[Cite as *Balcar v. Wal-Mart Store No. 2726*, 2012-Ohio-6027.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jenny Joliet Balcar,	:	
Plaintiff-Appellant,	:	
Andrew Balcar,	:	No. 12AP-344 (C.P.C. No. 10CVH-11-17022)
Plaintiff-Appellee,	:	
v.	:	(REGULAR CALENDAR)
Wal-Mart Store No. 2726,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 20, 2012

Jenny L. Joliet, pro se.

Roetzel & Andress, LPA, Bradley L. Snyder, and *Jeremy S. Young*, for Wal-Mart Store No. 2726.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant, Jenny Joliet Balcar, appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Wal-Mart Store No. 2726 ("Wal-Mart"), in this slip-and-fall negligence action. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} On June 28, 2009, appellant and her boyfriend, Andrew Balcar, were shopping at Wal-Mart. While they were shopping in the aisle containing toaster ovens, appellant slipped on a pool of liquid on the floor. Neither appellant nor Balcar observed the spill prior to appellant's fall. In her deposition testimony, appellant described the spill as follows: "clear with dirty marks in it. Like grayish." (Appellant's Deposition at 119.) Balcar described the spill in his deposition as follows: "I remember seeing a small round little pool of water with a little bit of a brown streak that kind of * * * swerved through it a little bit. Like one little swerve. * * * It was clear except for that one little streak that went through it. * * * I would say a small spill. * * * Maybe about six inches in diameter, possibly." (Balcar's Deposition at 28, 41.) Appellant indicated that the mark might have been "tire tracks from the cart" while Balcar indicated that his initial thought was that the mark had been made by appellant's shoe when she slipped. Although neither appellant or Balcar observed any other spills before appellant fell, Balcar indicated that, after appellant fell, he noticed another puddle of clear liquid further up the aisle in the direction in which they had been walking.

{¶ 3} Both appellant and Balcar stated that the store manager with whom they spoke after appellant fell, Chad Parks, told them that approximately ten minutes earlier store personnel had cleaned up a liquid spill in another aisle. Balcar was not sure whether Parks indicated that the other spill was the "same type" of liquid, only that he recalled Parks said it was "similar." Neither appellant nor Balcar were able to indicate with certainty how near or far away this aisle was located, only that it was an "adjacent" aisle. By comparison, in his deposition, Parks denied that he ever made such a statement. Parks indicated that Wal-Mart has a policy concerning spills. Specifically, all employees undergo spill clean-up training and the store had a protocol to be followed to ensure that a spill is cleaned up safely and immediately. Pursuant to Wal-Mart's policy, when a staff member discovers a spill, they are to contact the manger on duty. Parks stated that he did not receive a call regarding a spill prior to the time appellant fell. Concerning the spill which caused appellant's fall, Parks indicated that it was a "clear liquid" and that, although he could not recall how big it was, it was "large enough to be able to take pictures of" and that he was able to clean it up with "paper towels." (Parks Deposition at 28, 26.)

{¶ 4} Appellant filed suit against Wal-Mart on November 19, 2010, claiming her injuries were a proximate result of Wal-Mart's negligent failure to remove or warn of the hazard created by the liquid which Wal-Mart knew or should have known existed. On November 14, 2011, Wal-Mart moved for summary judgment, which the trial court granted.

II. ASSIGNMENT OF ERROR

{¶ 5} Appellant filed a timely notice of appeal asserting the following assignment of error:

> THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE ARE ISSUES OF MATERIAL FACT IN DISPUTE.

{¶ 6} Appellant asserts the trial court erred in finding that no genuine issue of material fact existed regarding Wal-Mart's constructive knowledge of the hazardous condition on the floor that caused her injuries. Appellant bases her contention that Wal-Mart had constructive notice of the spill on the following: (1) the length of time the hazard had been on the floor; (2) Wal-Mart's failure to perform a reasonable inspection of the surrounding areas following a spill in an adjacent aisle; and (3) Wal-Mart's failure to utilize the appropriate clean-up procedures when cleaning up a spill in an adjacent aisle because it led to a similar hazard remaining in existence for an extended period of time.

III. STANDARD OF REVIEW

{¶ 7} Appellate review of summary judgments is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579 (8thDist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4thDist.1993). When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103, 107 (10thDist.1992); *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9thDist.1995).

{¶ 8} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1998).

{¶ 9} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Once the moving party meets its initial burden, the nonmovant must set forth specific facts demonstrating a genuine issue for trial. *Id.* at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992), quoting *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶ 10} As the Supreme Court of Ohio has explained " '[l]egal liability for negligence is based upon conduct involving unreasonable risk to another, which must be established by affirmative evidence tending to show that such conduct falls below the standard represented by the conduct of reasonable men under the same or similar circumstances.' " *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584, 589 (1943), quoting *Englehardt v. Philipps*, 136 Ohio St. 73 (1939), paragraph two of the syllabus. The mere occurrence of an injury does not give rise to an inference of negligence. Rather, "there must be direct proof of a fact from which the inference can reasonably be drawn." *Parras v. Std. Oil Co.*, 160 Ohio St. 315, 319 (1953). "A probative inference for submission to a jury can never arise from guess, speculation or wishful thinking." *Id.*

{¶ 11} To establish a cause of action for negligence, a plaintiff must show the existence of a duty, breach of that duty, and an injury proximately caused by the breach.

Texler v. D.O. Summers Cleaners & Shirt Laundry Co., 81 Ohio St.3d 677, 680 (1998). A shopkeeper owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that invitees are not unreasonably exposed to unnecessary danger. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203 (1985). However, the shopkeeper is not an insurer of an invitee's safety and owes invitees no duty to protect them from open and obvious dangers on the property. *Id.* at 203-04, citing *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968), paragraph one of the syllabus.

{¶ 12} To recover from a shopkeeper in a slip and fall negligence action, a plaintiff must establish:

> 1. That the defendant through its officers or employees was responsible for the hazard complained of; or
>
> 2. That at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its presence or remove it promptly; or
>
> 3. That such danger had existed for a sufficient length of time reasonably to justify the inference that the failure to warn against it or remove it was attributable to a want of ordinary care.

Johnson at 589.

IV. DISCUSSION

{¶ 13} Appellant maintains that there is a genuine issue of material fact as to whether Wal-Mart had constructive notice of the hazardous condition on the floor that caused her to fall. In support, appellant directs this court to her deposition wherein she testified that Parks stated a similar spill was recently cleaned up in an adjacent aisle. For purposes of this motion, we accept as true appellant's testimony regarding Parks' statement of a prior spill. Appellant contends Parks' statement constitutes proof that this particular spill existed for a long enough period of time that Wal-Mart should have known about its existence, failed to properly clean-up the first spill, and failed to take reasonable steps to inspect the store to ensure that no other spills existed.

{¶ 14} Appellant first relies on *Schon v. Natl. Tea Co.*, 28 Ohio App.2d 49 (7th Dist.1971). In that case, the court held that evidence suggesting the grapes that caused the plaintiff's fall were present for at least 10 to 15 minutes constituted substantial evidence

that the defendant had either actual or constructive notice of the hazard. In *Schon*, there was no direct evidence that the store employees were aware of the presence of grapes on the produce floor. However, plaintiff's witness testified that, in four or five spots, the floor of the produce section was dirty or messy with such produce as lettuce or celery seeds and grapes and that the floor was also wet in spots. Further, plaintiff testified there were only five to seven people in the store when they arrived.

{¶ 15} The appellate court concluded that the trial court had committed error when it sustained the store's motion for directed verdict holding as follows:

> We hold that in an action by a customer against the owner of a grocery store to recover damages for personal injuries alleged to have been sustained by slipping on fruit matter on the floor of defendant's store, testimony that the foreign substance had remained on the floor at least ten or fifteen minutes; that the floor had last been swept one hour and forty-five minutes prior to the accident; that three employees of defendant were present in the store; that there were relatively few people in the store during at least an hour's time before the accident, and that the area where the customer fell was dirty or messy, is substantial evidence that the employees of the store owner knew that the substance was there, or, in the exercise of ordinary care, should have discovered and removed it before it caused injury to the customer.

Id. at 54.

{¶ 16} Even accepting as true appellant's assertions that a similar spill was cleaned up in an adjacent aisle approximately ten minutes prior to her fall, this court finds that does not demonstrate a genuine issue of material fact as to whether or not Wal-Mart had constructive knowledge of this particular spill. There is no evidence pertaining to how long the liquid appellant slipped on was on the floor. Unlike *Schon*, the deposition testimony here indicates that, overall, the floor of the store was clean thus, the prior existence of a spill in an adjacent aisle is not sufficient to create a genuine issue of material fact.

{¶ 17} Appellant also relies on *Cordle v. Bravo Dev., Inc.*, 10th Dist. No. 06AP-256, 2006-Ohio-5693. In that case, the plaintiff slipped on liquid in the bar area of the defendant's restaurant. In response to the defendant's motion for summary judgment, the plaintiff filed an affidavit by her daughter indicating that she believed an employee

had mentioned that a substance had been spilled near the bar area and that the substance had been mopped up but forgotten about and, further, that the floor had been recently waxed either the night before or the morning of the plaintiff's fall. The trial court granted summary judgment to the defendant after finding that the information in the affidavit regarding the employee's statements constituted hearsay and was not appropriate for summary judgment purposes.

{¶ 18} On appeal, this court remanded the case to the trial court finding that the statements were admissible as an admission by a party opponent. This court found that the statements in the affidavit indicated that the defendant was aware of the hazard and identified the nature of the hazard thereby creating a genuine issue of material fact.

{¶ 19} In the present case, construing the evidence in appellant's favor, Parks' alleged statements concerning a prior spill in an adjacent aisle does not constitute evidence that Wal-Mart was aware of the hazard at issue here. Although appellant attempts to argue the other spill was in the aisle *immediately* adjacent to the aisle in which she fell, neither her deposition testimony nor Balcar's deposition testimony supports that finding. In fact, Balcar acknowledged that he was not sure whether Parks referred to the next aisle or two aisles over. Further, there is no evidence in the present case that there was a trail of liquid on the floor. Although Parks denied that he had made the statement concerning the clean-up of a spill earlier, he acknowledged that Wal-Mart's employees would have looked to see if there was a trail of liquid. Neither appellant nor Balcar testified that there was a trail of liquid. This court finds that Parks' statements do not support the conclusion that a genuine issue of material fact existed as to whether Wal-Mart had constructive notice that a potential hazard existed. Appellant's first assignment of error is overruled.

{¶ 20} Appellant further argues that Parks stated that the spill causing her fall was large and that she, Balcar, and Parks indicated tire tracks from shopping carts were visible. We disagree with appellant's characterization of Parks' testimony. Parks indicated that the spill was "large enough to be able to take pictures of" and that the discoloration looked like tire marks from carts. Appellant was not able to remember the size of the puddle but only that it was "clear with dirty marks in it. Like grayish." Balcar testified

that the spill was a "small round little pool of water with a little bit of a brown streak that kind of * * * swerved through it a little bit" and that it was "about six inches in diameter."

{¶ 21} In *Perry v. Harvard Marathon, Inc.*, 8th Dist. No. 86633 (May 25, 2006), the Eighth District Court of Appeals upheld the grant of summary judgment in favor of a gas station in a personal injury action filed by a plaintiff who tripped and fell after stepping in a pothole. Finding that plaintiff failed to present any evidence as to the length of time the pothole had existed, the court rejected plaintiff's argument that the erosion of concrete permits the inference that the pothole existed for a significant period of time and afforded defendant constructive notice. The court stated at ¶ 25:

> Plaintiffs further argue that a jury may naturally conclude that pot holes do not occur instantaneously. Accordingly, Plaintiffs assert, the erosion of concrete permits an inference that the pot hole had existed for a significant period of time and afforded Defendants constructive notice of the condition. Numerous courts have previously rejected arguments substantially similar to Plaintiffs' contention. See *Howard v. Wal-Mart Stores, Inc.* (Oct. 24, 1996), Cuyahoga App. No. 70101 (evidence of discolored and crusted appearance of food insufficient to infer constructive notice); *Powers v. First Natl. Supermarkets* (June 13, 1991), Cuyahoga App. No. 61005 (dark and greasy spot indicating it was partially absorbed did not establish constructive notice); *Catanzano v. Kroger Co.* (January 11, 1995), Hamilton App. No. C-930761 (appearance of a dark ring around spilled ice cream did not create inference of sufficient time to put business owner on constructive notice); *Mackey v. Kroger Co.* (Aug. 22, 1994), Belmont App. No. 92-B-56 (grocery cart tracks through a melted popsicle insufficient to establish constructive notice). In so finding, these courts have held that "absent proof of when the [alleged hazardous condition was created], the court[s] did not permit an inference of length of time from the physical appearance of a [hazard]." *Catanzano*, supra. Accordingly, we find that the trial court did not err in determining that no genuine issue of material fact existed and that reasonable minds could only conclude that Defendants were entitled to summary judgment as a matter of law. Plaintiffs' first assignment of error is without merit.

Applying the rationale from *Perry*, this court finds that the above statements concerning marks in the liquid are not sufficient to establish a genuine issue of material fact concerning constructive notice.

{¶ 22} Appellant next contends that Wal-Mart's failure to perform a reasonable inspection of the surrounding areas following the alleged prior spill creates a genuine issue of material fact as to whether Wal-Mart had constructive knowledge of the hazardous condition. In support, appellant cites numerous cases (all dealing with latent defects) for the proposition that an owner must use ordinary care to conduct inspections of the premises to discover possible dangerous conditions, and the owner will be charged with constructive knowledge of defects which could have been revealed by a reasonable inspection. Appellant supports this argument by referencing that portion of Parks' deposition testimony indicating that, when an employee discovers a spill, the employee should look at the immediate surrounding area as well.

{¶ 23} Appellant specifically cites this court's decision in *Beck v. Camden Place at Tuttle Crossing*, 10th Dist. No. 02AP-1370, 2004-Ohio-2989, for the proposition that there is a duty to inspect the premises. In that case, the plaintiff fell after stepping onto a slippery, unknown substance, which oozed up from the grassy area where he was walking. Plaintiff argued that defendant negligently had constructive notice of the latent defect. The trial court granted defendant's motion for a directed verdict which was overturned on appeal. After noting that the duty of ordinary care includes the duty to warn and inspect premises to discover possible latent defects, this court found that the unknown substance was a latent defect and not an open and obvious hazard. As such, this court concluded that whether defendant conducted a reasonable inspection is a question to be determined by the trier of fact. The present case does not involve a latent defect. It involves a spill of a clear liquid on the floor. As such, the cases cited by appellant do not apply here.

{¶ 24} In the present case, no evidence was presented indicating that the alleged earlier spill left a trail of liquid which Wal-Mart employees failed to discover and clean-up nor that it occurred in the immediate surrounding area. Several times in her brief, appellant states that the evidence indicates that Wal-Mart has a policy to conduct "periodic inspections." However, we find the evidence does not support this contention.

{¶ 25} Appellant's final argument is virtually identical to her second argument. Appellant argues that she presented evidence to create a genuine issue of material fact as to whether reasonable minds could conclude that Wal-Mart had constructive knowledge of the hazardous condition based on the failure to utilize appropriate clean-up procedures, and argues that Wal-Mart employees failed to properly clean-up the original spill. We have previously addressed these arguments and find them to be meritless.

{¶ 26} Construing the evidence most strongly in favor of appellant, we conclude no genuine issues of material fact exist, and Wal-Mart is entitled to judgment as a matter of law. Accordingly, we overrule appellant's sole assignment of error.

V. CONCLUSION

{¶ 27} Based on the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN, P.J., and TYACK, J., concur.

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