk of harm.

The district court (1) granted summary judgment in favor of defendants Sheffield, Love's, and Employers Mutual; (2) denied a motion for reconsideration; and (3) granted a motion to amend summary judgment to include Sheffield employees Wilson Jamar Smith, Paul Dillard Williams, and Rex Pierce as defendants. Plaintiffs timely appealed the district court's entry of summary judgment in favor of the defendants and denial of plaintiffs' motion for reconsideration. Because the location of the restroom did not create an unreasonable risk of harm, we affirm the district court's judgments.

We review a district court's grant of summary judgment de novo. *Clift v. Clift*, 210 F.3d 268, 269-70 (5th Cir. 2000). Summary judgment is proper when "there is no genuine dispute as to any material fact." FED R. CIV. P. 56(a). We review the motion for reconsideration for abuse of discretion, unless the motion reconsidered a question of law, in which case it will be reviewed de novo. *Wise v. Wilkie*, 955 F.3d 430, 434 (5th Cir. 2020) (citing *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005)).

Under Louisiana law, courts apply a "duty/risk analysis" to determine whether negligence liability exists. *Farrell v. Circle K Stores, Inc.*, 2022-00849, p. 5 (La. 3/17/23), 359 So. 3d 467, 473. A plaintiff must prove five elements by a preponderance of the evidence:

> (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) the defendant's substandard conduct was

> a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of duty element); and, (5) proof of actual damages (the damages element).

Id.

The breach element is a "question of fact or a mixed question of law and fact." *Id.* at 474. In *Farrell*, the Louisiana Supreme Court created a risk/utility balancing test to determine whether there is a breach of duty. *Id.* This balancing test considers four factors:

> (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of social utility or whether the activities were dangerous by nature.

Id.

The Louisiana Supreme Court emphasized that whether a condition is open and obvious must be analyzed under the breach element. *Id.* at 475. Furthermore, whether a condition is open and obvious is not "a jurisprudential doctrine barring recovery, but only a factor of the risk/utility balancing test." *Id.* at 478. Here, the district court properly granted summary judgment in favor of the defendants. Applying the risk/utility balancing test established by *Farrell*, no reasonable jury could find that defendants breached their duty.

First, the utility factor weighs in favor of the defendants. Generally, if a condition is "meant to be there, it often will have social utility[.]" *Id.* at 474. Because of freezing weather, the restrooms inside of the Love's were not working. The portable restrooms were intentionally placed outside so employees and customers could use the restroom.

Second, the likelihood and magnitude of harm factor weighs in favor of the defendants. This factor "asks whether the condition presents a risk of great or small injury and the likelihood of each." *Id.* The openness and obviousness of the condition is considered under this factor because "[t]he more obvious the risk, the less likely it is to cause injury because it will be avoided." *Id.* Therefore, the size and location of the condition is a relevant consideration. *See id.* at 479; *see also Campbell v. Hosp. Serv. Dist. No. 3 for Par. of Lafourche*, 2022-1118 (La. App. 1 Cir. 8/1/23), No. 2022-CA-1118, 2023 WL 4940674, at *5 (two- to three-inch deep indentations in concrete were open and obvious and there was a small likelihood and magnitude of harm); *Bertrand v. Jefferson Arms Apartments, LLC*, 2022-1195, p. 12 (La. App. 1 Cir. 4/14/23), 366 So. 3d 595, 605 (missing panels between a walkway and a sidewalk were open and obvious and there was a small likelihood and magnitude of harm). Here, the likelihood and magnitude of harm was small, and the condition was open and obvious. The portable restroom was placed on an elevated sidewalk standing only six inches above the road. There was also approximately a twelve- to eighteen-inch gap from the edge of the curb to the front of the portable restroom, giving ample warning of a curb ahead to someone exiting the portable restroom. Given the small height of the curb and the portable restroom's position at least a foot away from the curb, the restroom placement did not present a great likelihood and magnitude of harm.

Third, there is no evidence regarding the cost of preventing the harm, so this factor is not considered. The petitioners argue that the cost of preventing the harm was low because after the accident an employee moved the restrooms and placed a warning sign. The district court, however, ruled that these "references to subsequent remedial measures . . . would not be admissible under Federal Rule of Evidence 407." Even if the cost of

preventing harm was low, this factor is outweighed by the other factors, collectively.

Fourth, the social utility factor weighs in favor of the plaintiffs, but this factor does not carry much weight. *See Farrell*, 359 So. 3d at 479. This factor "involves a consideration of the nature of the plaintiff's activity in terms of social utility or whether the activities were dangerous by nature." *Id.* Here, one of the plaintiffs used a restroom. Although using a restroom "may be important and is not dangerous in nature, it does not weigh heavily as a consideration in determining an unreasonably dangerous condition." *Lambert v. Zurich Am. Ins. Co.*, 55,064, p. 11-12 (La. App. 2 Cir. 6/28/23), 366 So. 3d 1285, 1293 (citing *Farrell*, 359 So. 3d at 479).

Applying the risk/utility balancing test laid out in *Farrell*, no reasonable jury could conclude that the restroom placement was unreasonably dangerous. Because the district court properly entered summary judgment in favor of defendants, it did not abuse its discretion when it denied the motion to reconsider. *See Anderson v. Martco L.L.C.*, 852 F. App'x 858, 860 (5th Cir. 2021) (denying motion for reconsideration was proper when plaintiff "sought to reexamine the evidence and reargue the same arguments made on summary judgment").

Based on the foregoing, we AFFIRM the district court's judgment.