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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002055-MR

BARBARA LANIER — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JAMES E. HIGGINS, JR., JUDGE
ACTION NO. 98-CI-00173

WAL-MART STORES, INC. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, JOHNSON, and KNOPF, Judges.

COMBS, JUDGE: Appellant, Barbara Ruth Lanier, appeals from the trial court's order granting summary judgment to Appellee, Wal-Mart Stores, Inc. ("Wal-Mart"), in her personal injury claim for damages incurred when she slipped and fell in a Wal-Mart Superstore. We affirm.

On February 18, 1997, Lanier entered the Wal-Mart Superstore in Hopkinsville, Kentucky, to shop for groceries. At approximately 12:40 p.m., Lanier parked her shopping cart and turned to speak to friends. As she approached her friends, Lanier slipped in a "spot of [clear] liquid" on the floor. She lost her balance, bumped her head against the aisle shelves, and

fell to the floor. Lanier admits that nothing blocked her view of the area but that she simply failed to pay attention to the floor in front of her. In February 1998, she filed this action in the Christian Circuit Court, alleging negligence on the part of Wal-Mart.

Following a period of discovery, Wal-Mart filed a motion for summary judgment, arguing that Lanier could not prove her case. The trial court agreed and granted summary judgment to Wal-Mart. This appeal followed.

Upon review, we must determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996) (Emphasis added.) There is no requirement that we defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378 (1992).

A business is not absolutely liable to its invitees. Wiggins v. Scruggs, Ky., 442 S.W.2d 581 (1969). As recognized in Stump v. Wal-Mart Stores, Inc., 946 F.Supp. 492, 493 (E.D.Ky. 1996), "a business is not liable in all situations where one customer spills some substance on the floor and then another customer slips and falls in it. Rather, there must be negligence on the part of the business itself."

In Cumberland College v. Gaines, Ky., 432 S.W.2d 650 (1968), the court set out the rule in premises liability slip-and-fall cases as follows:

> Where the floor condition is one which is traceable to the possessor's own act -- that is, a condition created by him or under his authority -- or is a condition in connection with which the possessor is shown to have taken action, no proof of notice of the condition is necessary. However, where it is not shown that the condition was created by the possessor or under his authority, or is one about which he has taken action, then it is necessary to introduce sufficient proof by either direct evidence or circumstantial evidence that the condition existed a sufficient length of time prior to injury so that in the exercise of ordinary care, the possessor could have discovered it and either remedied it or given fair adequate warning of its existence to those who might be endangered by it. Kroger Co. v. Thompson, Ky., 432 S.W.2d 31 (decided September 27, 1968).

432 S.W.2d 650, 652. In summary, when the business has either created the condition or taken some action concerning the condition, there is no need to prove that the business had notice of the condition. However, where there is no showing that the business either created the floor condition or took some action with regard to it, there must be some proof that the condition existed long enough to allow the business to discover it through the exercise of ordinary care.

Lanier admits that she does not know how long the slippery substance was on the floor and that she has no evidence to prove that Wal-Mart had actual or constructive knowledge of the spill before she fell. In an effort to address the requirement as to this evidence, Lanier contends — in effect — that the spill is presumably attributable to Wal-Mart's own actions. She observes that customers of all ages and abilities are invited to handle the merchandise and to move it about the

store in shopping carts provided by the store. She argues that the retailer's merchandising methods create and facilitate what amounts to a hazardous condition and thus that it is reasonably foreseeable that customers will be harmed. Therefore, Lanier maintains that she has presented a submissible case that should withstand a motion for summary judgment at the very least.

The appellant admits that her position is contrary to the established law of the Commonwealth. She urges us to adopt what she views as a more equitable and modern approach to the notice requirement in premises liability cases that has been adopted by several other jurisdictions. Under the "method of operation" theory that she advocates, a proprietor may be held liable for injuries to a customer if the proprietor's chosen mode of operation creates a hazardous condition which causes foreseeable harm to the customer. Ciminski v. Finn Corp., 537 P.2d 850 (1975). Where the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement disappears. Under this theory, proof that the dangerous condition existed long enough to allow Wal-Mart employees to discover it through the exercise of ordinary care would not be a part of Lanier's *prima facie* case. Instead, a jury would be asked to determine whether the store had taken all reasonable precautions necessary to protect its invitees from the foreseeable risks. Lanier argues that public policy is best served under this theory and that we should adopt this analysis as new precedent in Kentucky.

We have studied the recent Kentucky Supreme Court case of Smith v. Wal-Mart Stores, Inc., Ky., 6 S.W.3d 829 (1999), which involved a slip-and-fall accident of a customer in a Wal-Mart store. Garria Smith slipped in a pool of liquid resulting from a melted "Slushee." The court found that the plaintiff was entitled to submit her case to the jury and to avoid summary judgment since the Slushee or Icee causing the liquid had originated in a semi-frozen state and had apparently remained on the floor long enough to melt into the offending liquid. Justice Stumbo observed:

> This being so, the question arose as to whether the length of time it takes for an Icee to melt was a sufficient amount of time during which Wal-Mart, in the exercise of ordinary care, should have discovered the spill's existence and remedied the situation. This is a question of fact and was properly submitted to the jury.

Id. at 831.

Although the "mode of operation" theory was discussed at length by Justice Cooper in his concurring opinion urging its adoption in Kentucky, the court refrained from embracing that new theory in the absence of a cross-appeal on that specific issue. Nothing that the majority had decided the case by distinguishing an existing precedent, Justice Cooper argued in favor of a change in precedent:

> However, I would go further and address the onerous burden of proof placed on retail customers by cases such as [citations] .... Thus, absent proof that the proprietor or his employees caused the substance/object to be on the floor, the injured customer is faced with the daunting burden of proving how long the substance/object had been on the floor before the accident and whether that was a

> sufficient length of time for notice and correction to have taken place.... Placing this virtually insurmountable burden of proof on the customer is inconsistent with the proposition that a proprietor of a place of business has a duty to keep his premises in a reasonably safe condition for normal use by his customers.

Id.

Thus, Cumberland College, supra, remains the law of Kentucky -- even though our Supreme Court appears to be contemplating a change. There is no question that the appellant's theory, no matter how appealing, remains at odds with that controlling precedent. We are bound by Supreme Court Rule (SCR) 1.030(8)(a) to follow the precedent set by our Supreme Court.

There was no evidence before the trial court indicating that Wal-Mart either created the spill or took action upon it. As a result, it was incumbent upon Lanier to show that the spill had been on the floor a sufficient amount of time for Wal-Mart employees to have discovered it and to have attempted to remedy the situation. In this case, there was no showing of how long the spill had existed. Under controlling precedent, absent such evidence — either direct or circumstantial — Wal-mart is entitled to judgment as a matter of law.

The judgment of the Christian Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

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