[Cite as *Baker v. Meijer Stores Ltd. Partnership*, 2009-Ohio-4681.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

FLORA BAKER, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2008-11-136
	:	O P I N I O N
- vs -		9/8/2009
	:	
MEIJER STORES LIMITED PARTNERSHIP, et al.,	:	
	:	
Defendants-Appellees.		

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 05CV63878

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POWELL, P.J.

{¶1} Plaintiffs-appellants, Flora Frances Baker (Mrs. Baker) and Arthur C. Baker (Mr. Baker) (collectively the Bakers), appeal the Warren County Court of Common

Pleas' decision denying their motion to compel, and granting summary judgment to defendants-appellees, Meijer Stores Limited Partnership (Meijer) and Joseph Brown, Joseph Brown d/b/a Affordable Duct & Furnace Cleaning, and Affordable Duct & Furnace Cleaning (Brown). We affirm the trial court's decision.

{¶2} In the late hours of March 5, 2003, Mrs. Baker and her daughter Frances Renee Hensley went shopping at the Towne Boulevard Meijer store in Franklin, Ohio. Although large piles of snow were in the store's parking lot, the ground was dry. Mrs. Baker arranged to have her husband pick her up from the store after she had finished shopping. Mr. Baker arrived early. While waiting Mr. Baker observed workmen scraping paint from the cart deflection posts near the automatic doors. Mr. Baker also went inside to use Meijer's restroom, where he spoke to one of the workman who explained they were performing subcontracting work for Meijer.

{¶3} When Hensley and Mrs. Baker entered the checkout lanes, Mr. Baker brought the car to the store's entrance/exit. As Mrs. Baker exited the store, she slipped on the automatic doors' sensor mat. Hensley and Mr. Baker came to Mrs. Baker's assistance. As Mr. Baker knelt down to help Mrs. Baker stand, he felt dampness at his knees, and on the back of his wife's pants.[1] Believing she only sustained a sprained ankle, Mrs. Baker asked her husband to take her home. The Bakers left the store without reporting the fall to Meijer.

{¶4} At home, Mr. Baker noticed his wife's leg was swelling, so he had her transported to Middletown Regional Hospital where she was diagnosed and treated for a broken hip. A few hours later, Mr. Baker returned to the Meijer store to report the fall. In

1. Hensley also testified when she knelt down her knee was wet and that she saw grayish flakes on her mother's pants. At home, Mrs. Baker noticed the back of her pants were damp. Mr. Baker also found

accordance with Meijer policy, a store detective, Jimmy Barker, filled out a "Customer Accident Report" which included witness statements from Meijer employees. The accident report was forwarded to Meijer's corporate home office.

{¶5} The Bakers filed suit against Meijer and unknown John and Jane Does on March 1, 2005, asserting claims of negligence and loss of consortium. On June 14, 2006, Meijer filed an amended answer and a third-party complaint against the subcontractors Meijer believed were performing work that night: Timothy Monroe, Monroe Painting Limited, and Ohio Industrial Coating (Monroe). The Bakers subsequently amended their complaint to include Monroe as a defendant. On April 27, 2007, Meijer filed a motion in which it explained that Brown, rather than Monroe, was the subcontractor working for Meijer on the night of the accident. The trial court dismissed the action against Monroe and substituted Brown as the proper defendants in place of John and Jane Does. On October 24, 2007, the Bakers filed a second amended complaint to include Brown as a defendant. Meijer amended its own pleadings to include a cross-claim against Brown.

{¶6} During discovery, the Bakers requested a copy of the accident report; however, Meijer refused asserting the attorney-client privilege, Civ.R. 26, and the work-product doctrine. The trial court denied the Baker's subsequent motion to compel, by finding the report was protected by the attorney-client privilege and work-product doctrine.

{¶7} Both Meijer and Brown moved for summary judgment. The trial court granted Meijer's motion for summary judgment on the basis that Mrs. Baker was unable to identify the cause of her fall, and because Meijer had no notice of the conditions that

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some "gritty" substances, on both his pants and her pants, which he believed were paint chips.

were alleged to have caused her fall. Brown was granted summary judgment because the trial court found Brown was not joined in the proceedings until well after the statute of limitations on the Bakers' cause of action had run. The Bakers filed a timely appeal raising three assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION TO COMPEL THE ACCIDENT REPORT."

{¶10} In their first assignment of error, the Bakers argue their motion to compel should have been granted because the accident report prepared by Meijer was not privileged.

{¶11} In general, trial courts are given broad discretion in the management of discovery. *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55, 57. Absent an abuse of that discretion, a trial court's decision on discovery issues will not be reversed. *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 1998-Ohio-329.

{¶12} "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action * * *." Civ.R. 26(B)(1). One such privilege is "[t]he attorney-client privilege [which] prevents the disclosure of certain communications made from a client to that client's legal counsel." *Hunter v. Wal-Mart Stores, Inc.*, Clinton App. No. CA2001-10-035, 2002-Ohio-2604, ¶36, citing *Boone v. Vanliner Ins. Co.,* 91 Ohio St.3d 209, 210, fn. 2, 2001-Ohio-27 and R.C. 2317.02(A).

{¶13} Alternatively, "the work[-]product doctrine protects from discovery 'documents and tangible things prepared in anticipation of litigation.'" *Hunter* at ¶35, quoting Civ.R. 26(B)(3). See, also, *Witt v. Fairfield Pub. School Dist.* (Apr. 22, 1996),

Butler App. No. CA95-10-169, at 16. Even where papers are protected by the work-product doctrine, "Civ.R. 26(B)(3) allows '* * * discovery of [those] documents * * * prepared in anticipation of litigation * * *[ ] upon a showing of good cause therefor.'" *State ex rel. Greater Cleveland Regional Transit Authority v. Guzzo* (1983), 6 Ohio St.3d 270, 271.

{¶14} The Bakers argue that the accident report was merely a document that was created to notify Meijer of Mrs. Baker's fall as it was sent to Meijer's corporate offices and not to an attorney. In addition, the Bakers state that they have good cause for obtaining the document in discovery "because it is the only contemporaneous source of information;" and because the employee who prepared the report is unavailable. Finally, in their reply brief, the Bakers argue, pursuant to the decision in *McPherson v. Goodyear Tire & Rubber Co*., 146 Ohio App.3d 441, 2001-Ohio-1517, that Meijer waived any claims of privilege when the company failed to timely assert privilege as required by Civ.R. 34(B).

{¶15} Meijer argues that the accident report is protected from discovery based on the holdings of *In re Klemann* (1936), 132 Ohio St. 187, 193 (accident report was privileged when it was transmitted to an attorney in preparation for a lawsuit); *In re Tichy* (1954), 161 Ohio St. 104, 105-06 (information obtained after an accident was privileged when turned over to the legal department); *Woodruff v. Concord City Discount Clothing Store* (Feb. 19, 1987), Montgomery App. No. 10072, 1987 WL 6827, at *3 (notes taken after a slip and fall injury, per *Klemann*, were protected by the attorney-client privilege); *Leslie v. The Kroger Co.* (June 18, 1992), Clark App. Nos. 2824, 2899, 1992 WL 136789, at *2 (incident report, per *Klemann* and *Woodruff*, was protected by the

attorney-client privilege); *Witt*, Butler App. No. CA95-10-169 at 16-17 (witness statements were protected by the attorney-client privilege, not the work-product doctrine, per *Klemann*); and *Hunter*, 2002-Ohio-2604 at ¶39 (witness statements protected by the attorney-client privilege when turned over to attorneys to prepare a defense).

{¶16} In denying the Bakers' motion to compel, the trial court found the accident report was protected by the work-product doctrine and attorney-client privilege. Based on our previous decisions, it is clear the accident report is not shielded by the work-product doctrine. See *Witt* at 16-17; *Hunter* at ¶38-39. See, also, *Molden v. Davey Tree Co.* (Aug. 3, 1990), Trumbull App. No. 89-T-4201, 1990 WL 115968, at *5. However, the accident report is protected by the attorney-client privilege, because it was turned over to Meijer's attorneys in order to mount a defense to the Bakers' lawsuit. Accord *Klemann* at 193; *Tichy* at 104; *Woodruff* at *3; *Leslie* at *2; *Witt* at 16-17; *Hunter* at ¶38-39.

{¶17} Finally, while we note the Bakers' argument regarding waiver of privilege pursuant to Civ.R. 34(B), they failed to raise the issue in their initial appellate brief. It is well-established that a reply brief may only be used to respond to, or rebut, the appellee's brief, and may not be used by an appellant to raise new assignments of error, *or new issues for review*. (Emphasis added.) See App.R. 16(C); Loc.R. 11(A)(3); *Sheppard v. Mack* (1980), 68 Ohio App.2d 95, 97, fn. 1. As such, this court has held that we will not consider arguments which are raised for the first time in an appellant's reply brief. See, e.g., *In re Z.C.*, Warren App. Nos. CA2005-06-065, CA2005-06-066, CA2005-06-081, CA2005-06-082, 2006-Ohio-1787, at ¶20.

{¶18} In conclusion, we find no abuse of discretion in the trial court's denial of

the Bakers' motion to compel. Therefore, the Bakers' first assignment of error is overruled.

{¶19} Because the second and third assignments of error both deal with summary judgment, we have chosen to explain our standard of review prior to addressing the assignments of error.

{¶20} An appellate court examines a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Thus, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. We also review a trial court's decision regarding summary judgment independently, without any deference to the trial court's judgment. *Bravard* at ¶9, citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶21} Summary judgment is proper where: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion, adverse to the nonmoving party. Civ. R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the burden of demonstrating that no genuine issue of material fact exists with regards to the essential elements of the claim(s) of the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct.

2505.

{¶22} The nonmoving party must then present evidence showing that there is some issue of material fact yet remaining for the trial court to resolve. *Dresher* at 293. The nonmoving party may not rely on mere allegations or denials in his pleading, but must respond with specificity to show a genuine issue of material fact. Civ. R. 56(E); *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. The nonmoving party is, however, entitled to have any doubts resolved and evidence construed, most strongly in his favor. *Welco Indus., Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191. Nevertheless, summary judgment is appropriate where a nonmoving party fails to produce evidence essential to his claim. Id.

{¶23} Assignment of Error No. 2:

{¶24} "THE TRIAL COURT ERRED IN GRANTING MEIJER'S MOTION FOR SUMMARY JUDGMENT."

{¶25} In their second assignment of error, the Bakers argue summary judgment should not have been granted to Meijer because Mr. Baker witnessed the fall and could identify why his wife fell; and because Meijer had notice and/or constructive knowledge of the conditions on its premises.

{¶26} A successful negligence action requires a plaintiff to prove: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; and (3) the plaintiff suffered an injury as a direct and proximate result of the defendant's breach. See, e.g., *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602. In the context of premises liability, the relationship between the owner or occupier of land and the injured party determines the duty that is owed.

Gladon v. Greater Cleveland Regional Transit Auth., 75 Ohio St.3d 312, 315, 1996-Ohio-137.

{¶27} The owner or occupier of a business owes a duty of ordinary care to maintain the premises in a reasonably safe condition, so as to not expose business invitees to unreasonable or unnecessary dangers.[2] *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. However, a business owner or occupier is not the insurer of their invitees' safety. Id. The owner or occupier of a business does have a duty to warn invitees of latent or concealed dangers they know of, or have reason to know of, that invitees would not expect to discover or protect against. *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 359. "The fact that a patron is injured on the premises of a store owner does not by itself give rise to an inference of negligence." *Koop v. Speedway SuperAmerica, L.L.C.*, Warren App. No. CA2008-09-110, 2009-Ohio-1734, ¶15, citing *Kemper v. Builder's Square, Inc.* (1996), 109 Ohio App.3d 127, 134.

{¶28} "To establish negligence in a slip and fall case, it is incumbent upon the plaintiff to identify or explain the reason for the fall." *Stamper v. Middletown Reg. Hosp.* (1989), 65 Ohio App.3d 65, 67-68, citing *Cleveland Athletic Assn. Co. v. Bending* (1934), 129 Ohio St. 152. "Where the plaintiff, either personally or by outside witnesses, cannot identify what caused the fall, a finding of negligence on the part of the defendant is precluded." Id.

{¶29} In granting summary judgment to Meijer, part of the trial court's reasoning was that Mrs. Baker could not identify why she fell. After reviewing the record, we believe there is an arguable question of fact as to whether Mr. Baker was able to identify

2. There is no question that Mrs. Baker was a business invitee of Meijer.

or explain the reason for his wife's fall. We need not reach this issue, as summary judgment was proper for another reason – the Bakers failed to present sufficient evidence for their claim to survive summary judgment.

{¶30} "In order to avoid summary judgment in [a] 'slip and fall' case, [an] appellant must present evidence showing one of the following: (1) that one or more of the appellees was responsible for placing the hazard in her path; (2) that one or more of the appellees had actual notice of the hazard and failed to give appellant adequate notice of its presence or remove it promptly; or (3) that the hazard had existed for a sufficient length of time as to warrant the imposition of constructive notice, *i.e.,* the hazard should have been found by one or more of the appellees." *Steelman v. Hyper Shoppes, Inc.* (Apr. 18, 1994), Clermont App. No. CA93-11-079, at 4, citing *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, 589.

{¶31} The Bakers argue that they were not required to prove notice if Meijer or Brown created the dangerous situation. In addition, the Bakers contend that Brown was working on the cart deflection posts at least 45 minutes before Mrs. Baker fell and should have, or could have, known about it upon inspection. Meijer argues that they had no actual or constructive notice of any hazardous condition and they are not responsible for the acts or omissions of independent contractors. The trial court found that Meijer had no notice, constructive or otherwise, of any hazardous condition on their premises.

{¶32} In his deposition, Mr. Baker testified that while he waited in his car, for over an hour, he never saw anyone using water in the vicinity that his wife fell. Mr. Baker also testified that when he went to use the store's restroom, the floor was not wet. In

addition, Mr. Baker testified that the pavement around the store was not "dangerous, or slick, or wet." Moreover, a Meijer "flooring" employee testified that she came on duty at 11:30 p.m.; the lobby was mopped once per night; and she swept, vacuumed, and mopped the lobby area at one o'clock in the morning on March 6, 2003. The employee also testified that she put out wet floor signs. Based on this evidence, there is simply no proof that Meijer was responsible for placing any hazard in Mrs. Baker's path.

{¶33} Meijer did not have actual or constructive knowledge of any hazardous condition. The Bakers both testified that they did not see anything on the sensor mat. Mr. Baker even stated in his deposition that the alleged paint chips blended in to the surrounding area and were crushed by foot traffic in the area and were gritty. There is also no indication that weather conditions required Meijer to be more vigilant in the lobby area to prevent too much snow, ice or moisture being tracked in from outside. Finally, the flooring employee testified that she did not notice anything unusual or irregular that evening, which also weighs against a finding of actual or constructive notice.

{¶34} Because the Bakers failed to present sufficient evidence which would preclude summary judgment for Meijer, we find no error in the trial court's decision. The Bakers' second assignment of error is overruled.

{¶35} Assignment of Error No. 3:

{¶36} "THE TRIAL COURT ERRED IN GRANTING AFFORDABLE/BROWN'S MOTION FOR SUMMARY JUDGMENT."

{¶37} In their final assignment of error, the Bakers argue the trial court should not have granted summary judgment to Brown, because by substituting Brown the amended complaint related back to the filing of the original complaint and complied with

the statute of limitations.

{¶38} The Bakers' claims are governed by the requirements of R.C. 2305.10, but are also subject to the requirements of Civ.R. 3(A), 15(C), and 15(D). *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, syllabus.

{¶39} "An action for bodily injury * * * shall be brought within two years after the cause of action accrues." R.C. 2305.10. Where the name of a defendant is unknown, the unknown defendant may be designated as such in the pleading. Civ.R. 15(D). Once the defendant's identity is made known to the plaintiff, Civ.R. 15(D) sets forth the proper procedure for amending the complaint. *Patrolman "X" v. Toledo* (1999), 132 Ohio App.3d 374, 405, citing *Amerine* at 59. See, also, our decision in *Lawson v. Holmes Inc.*, 166 Ohio App.3d 857, 2006-Ohio-2511, ¶21 (requiring strict compliance with Civ.R. 15(D)).

{¶40} Civ.R. 3(A), 15(C), and 15(D) must be read in conjunction with one another in determining "if a previously unknown, now known, defendant has been properly served so as to avoid the time bar of an applicable statute of limitations * * *." *Amerine* at syllabus. Thus, the requirements of Civ.R. 15(C) and 3(A) must be satisfied before a complaint may be amended pursuant to Civ.R. 15(D).

{¶41} "Civ.R. 15(C) permits an amended complaint to relate back to the date of the original pleading when 'the claim * * * asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading * * *.'" *Patrolman "X"* at 405, quoting Civ.R. 15(C). However, the further requirements of Civ.R. 15(C), such as notice and mistake, are *not required* in those cases where a parties name is "substituted," pursuant to Civ.R. 15(D), rather than

"changed." *Amerine* at 59; *Patrolman "X"* at 405, fn. 4; *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, ¶11.

{¶42} Lastly, pursuant to Civ.R. 3(A), "[a] civil action is commenced by filing a complaint with the court, *if service is obtained within one year from such filing * * * upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D)*." (Emphasis added.) Thus, if the name of the defendant is unknown, a plaintiff has the initial statute of limitations period, plus one year, to identify and properly serve a defendant.

{¶43} Although we are cognizant that the spirit of the Rules of Civil Procedure is to resolve cases on the merits, rather than on pleading deficiencies, a failure to abide by the above rules affects a court's personal jurisdiction over the parties. *LaNeve* at ¶21-22.

{¶44} In this case, the Bakers filed their complaint, on March 1, 2005 – which was within the two-year statute of limitations period of R.C. 2305.10 – against Meijer and unknown John and Jane Does. Nevertheless, when the Bakers first amended their complaint, in July of 2006, against Monroe – the party whom they believed performed the contracting work – the Bakers failed to abide by the requirements of Civ.R. 15(D) and 3(A). There was no averment in the complaint that the Bakers could not discover Monroe's name; the summons did not contain the words "name unknown;" the complaint was sent via certified mail; and the complaint was sent four months after the one-year period required by Civ.R. 3(A).[3] For these same reasons, the second amended complaint filed against Brown failed to follow the dictates of Civ.R. 15(D). Moreover, the

3. We do not reach the question of whether service properly perfected on Monroe would have any effect on the dates of Brown's substitution, as it is beyond the scope of this decision.

complaint was sent in October of 2007, 18 months after the one-year restriction of Civ.R. 3(A). See *Amerine*; *Lawson*.

{¶45} Because the Bakers failed to abide by the requirements of Civ.R. 15(D) and 3(A), their action against Brown is time barred. See *LaNeve* at ¶20. Therefore, the trial court properly granted summary judgment to Brown as a matter of law. The Bakers' third assignment of error is overruled.

{¶46} Judgment affirmed.

YOUNG and HENDRICKSON, JJ., concur.