UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7339

(Summary Calendar)

SHIRLEY JEAN KUTZ,

Plaintiff-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-S92-0096(R))

(October 27, 1993)

Before SMITH, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

Shirley Jean Kutz appeals summary judgment of her negligence claim against Wal-Mart Stores, Inc. ("Wal-Mart"). Finding a genuine issue of material fact regarding causation, we reverse and remand.

On September 13, 1990, Kutz was leaving the pharmacy area of a Wal-Mart store in Picayune, Mississippi, when she slipped on an unidentified cola-like substance found on the floor of the main

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

aisle in front of the snack bar. The fall occurred within three feet of a trash can which Kutz alleged was overflowing and had liquid-filled cups resting on it.

Kutz filed suit against Wal-Mart on the basis of premises liability.[1] The district court granted Wal-Mart's motion for summary judgment, from which Kutz filed a timely notice of appeal.

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the

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[1] Mississippi substantive law applies to this diversity suit as Mississippi is the forum state. *See Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n, Inc.,* 783 F.2d 1234, 1238 (5th Cir. 1986). To maintain a premises liability action under Mississippi law, a plaintiff must make one of two alternative showings. Where the dangerous condition was caused by a third party, unconnected with the store operation, "the burden is upon the plaintiff to show that the operator had actual or constructive knowledge of its presence." *Munford, Inc. v. Fleming,* 597 So. 2d 1282, 1284 (Miss. 1992) (quoting *Jerry Lee's Grocery, Inc. v. Thompson,* 528 So. 2d 293, 295 (Miss. 1988)). Alternatively, where a plaintiff alleges that the dangerous condition was "caused by the operator's own negligence, no knowledge of its existence need be shown." *Id.* In opposing summary judgment, Kutz alleged only that the dangerous condition))i.e., the overflowing trash can))was caused by Wal-Mart's own negligence.

burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

In opposing summary judgment, Kutz submitted an affidavit[2] stating that she fell less than three feet from a trash can which was overflowing with garbage and had liquid-filled cups resting on top of it.[3] Whether the trash can was in such a state is a material issue of fact because a reasonable jury could have inferred that the cola-like substance upon which Kutz slipped originated from such a trash can located within three feet of her fall.[4] *See Anderson,* 477 U.S. at 255, 106 S. Ct. at 2513

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[2] We note that the district court made no mention of Kutz's affidavit in its memorandum opinion.

[3] Wal-Mart disputes that the trash can was overflowing. Specifically, Wal-Mart submitted the affidavit of an employee who claims to have inspected the trash can about one and one-half hours before the accident. Wal-Mart also submitted pictures taken after Kutz had left the scene, which showed that the trash can was not overflowing.

[4] We further find misplaced Wal-Mart's reliance upon *Moran v. Wal-Mart Stores, Inc.,* No. 92-7183 (5th Cir. Sept. 11, 1992) (unpublished) and *Washington v. Armstrong World Indus., Inc.,* 839 F.2d 1121 (5th Cir. 1988), as those cases stand for the proposition that a non-movant's complete failure to offer proof of causation can be a basis for summary judgment. Here, Kutz submitted her own affidavit from which a reasonable jury could infer causation.

("Credibility determinations, the weighing of evidence, and *the drawing of legitimate inferences from the facts* are jury functions." (emphasis added)).

Wal-Mart maintains that Kutz's affidavit directly contradicted her prior deposition testimony,[5] and therefore should be disregarded because it constituted an attempt to "manufacture" an issue of fact. We reject this argument because Kutz's affidavit))stating that she fell less than three feet from a trash can overflowing with garbage))did not directly contradict her deposition testimony, in which she stated that she did not know how the cola-like substance came to be on the floor. To the extent that discrepancies did exist, we note that because "of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an earlier deposition." *Kennett-Murray Corp. v. Bone,* 622 F.2d 887, 894 (5th Cir. 1980); *see also Dibidale of Louisiana v. American Bank & Trust Co.,* 916 F.2d 300, 307 (5th Cir. 1990) (stating that discrepancies between an affidavit and prior deposition testimony "present credibility issues properly put to the trier-of-fact"), *modified on other grounds,* 941 F.2d 308 (5th Cir. 1991).[6]

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[5] While being deposed by Wal-Mart's counsel, Kutz was asked on two occasions whether she knew where the liquid came from, how it came to be on the floor, and how long it had been there. On both occasions, Kutz stated that she did not know.

[6] To the extent that *Kennett-Murray* conflicts with *Albertson v. T.J. Stevenson & Co.,* 749 F.2d 223, 228 (5th Cir. 1984) (stating that a "nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts,

Accordingly, we REVERSE the district court's grant of summary judgment, and REMAND for further proceedings consistent with this opinion.

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without explanation, his previous testimony"), we note that we are bound to apply the former as it represents the decision of an earlier panel. *See Boyd v. Puckett,* 905 F.2d 895, 897 (5th Cir. 1990) ("Our rule in this circuit is that where holdings in two of our opinions are in conflict, the earlier opinion controls and constitutes the binding precedent in the circuit.").