Affirmed and Opinion filed October 18, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00271-CV

WILLIE BOWIE, Appellant

V.

FOOT LOCKER, Appellee

On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 703,026

O P I N I O N

Willie Bowie appeals from a summary judgment granted to Foot Locker for injuries he received while removing garbage from Foot Locker's property. We affirm.

BACKGROUND

Foot Locker entered into an oral agreement for services to be provided by Willie Bowie. Every month, Foot Locker paid Bowie twenty dollars in cash to remove trash from the back of its store. One day while cleaning, Bowie picked up what appeared to be a board. In actuality, there was a broken mirror on the underside of the board, and when Bowie lifted

it above his head to throw it into a dumpster, glass rained down on him. His throat was deeply cut by one of the shards.

Bowie sued, alleging Foot Locker committed negligence that proximately caused his injuries. Foot Locker moved for summary judgment, claiming it was not liable for injuries resulting from Bowie's activities as an independent contractor. Foot Locker also moved for summary judgment on the grounds that there was no evidence to support Bowie's contention that Foot Locker's employees had knowledge of the allegedly dangerous condition. Bowie contends that Foot Locker had a duty to know about the existing premises defect and to warn him. He also appeals that a fact issue exists about whether Foot Locker warned him.

ANALYSIS

In his first issue, Bowie contends Foot Locker had a duty to know and warn him about the alleged premises defect (broken mirror). However, we need not address this issue. The trial court's order granting summary judgment is general; therefore, summary judgment should be affirmed on appeal if any of the theories advanced are meritorious.[1] *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). While Foot Locker's primary argument was that Bowie was injured by a defect created in his work activity, it also argued "[a]fter a reasonable time for discovery, Willie Bowie has no evidence that Foot Locker or any of its employees knew of the dangerous condition . . . ."

As distinguished from a traditional summary judgment, we review a no-evidence summary judgment under the same legal sufficiency standard as a directed verdict. *Speciality Retailers, Inc., v. Fuqua*, 29 S.W.3d 140, 146 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). We view all evidence in a light most favorable to the nonmovant, disregarding all contrary evidence and inferences. *Id.* A no-evidence summary judgment is properly granted if the nonmovant fails to bring forth more than a scintilla of probative evidence to raise a

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[1] The trial court granted summary judgment on both specific grounds ("Plaintiff. . . was an independent contractor injured while in control of the work site and performing the duties for which he was hired") and general grounds ("Defendant. . . was not negligent as alleged by the Plaintiff, Willie Bowie").

genuine issue of material fact as to an essential element of the respondent's case. *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied); TEX. R. CIV. P. 166a(i). Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

There are two subcategories under a premises defect theory of premises liability, "(1) defects existing on the premises when the independent contractor/invitee entered; and (2) defects the independent contractor created by its work activity." *Coastal Marine Serv. Of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999) (per curiam). Under the first subcategory, a premises owner has a duty to inspect the premises and warn the independent contractor of dangerous conditions that are not open and obvious and that the owner knows or should have known exist. *Id.* The core of the premise owner's duty depends on actual or constructive knowledge of a dangerous condition that a reasonable inspection would reveal. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000); *see Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983) (actual or constructive knowledge is an element of a premises claim).

In its motion for summary judgment, Foot Locker specifically identified the element of Bowie's cause of action that it challenged. Accordingly, the burden shifted from Foot Locker to Bowie to present evidence raising a fact issue. Bowie's sole summary judgment evidence was selected portions of his deposition. We reviewed this evidence and found no discussion or reference to Foot Locker's actual or constructive knowledge of the alleged premises defect. Bowie failed to raise a fact issue on actual or constructive knowledge of the alleged premises defect; therefore, the trial court correctly granted summary judgment.

The judgment of the trial court is affirmed.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed October 18, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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