UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-60201
Summary Calendar

KENNETH HALL, ET AL,

Plaintiff,

KENNETH HALL,

Plaintiff-Appellant,

VERSUS

E.I. DUPONT DENEMOURS AND COMPANY,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Mississippi
(CA-1:93-3)

(September 30, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:[1]

Appellant Kenneth Hall (Hall) appeals from summary judgment entered in favor of Appellee E.I. du Pont de Nemours and Company (DuPont). We affirm.

I. FACTS

DuPont owns and operates a plant in Delisle, Mississippi, dedicated to the production of titanium dioxide. DuPont

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[1] Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

contracted with BE & K Construction Company (BE & K) and 20 other contractors to build a second titanium dioxide production facility on the site. BE & K worked at the site pursuant to a work permit program.

Under the terms of this program, construction areas were designated as "green zones," and BE & K personnel could access these areas without a daily work permit. According to DuPont, "green zones" were under the custody and control of BE & K, and DuPont's role in these areas was limited to inspection of work in progress and completed work.

Hall was injured in an area known as the Chemical Wet Treatment area (CWT). Hall and DuPont agree that the relevant portions of the CWT were designated as "green zones" at the time of the injury. The undisputed facts of the injury were reported by the district court as follows:

> At approximately 1:00 in the afternoon, shortly after the lunch break, Plaintiff descended the stairs marked as such by him in the upper right-hand corner of Ex. G. He followed a path approximated by the highlighted broken line to the vise, designated as such, in the lower left-hand corner of Ex. G. He picked up a saw and other equipment. He was in the process of carrying this equipment to a scaffold, marked as such at the top of Ex. G, to get the equipment out of an afternoon shower. The accident occurred as he crossed over the trench in the approximate area of the spot marked "Accident Site," in the lower left-hand corner of Ex. G. Mr. Hall's recollection is that he stepped with his left foot on the grating, which fell into the trench, resulting in the injuries, for which he claims.

R. vol 2, at 266-67.

Hall filed a state law negligence action in district court asserting that DuPont's negligence was the sole cause of his

accident. Hall contends that DuPont failed to exercise reasonable care by allowing the trench to remain uncovered and/or unmarked, and by failing to warn him of the hidden danger presented by the trench. DuPont moved for summary judgment on the ground that it owed no duty to keep the area in which the plaintiff worked free from dangerous conditions created by his fellow employees. DuPont also alleges that even if it had such a duty, the duty arose only if DuPont had actual or constructive knowledge of the dangerous condition.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989); Moore v. Mississippi Valley State Univ., 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). To that end 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). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine

issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

B. DuPont's Duty to Hall

Hall filed this negligence action in federal court based on diversity of citizenship, pursuant to 28 U.S.C. § 1332. We apply Mississippi substantive law to determine whether DuPont owed a duty to Hall. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

The parties agree that DuPont owed Hall, the employee of an independent contractor, the same duty it would owe to a business invitee. See Diamond Int'l Corp. v. May, 445 So. 2d 832, 835 (Miss. 1984). A property owner,

> (1) is not an insurer of the invitee's safety,
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> (2) has only a duty to keep the premises reasonably safe, and
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> (3) when not reasonably safe to warn only where there is hidden danger or peril that is not in plain and open view.

McGovern v. Scarborough, 566 So.2d 1225, 1228 (Miss. 1990).

DuPont's duty to Hall depends on whether the dangerous condition was created by DuPont or by a third party. Where a property owner creates a hazard, knowledge of the condition need not be shown. Waller v. Dixieland Food Stores, Inc., 492 So.2d 283, 285 (Miss. 1986). In contrast, where a third party creates a dangerous condition, plaintiff must show that the property owner had actual or constructive knowledge of the hazard. Id.

C. Creation of the Hazard

Appellant's injury was caused by the misalignment of a grate covering a trench within the CWT. Hall alleges that the defect was

not open and obvious, and would not have been evident to a passer-by. The only testimony presented to the district court regarding fault indicated that a BE & K laborer improperly reinstalled the grating after cleaning the trench. Appellant contends that this testimony is not credible because titanium dioxide was present in the trench at the time of the injury. Hall argues that the presence of the chemical showed that the trench had not been cleaned, and therefore that any number of individuals could be responsible for the misalignment of the grate.

Appellant's argument disregards the burden of proof. Hall has the burden of showing that DuPont is at fault. Speculation that DuPont or others may have been at fault does not satisfy this burden. The uncontradicted evidence indicates that BE & K, not DuPont, was in primary control of the portion of the trench in question. Hall presented no evidence to show that DuPont employees were working in the area or had occasion to remove the grating. In addition, Hall failed to shown that DuPont was under any duty to inspect the condition of the trench. Regardless whether BE & K cleaned the trench, Hall failed to raise an issue of material fact as to DuPont's culpability. The district court correctly concluded that Hall must show that DuPont had actual or constructive knowledge of the dangerous condition.

D. DuPont's Knowledge

Hall does not allege that DuPont had actual knowledge of the defect. Therefore, the sole question remaining is whether DuPont had constructive knowledge of the dangerous condition. The

Mississippi Supreme Court generally requires a showing that the hazardous condition existed for a sufficient duration that the owner of the property should have known of it through the exercise of reasonable care. See e.g. Waller v. Dixieland Food Stores, Inc., 492 So.2d at 286; Aultman, Inc. v. Delchamps, 202 So.2d 922, 924 (Miss. 1967).

Hall admits he has no evidence to indicate when the grating was improperly placed. Instead, he asks the Court to find that DuPont owed a duty to its employees to inspect the workplace. As indicated previously, Appellant provides no evidence to indicate that DuPont employees were actually working in the area where the accident occurred, nor does he provide any evidence showing that DuPont was under duty to inspect the grate. Appellant cannot show whether the dangerous condition existed for a matter of minutes or a matter of days, therefore cannot establish constructive knowledge under Mississippi law.

III. CONCLUSION

After a thorough review, we conclude that the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. Consequently, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). The judgment of the district court is AFFIRMED.