[Cite as *Miranda v. Meijer Stores Ltd. Partnership*, 2009-Ohio-6695.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

DEBORAH MIRANDA, et al. :

Plaintiffs-Appellants : C.A. CASE NO. 23334

v. : T.C. NO. 2008 CV 5827

MEIJER STORES LIMITED PARTNERSHIP : (Civil appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 18th day of December, 2009.

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DONOVAN, P.J.

{¶ 1} Plaintiff-appellants Deborah and Kevin Miranda appeal a decision of the Montgomery County Court of Common Pleas, General Division, in which the trial court sustained the motion for summary judgment of defendant-appellee Meijer Stores Limited

Partnership (hereinafter "Meijer"). The trial court filed its written decision on February 20, 2009. The Mirandas filed a timely notice of appeal with this Court on March 20, 2009.

I

{¶ 2} The incident which forms the basis for the instant appeal occurred around midnight on June 25, 2006, at a Meijer's store located on Wilmington Pike in Dayton, Ohio. Kevin dropped Deborah off at the store so that she could go shopping while he picked up dinner for the two of them. One of the items Deborah intended to purchase was dog food. After she entered the store, Deborah walked to the aisle where the dog food was located. No one else was in the aisle when Deborah arrived there. As Deborah reached up to grab the dog food she intended to purchase, she began sliding across the floor. Deborah testified at her deposition that she did not stop sliding until she hit her elbow on a rack that held dry dog food.

{¶ 3} Deborah testified that once she steadied herself, she looked down and realized that she had slipped on dry dog food that had spilled across the aisle. Shortly thereafter, Deborah was able to get the attention of an employee at the store and explain what happened. Deborah testified that she injured her lower back as a result of her accident. Deborah further testified that she clearly observed the dog food on the floor after she slipped, and would have been able see the dog food before she slipped if she had been looking. Deborah admitted that she was unable to identify who spilled the dog food, and she did not know when the dog food had been spilled.

{¶ 4} On June 23, 2008, Deborah and Kevin filed a complaint against Meijer alleging negligence and loss of consortium. Meijer filed a motion for summary judgment

on January 9, 2009. In its decision sustaining Meijer's motion, the trial court held that although the alleged hazard did not constitute an open and obvious condition, summary judgment was appropriate since no evidence was adduced which established that Meijer had either caused or knew of the hazard prior to Deborah's accident. The trial court also granted summary judgment to Meijer in regards to Kevin's loss of consortium claim which was dependent on Deborah's claims.

{¶ 5} It is from this judgment which the Mirandas now appeal.

II

{¶ 6} The Mirandas' sole assignment of error is as follows:

{¶ 7} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT TO THE APPELLEE."

{¶ 8} In their only assignment, the Mirandas contend that the trial court erred when it sustained Meijer's motion for summary judgment. The Mirandas suggest that the trial court correctly held that the hazard created by the spilled dry dog food was not an open and obvious condition. The Mirandas assert that the trial court erred, however, when it held that no evidence was adduced which established that Meijer had either caused or known of the hazard prior to Deborah's accident. Specifically, the Mirandas contend that a genuine issue of fact exists as to whether Meijer had constructive knowledge of the spill because the spill was large enough that it spread across the entire aisle.

{¶ 9} As we recently stated in *Brant v. Meijer, Inc.*, Montgomery App. No. 21369, 2006-Ohio-6300:

{¶ 10} "Our review of the trial court's decision to grant summary judgment is de

novo. (Internal citations omitted). Civ. R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material facts (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 and that conclusion is adverse to the party against whom the motion for summary judgment is made. (Internal citations omitted). 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 that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.' (Internal citations omitted). If the moving party satisfies its initial burden, 'the nonmoving party then has a reciprocal burden * * * to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' *Shirdon v. Houston*, Montgomery App. No. 21529, 2006-Ohio-4521.

{¶ 11} It is undisputed that Deborah was a business invitee of Meijer's. "'Business invitees are persons who enter the premises of another for a purpose that is beneficial to the owner.' (Citation omitted). 'Store owners owe 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.'" *Johnston v. Miamisburg Animal Hosp.* (Aug. 31, 2001), Montgomery App. No. 18863, 2001-Ohio-1467.

{¶ 12} "An inference of negligence does not arise from mere guess, speculation, or wishful thinking, but rather can arise only upon proof of some fact from which such inference can reasonably be drawn." Id. "To prevail in a case where the plaintiff has

allegedly slipped on a foreign substance on the floor of the defendant's premises, the plaintiff bears the burden of showing: 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 reasonable to justify the inference that the failure to warn against it or to remove it was attributable to a want of ordinary care." *Jones v. Sears, Roebuck Co.* (Oct. 19, 1994), Montgomery App. No. 14528.

{¶ 13} "'In *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, the Ohio Supreme Court reaffirmed the viability of the open and obvious doctrine as an absolute defense to liability. The court noted that: "in order to establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." (Internal citations omitted).'" *Springer v. University of Dayton*, Montgomery App. No. 21358, 2006-Ohio-3198.

{¶ 14} On the record before us, we find that no evidence was introduced which established that Meijer either caused the spilled dog food to be on the floor in the aisle, or if it was there because of the negligence of a third person, such as another shopper, that the dog food was there sufficiently long enough that Meijer should have reasonably discovered the condition and cured the hazard to shoppers such as Deborah. This is true notwithstanding the fact that the origin of the spilled dog food most likely was one of the many sacks of dog food shelved in the area. To find Meijer responsible for Deborah's injury on such account would make Meijer an insurer of its invitees' safety, a relation which imposes a higher form

of duty than the duty of ordinary care that an owner of a premises owes its invitees. Thus, the trial court did not err when it held that summary judgment was appropriate since the Mirandas failed to establish that Meijer had actual or constructive knowledge of the spilled dog food, regardless of whether the hazard constituted an open and obvious condition. Additionally, the trial court did not err when it awarded summary judgment to Meijer regarding Kevin's claim for loss of consortium and negligent infliction of emotional distress as both claims were dependent on the primary claims of Deborah.

{¶ 15} The Mirandas urge us to abandon well-settled Ohio law in the area of premises liability in favor of applying the doctrines of "mode of operation" and "burden-shifting" in the instant case. "A party *** contesting the opposing party's motion for summary judgment must inform the trial court and the other party of the basis of his motion, so that the court and other party are on notice of all potential issues." *Crandall v. City of Fairborn*, Greene App. No. 2002-CA-55, 2003-Ohio-3765. It is undisputed that the Mirandas did not raise these alternate theories of liability in their response to Meijer's motion for summary judgment. Therefore, we shall not address them on appeal. More importantly, the law in Ohio regarding the duty of care of a business owner to its business invitees is clear and well-established. In the absence of a directive from the Ohio Supreme Court abandoning its prior decisions, we must uphold the law as it presently exists.

{¶ 16} The Mirandas' sole assignment is overruled.

III

{¶ 17} The Mirandas' sole assignment of error having been overruled, the judgment of the trial court sustaining Meijer's motion for summary judgment is affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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