IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2001 Session

BARBARA J. BARREDO v. ROBERT ORR-SYSCO FOOD SERVICES, LLC

Appeal from the Circuit Court for Knox County
No. 1-197-00 Dale C. Workman, Judge

FILED APRIL 24, 2001

No. E2000-020680COA-R3-CV

The Trial Court granted summary judgment to Robert Orr-Sysco Food Services, LLC ("Defendant"). Barbara J. Barredo ("Plaintiff") filed a personal injury action against Defendant, claiming that Defendant's delivery driver improperly stacked a box containing six gallon-size Clorox bleach bottles during a delivery to Children's Hospital. While Plaintiff, an employee of Children's Hospital, was checking in Defendant's delivery, the box of Clorox fell from the top of a stack made by Defendant's delivery driver. Plaintiff was able to catch the box, but claims that she sustained physical injuries as a result. Defendant filed a Motion for Summary Judgment, arguing that the undisputed facts do not show Defendant's delivery driver was negligent and that the box could have fallen due to some intervening cause. The Trial Court granted Defendant's motion. Plaintiff appeals. We reverse.

Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Circuit Court Reversed; and Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and HERSCHEL P. FRANKS, J., joined.

Broderick Young, Knoxville, Tennessee, for the Appellant, Barbara J. Barredo.

John E. Winters, Knoxville, Tennessee, for the Appellee, Robert Orr-Sysco Food Services, LLC.

OPINION

Background

This appeal arises from a grant of summary judgment to Robert Orr-Sysco Food Services, LLC. On September 7, 1998, while working at Children's Hospital as a Food Service Supervisor, Barbara J. Barredo was checking in a delivery of goods made by Tony Stafford, Defendant's employee. Plaintiff was standing in the stock room when a box containing six one-gallon size Clorox Bleach bottles fell from the top of a stack of goods. Plaintiff was able to catch the box and alleges she sustained physical injuries as a result. Plaintiff denies having had any physical contact with the stack prior to the box falling.

It is undisputed that Stafford made the stack during his delivery and that the stack was as tall as Plaintiff's height of 5'4". The stack was located in the middle of an aisle, instead of against a wall. It is also undisputed that approximately fifteen minutes elapsed between the time Stafford delivered that particular stack of goods and when Plaintiff began to check the delivery. Plaintiff did not notice anything unusual about the stack other than the stack's location in the middle of the aisle and the position of the box of Clorox on top of the stack. Plaintiff could not recall what was beneath the box of Clorox in the stack.

Defendant's delivery driver, Stafford, testified that he had no independent recollection of that particular delivery. The record on appeal shows that Defendant's drivers, in general, follow the rule-of-thumb that heavier items should be stacked on the bottom to avoid smashing any lighter products below and to avoid causing the stack to lean and the box to fall off the stack. Stafford testified further that the box of Clorox usually would be located on the bottom of a stack.

Defendant filed a Motion for Summary Judgment, contending that the undisputed, material facts showed that Defendant was not negligent and that there was no proof that Defendant's conduct caused the box of Clorox to fall on Plaintiff. The motion was granted by the Trial Court which stated, in its Order, that it was granting Defendant's motion because there was no evidence that Defendant was negligent. Plaintiff appeals.

Discussion

Although not stated exactly as such, Plaintiff contends on appeal that the Trial Court erred in granting summary judgment to Defendant because it failed to assume Plaintiff's facts as true and improperly weighed the evidence presented. Defendant, of course, does not dispute the Trial Court's granting of its Motion for Summary Judgment and argues that the undisputed material facts support the Trial Court's finding that there was no proof that Defendant was negligent.

Our Supreme Court outlined the standard of review of a motion for summary judgment in *Staples v. CBL & Assoc.*, 15 S.W.3d 83 (Tenn. 2000):

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *See Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn.1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn.1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn.1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn.1993). The moving party has the burden of proving that its motion satisfies these requirements. *See Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn.1991). When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd v. Hall*, 847 S.W.2d at 215.

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. *See McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn.1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. *See McCarley v. West Quality Food Serv.*, 960 S.W.2d at 588; *Robinson v. Omer*, 952 S.W.2d at 426. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn.1995).

Staples, 15 S.W.3d at 88-89; *see also Madison v. Love*, No. E2000-01692-COA-RM-CV, 2000 WL 1036362, at * 2 (Tenn. Ct. App. July 28, 2000) (holding that "[m]aterial supporting a motion for summary judgment must do more than 'nip at the heels' of an essential element of a cause of action; it must negate that element").

We hold that under the record on appeal, the Trial Court erred in granting Defendant's Motion for Summary Judgment. For her negligence claim, Plaintiff must establish the following:

> (1) a duty of care owed by the [D]efendant to the [P]laintiff;
> (2) conduct by the [D]efendant falling below the applicable standard of care that amounts to a breach of that duty;
> (3) an injury or loss;
> (4) causation in fact; and
> (5) proximate, or legal, causation.

Staples, 15 S.W. 3d at 89. To obtain a grant of summary judgment, Defendant, as the moving party, must "affirmatively negate an essential element of [Plaintiff's] claim or conclusively establish an affirmative defense." *Id.* at 88. As Defendant did not rely on establishing an affirmative defense as the basis for summary judgment, the question before us is did the Defendant affirmatively negate any essential element of Plaintiff's claim.

The record on appeal shows that Defendant failed to negate any essential element of Plaintiff's negligence claim. In support of its motion, Defendant did not establish that the conduct of its delivery driver, Tony Stafford, in stacking the box of Clorox on top of the stack in the middle of the aisle did not breach Defendant's duty of care and cause the box of Clorox to fall on Plaintiff. Rather, Stafford's testimony establishes that heavier items are generally stacked on the bottom to prevent boxes from falling, and that, usually, a box of Clorox such as this box would be located on the bottom of a stack. The record on appeal, however, contains no proof that the box of Clorox was stacked on top of heavier items which may have better stabilized the stack.

Defendant also contends that the stack could have fallen because of an intervening cause, especially in light of the fifteen-minute interval between Stafford's delivery of the stack of goods and Plaintiff's check of the delivery. As discussed, however, this Court, like the Trial Court, must drawn all reasonable inferences in favor of Plaintiff. *See id.* at 89. The Trial Court did not follow this mandate when considering Defendant's Motion for Summary Judgment. Instead, the Trial Court apparently agreed with Defendant's argument that the box of Clorox could have fallen because of some intervening factor or the conduct of Plaintiff herself, as shown by statements made by the Trial Court during the motion hearing. Even assuming that the box *could* have fallen because of some intervening act or Plaintiff's conduct, no essential element of Plaintiff's claim is negated by this possibility. If it *could* have fallen because of some intervening factor or Plaintiff's conduct, it necessarily follows that it *could* have fallen not because of an intervening factor or Plaintiff's conduct, leaving only Defendant's conduct as the cause.

Since we must "view the evidence in the light most favorable to the nonmoving party and . . . draw all reasonable inferences in the nonmoving party's favor," we hold that the proof submitted does not support a grant of summary judgment. *See id.* at 89. The proof submitted by Defendant in support of its Motion for Summary Judgment certainly raises serious doubt as to the ultimate success of Plaintiff's claim. This "doubt" does not rise to the level of negating an essential element of Plaintiff's claim but instead is a "nip at the heels" of those essential elements. *See Madison v. Love*, 2000 WL 1036362, at *2. While here the "nip" may be even more of a bite than a nip, it does not negate any essential element of Plaintiff's claim.

From our review of the record before us, we cannot say that both the facts and the inferences to be drawn from those facts permit a reasonable person to reach only a conclusion in favor of Defendant. We hold, accordingly, that the Trial Court erred in granting Defendant's Motion for Summary Judgment.

CONCLUSION

The judgment of the Trial Court is reversed and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellee, Robert Orr-Sysco Food Services, LLC, and its surety, if any.

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D. MICHAEL SWINEY, JUDGE