[Cite as *Middleton v. Meijer, Inc.*, 2010-Ohio-3244.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JAMES LOUIS MIDDLETON, et al.	:	
	:	Appellate Case No. 23789
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2009-CV-0973
v.	:	
	:	
MEIJER, INC., et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 9th day of July, 2010.

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JAMES E. SWAIM, Atty. Reg. #0007362, and BROCK A. SCHOENLEIN, Atty. Reg. #0084707, Flanagan, Lieberman, Hoffman & Swaim, 15 West Fourth Street, Suite 100, Dayton, Ohio 45402
Attorneys for Plaintiff-Appellant

ERIN B. MOORE, Atty. Reg. #0061638, and JARED A. WAGNER, Atty. Reg. #0076674, Green & Green, 800 Performance Place, 109 North main Street, Dayton, Ohio 45402
Attorneys for Defendant-Appellees

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BROGAN, J.

{¶ 1} James Middleton appeals from the trial court's grant of summary judgment to Meijer's Stores in his "slip and fall" lawsuit.

{¶ 2} On February 27, 2007 in the late afternoon Middleton entered the

Meijer Store located at Stroop and Wilmington Pike in Kettering, Ohio. Middleton walked to the rear of the store and picked up two gallons of milk, one in each hand. Middleton walked through the main grocery aisle to look at sale displays. As he was walking, Middleton felt his left foot slide out from beneath him, causing him to "do the splits and hit his knee on the ground." (Deposition at 22.) Middleton thought he must have slipped on water, but a Meijer employee who was standing nearby said Middleton had slipped on liquid laundry detergent. Middleton said a person named Betty Swihart witnessed his fall and asked if he was all right. She provided her name and address and advised Middleton to go home and ice his knee right away. Middleton said the puddle was about ten feet long forward of him and got all over his clothes. Middleton said the liquid smelled like liquid laundry detergent. (Deposition at 34.) Middleton noticed no one in front of him and he could not say how long the liquid had been on the floor. (Deposition at 36.) He did not see anything that was leaking or causing the puddle. He described the liquid as clear. (Deposition at 37.) When on the floor, Middleton could see that the "substance had been all tracked through." (Deposition at 34.) Middleton stated the floor color was light colored.

{¶ 3} Betty Swihart told Middleton she had seen the clear substance on the floor prior to Middleton's fall and had gone to tell a Meijer staff member about the spill. (Deposition at 41.) In an affidavit, Betty Swihart stated she saw a clear substance on the floor which appeared dangerous, and she went to inform Meijer management about the spill. She stated she returned to find that James Middleton had fallen on the substance. She stated the elapsed time between when she first saw the substance on the floor and when she saw Mr. Middleton had fallen in it was

approximately ten minutes. A supervisor eventually appeared and asked if Middleton was hurt. The next day when his knee kept bothering him, Middleton went to the emergency room at Miami Valley Hospital. He was later diagnosed with a torn meniscus in his knee and he underwent surgery for its repair.

{¶ 4} The trial court found that Meijer's had no duty to protect Middleton from an "open and obvious" danger and the clear liquid laundry detergent was just such a danger. The court found the facts in our previous case of *Brant v. Meijer, Inc.*, Montgomery App. No. 21369, 2006-Ohio-6300, to be persuasive. In that case we found that a puddle of water on a main aisle inside the store was an open and obvious danger. We also found that even if the puddle was not open and obvious, there was no evidence that a Meijer's employee had created the puddle or that the store had actual or constructive knowledge of the presence of the puddle. Further, Judge Donovan in *Brant* noted that because the plaintiff saw the puddle of water after her fall it established that it was visible to an ordinary observer looking directly where he was walking. We also found there were no attendant circumstance that would have created an exception to the puddle being an open and obvious danger to Brant. The trial court noted in this matter that there was no evidence that a Meijer employee caused the spill of the detergent and there was no evidence Brenda Swihart actually contacted a Meijer employee about the spill she observed prior to Middleton's fall.

{¶ 5} In *Brant*, Judge Grady dissented. He stated that a puddle of water on the tile floor of a large retail store is not a condition which is so readily observable that Brant should have discovered it as she walked through the Meijer's store.

Judge Grady also stated that a puddle of water on the floor is not a condition which an invitee should reasonably expect to exist on the premises of a store like Meijer's, and the puddle was not an open and obvious hazard.

{¶ 6} The ground rules for the grant of summary judgment are well known. There must be no material fact in dispute, and the movant must be entitled to judgment as a matter of law. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The evidence must, however, be construed moot strongly in favor of the non-moving party and the burden of showing that no genuine issue exists as to any material fact is upon the moving party. *Mitseff v. Wheeler*, 38 Ohio St.2d 112 (1988).

{¶ 7} Long ago, the Ohio Supreme Court held that a shopkeeper owes his 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. *Campbell v. Hughes Provision Co.* (1950), 153 Ohio St. 9. A shopkeeper is not, however, an insurer of the customer's safety. Further, a shopkeeper is under no duty to protect business invitees from dangers "which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, Syllabus, ¶ 1.

{¶ 8} In *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, the Supreme Court held that the defendant was not liable to the plaintiff who slipped in a puddle of water near the entrance to the store caused by snow tracked into the pharmacy.

{¶ 9} Paschal however was distinguished in *Nienhaus v. Kroger Co.* (June 14, 2001), Franklin App. No. 00AP-1083. In that case, the appellant slipped and fell on a puddle of water caused by a cleaning crew and injured her back and knee. The trial court sustained the defendant's motion for summary judgment. In reversing the trial court, Judge McCormac writing for the Franklin County Court of Appeals noted that it is obvious that the puddle of water was not weather related like in *Paschal*. The court also rejected the argument that shoppers who happen to frequent a store during cleaning hours assume the risk of being injured. The court noted that it is obvious that water is transparent and may not be easily detected by unsuspecting shoppers. The court noted that the duty is on the shopkeeper to make sure that its premises are safe.

{¶ 10} In *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, the Supreme Court held that in order for a customer to recover for injuries sustained in a fall in a store as a result of stepping on a substance on the floor of the store, the customer must show that the storekeeper, through its officers or employees, was responsible for the hazard, or 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 that such hazard had existed for a sufficient length of time reasonably to justify an inference that failure to warn against it or remove it was attributable to want of ordinary care. In *Johnson*, the plaintiff stepped on mayonnaise which had spilled from a jar dropped by another customer.

{¶ 11} In *Sempireck v. Kroger Company* (Mar. 10, 1977), Belmont App. No. 1224, the court of appeals reversed the trial court's grant of summary judgment

where the plaintiff fell on a foreign substance in the aisle of one of the defendant's stores which turned out to be a jar of mushrooms which had been knocked off a speciality rack onto the floor by a customer. The customer called the matter to the attention of a store employee, a Shirley Lucas, who blocked the area off with cardboard boxes and then went to get some clean-up materials. The store employee stated the accident occurred two to three minutes prior to her knowing about the broken jar of mushrooms.

{¶ 12} The court further noted in the opinion that:

{¶ 13} "Defendant took the deposition of plaintiff, which was filed in this case. In her deposition plaintiff stated that on December 24, 1973, around 4:00 p.m. she slipped and fell in an aisle of defendant's store while shopping; that she did not look at the floor before it happened but was looking to the left for Busch beer to buy for her father when her right foot slipped and she fell forward; that she did not see the cause of her fall until after she fell when she felt something wet on the floor and saw 'something slick on the floor' ; that the area of the floor that was wet was somewhat circular and about a foot long and was sprayed at the edges described by plaintiff as 'splattered all over the place'; that she felt something sharp on her leg but did not see any glass; that the area was clear; that she did not see any pieces of vegetable, fruit, or boxes in the area where she fell; that after approximately fifteen minutes she told Shirley about her accident; that Shirley told her that she had picked up the pieces of glass and 'went back to get Handi-wipes' (R.10, 26, 36-42, 45-51)."

{¶ 14} Judge Lynch, in reversing the trial court's grant of summary judgment to defendant, explained:

{¶ 15} "Construing the evidence most strongly for plaintiff we find that inferences from the record can be made that the accident in this case occurred after Shirley Lucas was informed that a jar of mushrooms packed in oil fell and broke in the subject aisle and after either Shirley or 'one of the boys' had cleaned up the area and removed the cardboard boxes that Shirley Lucas had placed around such area.

{¶ 16} "Although apparently a short time elapsed between the time the jar of mushrooms fell and broke in defendant's store and the accident we feel that there are factual questions whether sufficient time elapsed for defendant's employees to clean up such area and whether the efforts of defendant's employees to clean up such area were reasonably adequate under the circumstances. Therefore, we feel that the facts of this case can be distinguished from the facts in the cases of *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584; *Hardgrove v. Isaly Dairy Co.,* 139 Ohio St. 641; and *Sherlock v. Strouss-Hirshbert Co.,* 132 Ohio St. 35. See *Duke v. Sanymetal Products Co.,* 31 Ohio App.2d 78 and *Bounds v. Baldwin*, 32 Ohio Law Abstract 91."

{¶ 17} Although store owners have no duty to protect its patrons from tracked-in water from snow or rain near the entrance to the stores, they do have a duty to protect patrons from clear substances on their store floors that are not open and obvious dangers. We believe a jury could find from the plaintiff's evidence that the laundry detergent was not an open and obvious danger to the plaintiff Middleton and that the defendant had sufficient notice of its presence in order to protect the plaintiff from falling in it.

{¶ 18} The assignment of error is Sustained. Judgement Reversed and this

cause Remanded.

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GRADY, J., concurring:

{¶ 19} In *Brant v. Meijer, Inc.*, Montgomery App. No. 21369, 2006-Ohio-6300, this court held that because a puddle of water on the floor of a retail store that caused the plaintiff to slip and fall presented an open and obvious hazard, the owner and operator of the premises was relieved of its common-law duty to either warn patrons who entered the store of the condition that created the hazard permitting patrons to avoid the risk of injury the hazard presented, or, alternatively, to cure the condition from which the hazard arose. Lacking any duty to do either, the owner/operator could not be liable for injuries to the plaintiff that proximately resulted from her slip and fall.

{¶ 20} We reasoned in *Brant* that the puddle of water presented an open and obvious hazard because it was "observable," citing our prior holding in *Springer v. University of Dayton*, Montgomery App. No. 21358, 2006-Ohio-3198. In *Springer*, the plaintiff was injured when, upon leaving a sporting event at about 11:00 p.m., he tripped and fell over a steel cable suspended between two posts in a university's parking lot.

{¶ 21} The open and obvious doctrine derives from the holding in *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, in which a minor delivering newspapers was injured when he slipped and fell on ice that had accumulated on the front steps of a residence during December. The Supreme Court held: "The dangers from natural

accumulations of ice and snow are ordinarily so obvious and apparent that an occupier of premises may reasonably expect that a business invitee on his premises will discover those dangers and protect himself against them. (*Debie v. Cochran Pharmacy-Berwick, Inc*., 11 Ohio St.3d 38, 227 N.E. 2d 603, approved and followed.)" Syllabus by the Court, paragraph two.

{¶ 22} *Debie*, on which *Sidle* relied, likewise involved a natural accumulation of snow and ice, but on a public sidewalk. More recently, in *Armstrong v. Best Buy, Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, a shopping-cart guardrail affixed to the floor of an exit vestibule at a store premises, on which the plaintiff tripped, was held to present an open and obvious danger. Also, in *Lang v. Holly Hill Motel, Inc.,* 122 Ohio St.3d 120, 2009-Ohio-2495, a set of steps that failed to conform to a building code was held to present an open and obvious danger, preventing liability for injuries an invitee suffered when he fell while ascending the steps.

{¶ 23} The common thread running through the holdings in *Sidle, Debie, Armstrong, Lang, and Springer*, is that the particular physical condition that presented the hazard or danger was a condition which the invitee could or should have anticipated would be present when and where it was encountered on the premises. In that circumstance the hazard the condition presents is deemed open and obvious. The invitee is then charged with a duty to apprehend and protect himself from the risk of harm the hazard presents, from which his injuries resulted.

{¶ 24} In the present case, the condition that presented the hazard was not one that the invitee could or should have anticipated would be present when he encountered it on the premises, because the condition was one foreign to where it

was encountered. In that circumstance, the prospect that the invitee will apprehend the risk of harm the hazard presents is diminished. That diminution should be taken into consideration when liability is in issue. On a motion for summary judgment by the defendant, in which the evidence must be construed most strongly in the plaintiff's favor, the diminution ordinarily preponderates against granting the motion.

{¶ 25} Reasonable minds could find that the patch of spilled liquid detergent on which Plaintiff Middleton slipped and fell, being a condition foreign to when and where Plaintiff encountered it, presented a hazard that was not open and obvious. The fact that it was observable on subsequent examination may be determinative of whether the Plaintiff should have seen it, but not whether it was as a matter of law open and obvious. Therefore, I agree with Judge Brogan that the trial court erred when it granted summary judgment for Meijers. Our holding in *Brant* should be limited to the particular facts of that case.

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DONOVAN, P.J., dissenting:

{¶ 26} In *Brant*, the majority noted that the open and obvious doctrine relates to the threshold issue of duty and whether a dangerous condition is observable. The critical issue is whether an invitee exercising ordinary care could have seen the condition had he or she looked. This court noted in *Brant* an abandonment by plaintiff of the duty imposed upon her to look. Here, Middleton too admitted in his deposition testimony that he was not looking either as he walked down the unobstructed grocery store aisle. Utilizing an objective standard, this liquid detergent was observable. Clearly, Betty Swihart, another shopper, was able to

observe it.

{¶ 27} I agree with the trial court, based on Middleton's deposition testimony and Betty Swihart's affidavit, the condition was readily observable and recovery is barred by the open and obvious doctrine. I would affirm.

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Copies mailed to:

James E. Swaim
Brock A. Schoenlein
Erin B. Moore
Jared A. Wagner
Hon. Mary K. Huffman