IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60850
Summary Calendar

MARY SAUCIER,

Plaintiff-Appellant,

v.

WAL-MART STORES, INC.,

Defendant-Appellee.

Appeal From the United States District Court
for the Southern District of Mississippi
(1:93-CV-559-GR)

(May 12, 1995)

Before SMITH, Emilio GARZA, and PARKER, Circuit Judges.

PER CURIAM:[1]

Plaintiff-appellant Mary Saucier (Saucier), appeals the district court's grant of summary judgment in favor of defendant-appellee Wal-Mart Stores, Inc. (Wal-Mart). Because we find that Saucier failed to provide evidence on a necessary element

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of her cause of action, we affirm the district court's entry of summary judgment in favor of Wal-Mart.

I

On June 20, 1990, while shopping at Wal-Mart in Waveland, Mississippi, Saucier injured her knee when she struck a box protruding into the aisle. Saucier said that the box was stacked in the lower part of the aisle and she did not see the box while browsing the merchandise on the right side of the aisle. She stated that she did not know how long the box had been protruding into the aisle. Wal-Mart moved for summary judgment, arguing that Saucier failed to produce evidence demonstrating that there was a genuine issue of material fact as to whether the dangerous condition was caused by Wal-Mart, or whether Wal-Mart had actual or constructive knowledge of the dangerous condition. After finding that Saucier failed to produce such evidence, the district court granted Wal-Mart's motion. Saucier appeals.

II

On appeal, Saucier contends that the district court erred in granting summary judgment in favor of Wal-Mart. We review *de novo* a district court's grant of summary judgment, viewing the record in the light most favorable to the non-movant. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir.1987).

When seeking summary judgment, the movant bears the initial responsibility of demonstrating the absence of an issue of material fact with respect to those issues on which the movant bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,

106 S.Ct. 2548, 2558, 91 L.Ed.2d 265 (1986). However, where the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial. *Id.* at 322, 106 S.Ct. at 2553-54; *see also*, *Moody v. Jefferson Parish School Board*, 2 F.3d 604, 606 (5th Cir.1993); *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 190 (5th Cir.1991). Only when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" is a full trial on the merits warranted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Initially, Saucier contends that summary judgment is inappropriate because a jury must pass upon the reasonableness of the defendant's conduct in determining whether that conduct constitutes negligence. This is generally true, *see Gauck v. Meleski*, 346 F.2d 433, 437 (5th Cir.1965), provided that the plaintiff has produced, with respect to each element of her cause of action, competent proof that will withstand summary judgment. Although Saucier contends that she properly demonstrated that there is a genuine issue as to a material fact as to whether Wal-Mart met its duty of reasonable care, she failed to provide evidence on all necessary elements of their cause of action.

Under Mississippi law, an operator of a business premises owes a duty to an invitee to exercise reasonable care to keep the

premises in a reasonably safe condition. *Munford, Inc. v. Fleming*, 597 So.2d 1282, 1284 (Miss.1992); *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 at 1284. Thus, merely proving the occurrence of an accident within the business premises is insufficient to prove liability; rather, the plaintiff must demonstrate that the operator of the business was negligent. *Sears, Roebuck & Co. v. Tisdale*, 185 So.2d 916, 917 (Miss.1966) (the doctrine of res ipsa loquitur is inapplicable in premises liability cases). To prove that the operator was negligent, the plaintiff must show either [1] that the operator caused the dangerous condition, or, [2] if the dangerous condition was caused by a third person unconnected with the store operation, that the operator had either actual or constructive knowledge of the dangerous condition. *Munford, Inc. v. Fleming*, 597 So.2d at 1284; *Waller v. Dixieland Food Stores, Inc.*, 492 So.2d 283, 285 (Miss.1986). Constructive knowledge is established by proof that the dangerous condition existed for such a length of time that, in the exercise of reasonable care, the proprietor should have known of that condition. *Munford, Inc. v. Fleming*, 597 So.2d at 1284.

Saucier contends that the Mississippi Supreme Court's decision in *Tharp v. Bunge Corp.* 641 So.2d 20 (Miss. 1994), shifted the burden to Wal-Mart to prove that it lacked constructive knowledge that the box was out of place. We find this argument to be without merit. *Tharp* eliminated the "open and obvious" defense to

negligence actions. The court observed that, if a dangerous condition is obvious to the plaintiff, it is surely obvious to the defendant as well, and held that the party in the best position to eliminate a dangerous condition should be burdened with that responsibility. *Tharp* did not change the standards for constructive knowledge of a dangerous condition. *Tharp* does not require that Wal-Mart correct a dangerous condition before it would discover that condition in the exercise of reasonable care.

After reviewing the record in this case, we are unable to find any evidence demonstrating that Wal-Mart either caused the dangerous condition, or that Wal-Mart had actual or constructive knowledge of a dangerous condition caused by an unrelated third party. Instead of providing evidence on this necessary element of their cause of action, Saucier merely assumed that Wal-Mart was responsible for the location of the box, thus causing the dangerous condition. Saucier argues that since Wal-Mart employees were responsible for stocking the shelves, Wal-Mart employees must have been responsible for the box being out of place, but she offers no evidence that any Wal-Mart employee actually misplaced the box. Mississippi law requires the plaintiff to demonstrate that the dangerous condition was the result of an affirmative act of the proprietor. *See Sears, Roebuck & Co. v. Tisdale*, 185 So.2d at 917. Nor does Saucier offer any evidence that the dangerous condition existed for a sufficiently long time that Wal-Mart could be charged with constructive knowledge. The district court's observation that the plaintiff in *Lindsey v. Sears Roebuck & Co.*, 16 F.3d 617 (5th

Cir. 1994) presented an almost identical scenario and argument is on target. Here, as in *Lindsey*, the plaintiff failed to provide evidence on a necessary element of her cause of action, so summary judgment in favor of the Wal-Mart was appropriate.

III

For the foregoing reasons, the judgment of the district court is AFFIRMED.