[Cite as *Titenok v. Wal-Mart Stores E., Inc.*, 2013-Ohio-2745.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Nadezhda Titenok	:	
Plaintiff-Appellant,	:	
		No. 12AP-799
v.	:	(C.P.C. No. 11CVC-10-12456)
Wal-Mart Stores East, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 27, 2013

Blue + Blue, LLC and *Douglas J. Blue*, for appellant.

Reminger Co., LPA, D. Patrick Kasson and *Whitney Cole*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiff-appellant, Nadezhda Titenok, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendant-appellee, Wal-Mart Stores East, Inc. Appellant assigns a single error for our review:

> THE TRIAL COURT ERRED WHEN IT HELD THAT REASONABLE MINDS COULD COME TO ONE CONCLUSION ON WHETHER DEFENDANT HAD CONSTRUCTIVE NOTICE OF THE HAZARD WHICH CAUSED PLAINTIFF'S INJURIES.

Because the trial court properly concluded appellant failed to present evidence creating a genuine issue of material fact whether appellee had constructive knowledge of the liquid substance in which appellant fell, we affirm.

I. History

{¶ 2} On October 6, 2011, appellant filed a complaint in the common pleas court alleging she slipped, due to an accumulation of water, on the surface of the flooring in one of appellee's stores. Appellant asserted appellee negligently failed to use ordinary care for appellant's safety when it failed to remove the water from the floor, even though it knew or should have known the substance would cause substantial bodily injury. Appellant further alleged appellee negligently failed to provide notice of the dangerous condition the water posed and negligently failed to correct a concealed danger of which it knew or should have known in the exercise of ordinary care. Appellant asserted that as a direct and proximate result of appellee's negligence, she suffered injury, pain, suffering, mental anguish, medical expenses and lost wages.

{¶ 3} Appellee responded with an answer on October 18, 2011, took appellant's deposition and that of her daughter, and a motion for summary judgment on May 3, 2012. After the parties fully briefed the motion, the trial court issued a decision on August 6, 2012 granting appellee's summary judgment motion. Observing that the single issue in the case was whether appellee had constructive knowledge of the substance on the surface of the aisle floor, the trial court noted appellant's evidence amounted to nothing more than speculation, as no evidence indicated the liquid existed for any determinable period of time or any of appellee's employees were aware of the hazard. Although appellant's daughter suggested other patrons had tracked through the liquid, thereby indicating it had existed on the floor for some period of time, the court again could point to no evidence supporting appellant's contention, apart from her daughter's own speculation. Finally, the court noted that although appellant sought to rely on a video from the store to substantiate a traffic pattern, the video was not part of the record. As a result, the court determined the video was not a factor in its decision.

{¶ 4} Ultimately concluding the record contained no evidence creating a genuine issue of material fact as to whether appellee had constructive knowledge of the liquid on which appellant slipped and fell, the court granted appellee's summary judgment motion.

II. Assignment of Error

{¶ 5} Appellant's single assignment of error contends the trial court erred in concluding no genuine issue of material fact exists concerning appellee's constructive knowledge of the hazard that caused appellant's injuries.

{¶ 6} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

{¶ 7} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the non-moving party has no evidence to support the non-moving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate if the non-moving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

{¶ 8} [T]o establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom." *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). The parties agree that appellant was a business invitee of appellee and that store owners owe business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger. *Paschal v. Rite Aid*

Pharmacy, Inc., 18 Ohio St.3d 203 (1985), citing *Campbell v. Hughes Provision Co.*, 153 Ohio St. 9 (1950). The store's duty includes a duty to provide reasonably safe aisles for its customers. *Dickerson v. Food World*, 10th Dist. No. 98AP-287 (Dec. 17, 1998). A business owner, however, is not an insurer of a customer's safety or against all types of accidents that may occur on its premises. *Paschal*; *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584, 589 (1943). No presumption or inference of negligence arises from the mere happening of an accident or from the mere fact that an injury occurred. *Dickerson*, citing *Green v. Castronova*, 9 Ohio App.2d 156 (7th Dist.1966). *See also J. C. Penny Co. v. Robison*, 128 Ohio St. 626 (1934), paragraph four of the syllabus (concluding the fact that a customer slipped and fell on a floor does not, standing alone, create an inference that the floor was unsafe, but instead there must be testimony tending to show that some negligent act or omission of the business owner caused the customer to slip and fall).

{¶ 9} In a slip-and-fall case such as this, the store is not liable for a customer's injuries unless the customer can show: (1) the store, through its officers or employees, placed the substance on the floor; (2) at least one of the store's officers or employees had actual knowledge of the presence of the substance and failed to remove it or warn the customer; or (3) the substance had been on the floor long enough that the store officers or employees should have known of its presence and removed it or warned the customer. *Vernardakis v. Thriftway, Inc.*, 1st Dist. No. C-960713 (May 7, 1997). *See also Anaple v. Standard Oil Co.*, 162 Ohio St. 537 (1955), paragraph one of the syllabus; *Johnson*, at paragraph three of the syllabus; *Cooper v. Red Roof Inns, Inc.*, 10th Dist. No. 00AP-876 (Mar. 30, 2001). Appellant does not claim that appellee created the hazard by placing the fluid on the floor. Rather, appellant asserts appellee had either actual or constructive knowledge of the presence of the fluid on the floor and negligently failed to remove it or warn appellant of its existence.

{¶ 10} The summary judgment motion was decided on the depositions of appellant and her daughter Vera Sils. Appellant testified that on the evening of October 9, 2010 at approximately 7:00 p.m., she and her daughter were in a Wal-Mart store buying a present for appellant's grandchildren. They went first to the clearance where the discounted goods were, but they were unable to find a suitable present. Accordingly, they went to the section for children and, finding something, returned to the discount aisle to look for

wrapping paper. Appellant was holding onto the cart, walking with it. She stepped into something and began to fall. Her "legs were spreading apart, and [she] was falling to the floor. And [she] couldn't hold onto the cart." (Tr. 6.) The last thing she remembered was losing her balance, and then she lost consciousness. In her deposition, she admitted she did not know what the substance was on the aisle floor, but it was wet and everything on her right side from her leg to her waist was wet from the fall. She further admitted she had no idea how the liquid came to be on the floor or for how long it was there.

{¶ 11} Her daughter's testimony added few specifics to that of her mother. Sils stated she was in front of the cart in the Wal-Mart store on Rome-Hilliard Road, and her mother was pushing the cart. Sils did not step into the substance; nor did she see it until after her mother's fall. Rather, she heard her mother begin to fall, turned around and then saw the fall. On examining the situation, the daughter concluded her mother had fallen in something like "standing water;" it was a clear liquid, but she had no idea what it was. She, too, had no idea how the puddle came to be and did not know how long it had been there. Although she added that it looked like someone had walked through the liquid, she also admitted that, by the time she saw the liquid, appellant already had slipped in it. She estimated that the time lapse between her two trips down the clearance aisle could be one hour or perhaps less.

{¶ 12} Although appellant cites a number of cases in an effort to analogize them to the facts present here, appellant's attempts fall short of creating a genuine issue of material fact for trial. Because appellant does not know what the substance was, how it came to be on the aisle floor, or how long it was there, the trial court correctly concluded she did not demonstrate constructive notice. Neither the testimony of appellant nor that of her daughter advances appellant's position in that regard, as neither had personal knowledge of how long the puddle had been on the floor. Although appellant's daughter suggested others had walked through the puddle, she did not see the puddle until after appellant had slipped, rendering her statement speculative. Even if, however, her statement could be relied upon, it does nothing to establish how long the puddle was there, as the record does not indicate when other patrons may have been in the aisle.

{¶ 13} Appellant attempts to remedy that issue by relying upon videotape that revealed traffic patterns in and around the area during the time surrounding appellant's

fall, as well as the deposition testimony of James Phelps, one of appellee's employees who testified to the responsibilities of store employees with respect to aisle maintenance. His testimony, however, advances appellant's case only in connection with the videotape that would demonstrate the traffic pattern for the aisle and those surrounding it. Absent the video, the deposition testimony of James Phelps does not suggest appellee had constructive knowledge of the substance of which appellant fell. Because the videotape is not part of the record, this court on appeal cannot consider it. *Condron v. Willoughby Hills*, 11th Dist. No. 2007-L-015, 2007-Ohio-5208, ¶ 38, quoting *Napper v. Napper*, 3d Dist. No. 1-02-82, 2003-Ohio-2719, ¶ 5.

{¶ 14} Similarly, to the extent appellant seeks to rely on the size of the puddle of substance in which appellant slips, appellant's attempts are unavailing. The size of the alleged hazard does not indicate the length of time it actually existed. *Stepp v. Getgo Gas & Grocery*, 8th Dist. No. 98325, 2012-Ohio-5184, ¶ 5-6; *Wachtman v. Meijer, Inc.*, 10th Dist. No. 03AP-948, 2004-Ohio-6440, ¶ 11. As a result, relying on the daughter's testimony concerning the size of the spill does not create a genuine issue of material fact about appellee's constructive notice of the spill.

{¶ 15} Appellant here failed to present evidence of how long the substance was on the floor before she fell, other than her own speculation and that of her daughter. Mere speculation or conjecture is insufficient as a matter of law to constitute proof that appellee committed a wrongful or negligent act. *Louderback v. Big Bear Stores Co. Big Bear Bakeries*, 4th Dist. No. 96CA569 (Oct. 2, 1996), citing *Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Corp*., 42 Ohio St.2d 122, 126 (1975). Where no evidence shows how a slippery substance came to be on the floor or how long it had been there, an appellant cannot show that the store breached a duty of ordinary care. *Sweet v. Big Bear Stores Co*., 158 Ohio St. 256 (1952); *Neal v. Kroger Co.*, 4th Dist. No. 93CA2167 (May 11, 1994).

{¶ 16} Although appellant cites a number of cases in an effort to demonstrate that her evidence meets the threshold for demonstrating constructive notice, the cases are considerably different. Appellant attempts to draw an analogy between *Youngerman v. Meijer, Inc.*, 2d Dist. No. 15732 (Sept. 20, 1996), but the facts there indicate the water was emanating from a freezer, the puddle had a spot where it began, and it flowed from an

area in a stream down along the freezer as if it had gradually collected, not as if it had flowed straight out. All of those facts suggested not only the source of the water, but that the water gradually collected into a puddle only six feet from the end of the aisle. None of those facts are present here, as appellant does not know from where the substance came and has no evidence to indicate a gradual collection on the aisle floor.

{¶ 17} Appellant also relies on *Averiette v. Krist*, 9th Dist. No. 10886 (Feb. 23, 1983) where the appellate court found summary judgment inappropriate due to evidence that the floor was not cleaned since the store opened, the accident occurred between 2:00 and 4:00 p.m., and the substance on which the appellant slipped, facial cream, was dried and hard. The nature of the substance, and its appearance at the time of the fall, were evidence of how long the substance had been on the floor to arrive at that condition; no similar evidence supports appellant's contentions here.

{¶ 18} Although appellant also relies on *Schon v. Natl. Tea Co.*, 28 Ohio App.2d 49 (7th Dist.1971), *Schon* is distinguishable. As this court noted in *Sharp v. Andersons, Inc.*, 10th Dist. No. 06AP-81, 2006-Ohio-4075, the *Schon* record contained competent evidence of the length of time the hazard existed before the appellant's fall. By contrast, *Sharp*, as here, presented no evidence suggesting how long the hazard had been on the floor. Similarly *Nicholson v. Kroger Co.*, 5th Dist. No. CA-6348 (July 24, 1984), is distinguishable in that it involved melting ice near a produce bin containing ice. The ice in that case was placed in the produce bin at 8:00 a.m., the floor was mopped immediately after that, and the customer fell about 10:00 a.m. The court there was willing to recognize constructive knowledge because, "if the crushed ice was there long enough to melt, it was there long enough for the Kroger Co. to discover it." *Id.* As appellee properly notes, however, the evidence in *Nicholson* suggested that appellee created the hazard and the physical characteristics of the substance suggested how long it had existed. Here, nothing suggests appellee created the hazard; nor does the substance, by its nature, indicate how long it may have been on the floor before appellant's fall.

{¶ 19} Accordingly, absent the requisite evidence, the trial court properly granted summary judgment to appellee. Appellant having failed to present the necessary evidence to demonstrate a genuine issue of material fact for trial, we overruled appellant's single assignment of error.

III. Disposition

{¶ 20} Having overruled appellant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur