

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60742
Summary Calendar

MARYANN COSTELLO,

Plaintiff-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:94-CV-144-LN)

(June 23, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Maryann Costello appeals the grant of summary judgment in favor of Wal-Mart Stores, Inc. in this "slip-and-fall" case. Finding no error in the district court's judgment, we affirm.

BACKGROUND

Maryann Costello and her sister were shopping in the Hazelhurst, Mississippi Wal-Mart around 5:00 pm on January 5, 1992 when appellant alleges she slipped and fell on some clothing lying

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

on the floor. Costello has testified that while walking and looking at the racks of baby clothes, she felt something suddenly get caught in her feet causing her to slip. She fell backward, striking her head, and medical emergency technicians were called to assist her. Ms. Costello's sister, Millie Stevens, is the only person who corroborates this version of events.

Wal-Mart employees Mary Shanahan and Genola Davis were conversing approximately six (6) feet from the accident and have testified that there was nothing on the floor twelve (12) seconds prior to Costello's fall that could have caused her to slip. Additionally, the record includes the testimony of employee Chris Krammer who stated that he, as well as Shanahan and Davis, had inspected the location of Ms. Costello's fall regularly throughout the day and had found that particular aisle to be free of dangerous debris and clothing ten to fifteen minutes before the accident.¹ Davis has also testified that appellant did not trip over clothing but instead seemed to "stiffen up" and fall backwards.

On appeal, Maryann Costello alleges that the district court erred in granting a summary judgment verdict in favor of Wal-Mart. Appellant contends that several material issues of fact existed, critically including (1) whether Wal-Mart's employees complied with the company safety procedures to maintain the premises in a reasonably safe condition, (2) whether Wal-Mart had

¹ The record is also replete with uncontroverted evidence of this particular Wal-Mart's adherence to company guidelines regarding "zoning" and "sweeps" policies meant to ensure that such risks as appellant alleges existed would be kept to a minimum.

constructive knowledge of the clothes on the floor and other issues alleged, too.

DISCUSSION

Under Mississippi law, an operator of a business owes a duty to an invitee to exercise reasonable care to keep the premises in reasonably safe condition. Jerry Lee's Grocery, Inc. v. Thompson, 528 So.2d 293, 295 (Miss. 1988). The operator of a business, however, is not an insurer against all injuries. Munford, Inc. v. Fleming, 597 So.2d 1282, 1284 (Miss. 1992). Therefore, in order for Costello's negligence claim to survive summary judgment she must demonstrate the existence of a material fact dispute regarding whether:

"[Wal-Mart] had actual knowledge of a dangerous condition, or the dangerous condition existed for a sufficient amount of time to establish constructive knowledge, in that [Wal-Mart] should have known of the condition, or the dangerous condition was created through a negligent act of [Wal-Mart] or its employees."

Id. at 1284. Absent such a showing, the district court's grant of summary judgment must be affirmed. Lindsey v. Sears Roebuck & Co., 16 F.3d 616 (5th Cir. 1994).

Costello concedes that Wal-Mart did not have actual knowledge of the allegedly dangerous condition. Appellant is therefore compelled to prove the merits of her appeal based upon the theory of constructive knowledge.

In Mississippi, constructive knowledge is established by proof that the condition existed for such a period of time that, in the exercise of reasonable care, the proprietor should have known

about it. Waller v. Dixieland Food Stores, Inc., 492 So.2d 283, 285 (Miss. 1986). This is another hurdle that Costello cannot clear. Viewing the facts in the light most favorable to her (she did slip upon a pre-existing pile of clothing lying in the aisle), the uncontroverted testimony indicates that this clothing could not have been present for more than ten to fifteen minutes prior to the accident. The true issue then becomes not whether the clothes were upon the floor but whether Wal-Mart was negligent in failing to discover them during this brief time period.

Mississippi case law is well-settled on this point. A stream of Mississippi Supreme Court cases have consistently held that proprietors are under no duty to discover hazards within a matter of minutes. Munford, Inc. v. Fleming, 597 So.2d 1282, 1285 (Miss. 1992). Jerry Lee's Grocery, Inc. v. Thompson, 528 So.2d 293, 294 (Miss. 1988). Waller v. Dixieland Food Stores, 492 So.2d 283, 286 (Miss. 1986) (indicating that time lapses of up to two and three hours might be permissible). Douglas v. Great Atlantic & Pacific Tea Co., 405 So.2d 107, 110 (Miss. 1981).

Appellant contends that Wal-Mart violated its own self-imposed standard of care by not inspecting the floor yet again in the fifteen minutes prior to her accident. The promise of this argument is wrong: Wal-Mart had no "policy" that required discovery of slip hazards within 5 minutes, and the evidence shows the store followed all applicable Wal-Mart safety policies. Moreover, for this Court to adopt appellant's position, would essentially raise the duty of care owed patrons from one of

reasonableness to strict liability, something the Supreme Court of Mississippi has refused to do. Caruso v. Picayune Pizza Hut, Inc., 598 So.2d 770 (Miss. 1992). Absent a finding that Wal-Mart must now patrol its aisles minute by minute, Costello has failed to prove a factual issue worthy of trial.

Therefore, the judgment of district court is **AFFIRMED**.