[Cite as *Smith v. Kroger Co.*, 2011-Ohio-1871.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

AARON F. SMITH, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2010-09-233
	:	O P I N I O N
- vs -		4/18/2011
	:	
KROGER COMPANY,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-06-2460

Fiehrer & Fritsch, LLC, Matthew S. Fritsch, 10 Journal Square, Suite 400, Hamilton, Ohio 45011 and Davidson Law Offices Co., LPA, David T. Davidson, 127 N. Second Street, Hamilton, Ohio 45011, for plaintiffs-appellants, Aaron F. and Ying Smith

Schroeder, Maundrell, Barbiere & Powers, Christopher L. Moore, Suite 200, 5300 Socialville Foster Road, Mason, Ohio 45040, for defendant-appellee, Kroger Co.

POWELL, P.J.

{¶1} Aaron F. Smith sued Kroger Company after he slipped and fell inside one of its grocery stores in 2008. The Butler County Common Pleas Court granted summary judgment to Kroger. We affirm the trial court's decision because the hazard causing Smith to slip was open and obvious.

{¶2} Smith filed his complaint requesting damages for injuries he claimed he

sustained when he slipped on water in a Kroger store aisle and fell. Smith testified by deposition that he was shopping in Kroger one morning on his way to work. He walked down most of the length of aisle two, which he estimated was 85 feet long. About ten feet from the end of the aisle Smith's feet went out from under him and he fell. Smith said he did not see anything on the floor that would have caused him to go "airborne."

{¶3} While on the floor, Smith noticed that he was lying in water and his clothes were wet. Smith said he began "hollering for help" and a Kroger employee came to his assistance. Asked how he knew the person was a Kroger employee, Smith replied that the man wore a Kroger uniform and was mopping.

{¶4} The Kroger employee and Smith walked to the service desk. According to Smith, the employee later showed Smith a "wet floor" sign that was placed around the corner from aisle two. Smith said he did not see anyone mopping and did not see any sign before he fell. He said there were no "wet floor" signs visible to him in aisle two because he walked down that aisle from the opposite direction of where the sign was placed around the corner. Smith walked back to aisle two with the employee to show him where he fell. At that point, Smith said he saw the water in the aisle from about ten feet away. The area of water was described as "pretty much a circle" about two and one-half to three feet in diameter.

{¶5} Kroger moved for summary judgment, arguing the water was open and obvious, and therefore, Kroger had no duty to warn Smith of the danger. Smith responded that Kroger created the hazard while mopping and failed to adequately warn of the hazard. The trial court granted summary judgment to Kroger, finding the hazard was open and obvious and, therefore, Kroger owed no duty to Smith to warn him of the hazard.

{¶6} Smith filed this appeal, presenting a single assignment of error for our

review.

{¶7} Assignment of Error:

{¶8} "THE TRIAL COURT ERRED IN DECIDING AS A MATTER OF LAW THAT THE KROGER COMPANY DID NOT OWE A DUTY OF CARE TO AARON F. SMITH BECAUSE THE PUDDLE OF WATER IN THE AISLE WAS AN OPEN AND OBVIOUS HAZARD."

{¶9} Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the non-moving party, construing the evidence most strongly in that party's favor. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Harless*. Once this burden is met, the non-moving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.

{¶10} On appeal, a trial court's decision granting summary judgment is reviewed de novo, which means we review the judgment of the trial court independently and without deference to its determination. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296.

{¶11} To avoid summary judgment in a negligence action, Smith must show: (1) Kroger owed him a duty of care; (2) Kroger breached the duty of care; and (3) as a direct and proximate result of Kroger's breach, Smith suffered injury. See *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶12} The trial court determined that Smith was a business invitee of Kroger, and Kroger was responsible for creating the water hazard as an employee was mopping that

area shortly before Smith walked down the aisle. It does not appear for purposes of this appeal that those determinations are disputed.

{¶13} A shopkeeper owes its business invitees a duty of ordinary care to maintain the premises in a reasonably safe condition so that the invitees are not unreasonably or unnecessarily exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. The shopkeeper is not an insurer of an invitee's safety and, further, owes no duty to warn invitees of open and obvious dangers on the property. Id.; *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus. A danger that is open and obvious "is in itself, a warning." *Uhl v. Thomas*, Butler App. No. CA2008-06-131, 2009-Ohio-196, ¶15, citing *Armstrong* at ¶5.

{¶14} Where a hazard is not hidden from view or concealed and is discoverable by ordinary inspection, the court may properly sustain a summary judgment against the claimant. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51.

{¶15} And a dangerous condition need not be actually observed by the claimant to be open and obvious. *Barnett v. Beazer Homes, L.L.C.*, 180 Ohio App.3d 272, 2008-Ohio-6756, ¶31-32, citing *Simmers v. Bentley Construction Co*., 64 Ohio St.3d 642, 644, 1992-Ohio-42; *Wainscott v. Americare Communities Anderson Dev., L.L.C.*, Butler App. No. CA2006-12-308, 2007-Ohio-4735, ¶37.

{¶16} The question is whether the condition is discoverable or discernible by one acting with ordinary care under the circumstances. *Packman v. Barton*, Madison App. CA2009-03-009, 2009-Ohio-5282, ¶33, citing *Galinari v. Koop*, Clermont App. No. CA2006-10-086, 2007-Ohio-4540, ¶13. Generally, determining whether a danger is open and obvious presents a question of law for the court to decide. See *Galinari*.

{¶17} Construing the evidence most favorably for Smith as the non-moving party, there are no genuine issues of material fact remaining for trial and reasonable minds

can only come to a conclusion adverse to Smith.

{¶18} Smith argued he couldn't see the hazard as he walked down the aisle because the hazard was clear water on a shiny, tile floor. However, when Smith returned to aisle two after his fall, he said he could see this clear water hazard from ten feet away.

{¶19} Consequently, the hazard in aisle two was not hidden from view or concealed, and was discoverable by ordinary inspection. The water was observable from a distance of ten feet when Smith was looking where he was going. The water on the floor was open and obvious, which is in itself, a warning.

{¶20} Summary judgment to Kroger was appropriate and the trial court did not err in that regard. Smith's single assignment of error is overruled.

{¶21} Judgment affirmed.

BRESSLER, J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

{¶22} I respectfully dissent from the majority's decision, for when the evidence is looked at in the light most favorable to Smith, the non-moving party, a genuine issue of material fact remains regarding the open and obvious nature of the hazard, and therefore, I would find the trial court erred by granting summary judgment to Kroger.

{¶23} Initially, it should be noted that while Smith's attorney characterizes the area of water as a "clear puddle" in his brief, that characterization does not comport with Smith's deposition testimony. When asked by Kroger if the area of water was a "puddle" or "dribbles of water" at his deposition, Smith testified that he was "not sure

what's going to be a puddle for you as compared to a dribble." His answer not only indicates that he did not necessarily agree that the area of water should be characterized as a "puddle," but that the term connotes different meanings to different people. The term "puddle" is a legally imprecise term that lacks a clear definition of depth, dimensions, and nature of the area of water. No definition of "puddle" exists for the court to conclude that by its very nature of being a "puddle," it would necessarily be open and obvious as a matter of law.

{¶24} In addition, while I agree with the majority when it states Smith described the area of water as "pretty much a circle" measuring approximately two-and-a-half to three feet in diameter, it should also be noted that his approximation occurred only after he fell in the area of water and attempted to "roll over." In turn, because the facts in this case indicate Smith fell directly into the water, followed by his failed attempt to roll over, the trier of fact could easily determine that area of water he observed while lying on the store floor had expanded significantly from that which he originally encountered while making his way down the aisle.

{¶25} Regardless, as the majority correctly states, and as this court has consistently stated, "[a] hazard is open and obvious when it is in plain view and readily discoverable upon *ordinary inspection*." (Emphasis added.) *Forste v. Oakview Constr., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶16, citing *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 51; see, also, *Barnett v. Beazer Home Invests, L.L.C.*, 180 Ohio App.3d 272, 2008-Ohio-6756, ¶32. The crucial inquiry, therefore, is whether "a customer exercising ordinary care under [the] circumstances would have seen and been able to guard * * * against the condition." *Kidder v. Kroger Co.*, Montgomery App. No. 20405, 2004-Ohio-4261, ¶11. (Brackets sic.) However, while customers, as invitees, are expected to exercise ordinary care when walking through a store, "the law

does not require them to 'look constantly downward[.]'" *Mohn v. Wal-Mart Stores, Inc.*, Hardin App. No. 6-08-12, 2008-Ohio-6184, ¶14, quoting *Grossnickle v. Germantown* (1965), 3 Ohio St.2d 96, paragraph two of the syllabus.

{¶26} In this case, Smith testified that although the store lights were on, and no other customers were present, he did not see anything on the floor as he turned the corner and began walking down the aisle, nor did he see anything on the floor immediately prior to his fall. Nothing in the record indicates Smith, who testified he was wearing his contact lenses at that time, was not looking where he was going, acting unreasonably, or engaged in activities contrary to his duty of ordinary care as he made his way down the aisle. As noted above, the law does not require him to "look constantly downward," and therefore, I find that a trier of fact could interpret this evidence as demonstrating the area of water located on the Kroger floor was not readily discoverable upon ordinary inspection. See, e.g., *Middleton v. Meijer, Inc.*, Montgomery App. No. 23789, 2010-Ohio-3244, (finding question of fact existed regarding open and obvious nature of "ten feet long" puddle of "liquid laundry detergent" on store floor); *Szerszen v. Summit Chase Condominiums*, Franklin App. No. 09AP-1183, 2010-Ohio-4518, ¶16 (finding question of fact existed regarding open and obvious nature of puddle of water on condominium kitchen floor); *Johnson v. Metrohealth Medical Center*, Cuyahoga App. No. 87976, 2007-Ohio-392 (finding question of fact existed regarding open and obvious nature of four-foot-wide puddle of water on hospital floor); *Kidder*, 2004-Ohio-4261 (finding question of fact existed regarding open and obvious nature of "transparent layer of mop water" on grocery store floor); see, also, *Nienhaus v. Kroger Co.* (June 14, 2001) , Franklin App. No. 00AP-1083, 2001 WL 664444, at *2.

{¶27} Furthermore, as noted by a number of appellate courts throughout the state, "the presence of water on a business floor tends to be an open and obvious

condition when the facts involve some expectation on the part of the invitee that water might be encountered." *Kraft v. Dolgencorp, Inc.*, Mahoning App. No. 06 MA 69, 2007-Ohio-4997, ¶35; see, also, *Szerszen*, 2010-Ohio-4518 at ¶16 ("many of the cases in which 'clear' water is still found to be an open and obvious condition involve plaintiffs who had an expectation that they may encounter water due to additional circumstances"); *Young v. Rosie's Fine Foods*, *Inc*., Lucas App. No. L-06-1271, 2007-Ohio-1329, ¶11 ("when a patron slips and falls on water which is in an unexpected location * * * a jury question exists regarding the foreseeability of the presence of water on that area of the floor"); *Brant v. Meijer, Inc.*, Montgomery App. No. 21369, 2006-Ohio-6300, ¶38 (Grady, P.J., dissenting and concurring) ("a puddle of water on the floor is not a condition which an invitee should reasonably expect to exist on the premises of a general merchandise store").

{¶28} In this case, however, not only is it undisputed that Smith did not see the area of water prior to his fall, it is also undisputed that he did not see any Kroger employees mopping the floor, nor he did not see any wet floor signs warning him of any potential danger. In fact, based on Smith's own deposition testimony, the aisle where he fell did not contain any liquids, but instead, merely contained "housewares," "pasta," and an "international section." Smith, therefore, had no reason to expect that he would encounter the area of water, or for that matter, any other liquids, as he made his way down the aisle.[1]

{¶29} The majority puts great weight on the fact that Smith saw the area of water from approximately ten feet away upon returning to the scene. However, upon his

1. This case is markedly different from the numerous cases in which courts have found areas of water to be open and obvious where patrons have slipped and fell on water accumulated inside an entryway that was tracked inside due to inclement weather. See, e.g. *Blair v. Vandalia United Methodist Church*,

return, Smith testified that he "knew what [he was] looking for." As recently stated by the Tenth District Court of Appeals, "[t]here exist few substances that are completely invisible when one knows to look for it and is looking directly at it." *Szerszen*, 2010-Ohio-4518 at ¶16. Moreover, by returning to the scene of his fall, Smith was conducting much more than an "ordinary inspection" as the law requires, but instead, investigating the scene with heightened scrutiny to determine what caused him to slip and how to avoid stumbling upon the same hazardous area. See, e.g., *Middleton*, 2010-Ohio-3244 at ¶25 (Grady, J., concurring) (fact that a puddle of water on store floor "was observable on a subsequent examination may be determinative

Montgomery App. No. 24082, 2011-Ohio-873; *Towns v. WEA Midway, LLC*, Lorain App. No. 06CA009013, 2007-Ohio-5121; see, also, *S.S. Kresge Co. v. Fader* (1972), 116 Ohio St. 718, 723-724.

of whether [p]laintiff should have seen it, but not whether it was as a matter of law open and obvious"); *Kraft*, 2007-Ohio-4997 at ¶36 (stating "[t]he fact that [plaintiff] saw water after her fall does not carry great weight since she indicated that she was laying in it at the time"); *Bahlak v. Target Corp.* (E.D.Michigan 2008), 2008 WL 4937969 (finding "the fact that [plaintiff] discovered the water after slipping on it would not require a jury to find that she should reasonably have seen it before falling"); *McAdory v. Target Corp.* (E.D.Michigan 2009), 2009 WL 1076296 (finding the fact that plaintiff discovered substance on store floor after her "attention was drawn to it" when she slipped does not establish "that it was visible upon 'casual inspection'"). Although Smith was able to see the area of water upon returning to the scene, this area of water had arguably changed in its size and nature from that which he originally encountered. Therefore, when the evidence is looked at in the light most favorable to Smith, the nonmoving party, a genuine issue of material fact remains regarding its open and obvious nature.

{¶30} In light of the foregoing, and based on the facts and circumstances of this case, I disagree with the majority's decision finding the area of water to be open and obvious as a matter of law. Accordingly, I respectfully dissent from the majority's decision and would find the trial court erred by granting summary judgment to Kroger.