United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 13, 2021
Lyle W. Cayce
Clerk

No. 20-10455

Richard E. Barry,

Plaintiff—Appellant,

versus

Lowe's Home Centers, L.L.C.,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CV-872

Before Owen, *Chief Judge*, and King and Engelhardt, *Circuit Judges*.

Per Curiam:*

Richard E. Barry appeals the judgment of the district court granting summary judgment to Lowe's Home Centers, L.L.C. Barry filed a premises-liability suit against Lowe's, and at summary judgment, the district court concluded that Lowe's owed no duty to Barry under Texas's open-and-obvious-danger doctrine. For the reasons that follow, we AFFIRM.

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

I.

Plaintiff-appellant Richard E. Barry was shopping in the outdoor-gardening center of a Lowe's Home Centers, L.L.C. ("Lowe's") store in Burleson, Texas, when he slipped on a wet floor and fell. Barry had regularly visited this center, and he was aware that employees watered flowers there. On the day of his fall, Barry saw that employees were watering flowers. Some of that water landed on the floor. As Barry was approaching some flowers in the center, he suddenly slipped and fell on the wet floor. Barry filed a premises-liability suit in state court alleging that Lowe's negligently maintained the grounds. Lowe's then removed the case to the district court.

After discovery, Lowe's moved for summary judgment on three grounds: (1) that it owed no duty to Barry because the dangerous condition—the wet floor—was open and obvious; (2) that Barry failed to present evidence showing an unreasonable risk of harm; and (3) that Barry failed to present evidence of proximate causation. The district court granted Lowe's motion on the first ground, finding that Barry knew of the dangerous condition, and therefore, Lowe's did not owe Barry a duty.

The court based its determination on the following written statement by Barry:

> Manager Bill B., requested information of what took place, I stated that I was going toward some flowers that where [sic] extremely beautiful and I unexpectedly began losing control of my footing resulting in my footing slipping and no longer contacting the floor under myself. I quickly and uncontrolledly fell backwards, down toward the floor. I intentionally grab the handle of the shopping basket which I was using, with both hands, in an attempt to gain some control and at least lessen the impact of the fall; I instead pulled the shopping basket back on myself, during the fall. I apologized for causing problems. (I was unaware that the complete floor lane was extremely wet,

> with standing water; to me the floors appear to be just damp. I did not realize how wet the floor lane was at the time, until I notice while sitting in the chair provided that my entire backside clothing was completely wet and soaked. I did not report this observation to the manager).

Barry also stated that he did not see the water before he slipped and that he did not see employees watering the specific area where he slipped. The district court ultimately found that "Barry set[] forth no evidence to controvert th[e] statement that he knew the floor was damp." Therefore, the district court concluded that Barry knew of the potential danger and appreciated its inherent risk. Barry appeals only the district court's finding that he knew of the dangerous condition.

II.

"We review a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor." *Pierce v. Dep't of the U.S. Air Force*, 512 F.3d 184, 186 (5th Cir. 2007). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A mere scintilla of evidence will not defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

III.

This is a diversity action, so we apply state law. *See Samuels v. Drs. Hosp., Inc.*, 588 F.2d 485, 488-89 (5th Cir. 1979). Under Texas law, to succeed on a premises-liability claim, a plaintiff must prove that "(1) a condition of the premises created an unreasonable risk of harm to the invitee; (2) the owner knew or reasonably should have known of the condition; (3) the owner failed to exercise ordinary care to protect the invitee from danger; and (4) the owner's failure was a proximate cause of injury to the invitee."

Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater, 285 S.W.3d 879, 883 (Tex. 2009). The owner's duty is only to "make safe or warn against any concealed, unreasonably dangerous conditions of which the [owner] is, or reasonably should be, aware but the invitee is not." *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 201 (Tex. 2015). That means an owner generally has no duty to warn an invitee against unreasonable dangers that are (1) open and obvious or (2) otherwise known to the invitee. *Id.* at 204. "Whether a danger is open and obvious is a question of law determined under an objective test." *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 788 (Tex. 2021)."The question is whether the danger is 'so open and obvious that as a matter of law [the plaintiff] will be charged with knowledge and appreciation thereof.' " *Id.* (alteration in original) (quoting *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 516 (Tex. 1978)).

Applying the open-and-obvious-danger doctrine, the district court concluded that Barry knew the floor was damp, and thus, knew of the dangerous condition. Therefore, it found that Lowe's owed no duty to Barry, and Barry's claim failed as a matter of law.

On appeal, Barry argues that the district court erred because "facts remained disputed as to what [he] knew and saw" regarding the water in the area where he fell. Specifically, he argues that he did not know that the floor in the particular area where he was walking was wet and that he did not recall employees watering in that particular area. He further contends that the district court misinterpreted his written statement because when he wrote that the "floors appear to be just damp," he "could have been referring to a photograph of the floor."

To be sure, Barry presented somewhat contrary evidence: he testified that he did not recall seeing employees watering the particular area where he fell and that he did not see the water he slipped on before falling.

Nevertheless, in his written statement, Barry clearly states that the floor did "appear to be damp," though he did not recognize "how wet." Barry sets forth no concrete evidence to controvert that he knew the floor was damp—his speculative arguments of what his written statement "could have been referring to" do not suffice. *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) ("[C]onclusory allegations unsupported by concrete and particular facts will not prevent an award of summary judgment."). And not only did Barry acknowledge that the floor was damp, but he also testified that he was familiar with the Lowe's gardening center, was aware that Lowe's employees watered plants in the center, and knew that they had been watering the center on that very day.

Taking this evidence together, we find that Lowe's has offered sufficient evidence that Barry knew about the damp floors before he slipped. Barry regularly visited the Lowe's gardening center, knew employees regularly watered the plants and that such water got on the floor, saw employees watering plants on the day he fell, and saw that the floor was damp. Thus, he knew of the dangerous condition and appreciated its inherent risks. *See Brookshire Grocery Co. v. Goss*, 262 S.W.3d 793, 795 (Tex. 2008) (finding no duty to warn or make safe where a plaintiff tripped over a loading cart in the defendant's store when the plaintiff was aware of the cart and the risk of tripping over it was "commonly known and appreciated"). Barry has failed to offer more than a mere scintilla of evidence to the contrary, and therefore, he has not raised a genuine dispute of material fact regarding his knowledge.[1]

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[1] Lowe's also argued that the grant of summary judgment should be affirmed because Barry failed to raise a genuine dispute of material fact regarding proximate causation. Because we affirm the district court's judgment on the first ground, however, we need not reach this argument.

IV.

For the foregoing reasons, we AFFIRM.