

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY**

LINDA SWICK, et al.	:	
	:	Appellate Case No. 2015-CA-26
Plaintiffs-Appellants	:	
	:	Trial Court Case No. 14-CV-571
v.	:	
	:	(Civil Appeal from
PATTY'S MARKET & DEPT.	:	Common Pleas Court)
STORE, INC.	:	
	:	
Defendant-Appellee	:	

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OPINION

Rendered on the 15th day of July, 2016.

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FAIN, J.

{¶ 1} Plaintiff-appellant Linda Swick appeals from a summary judgment rendered

against her on her personal injury action against defendant-appellee Patty's Market & Department Store. Swick contends that the trial court erred by finding that she failed to meet her burden of proof on the basis that her claim depended on the impermissible stacking of inferences. Patty's Market contends that the trial court properly rendered summary judgment in its favor, because it established that Swick could not prove all elements of her negligence claim.

{¶ 2} We conclude that the trial court properly rendered summary judgment. Therefore, the judgment of the trial court is Affirmed.

I. Swick Falls Inside Store Premises

{¶ 3} While shopping at Patty's Market, Swick slipped and fell near the checkout line. She described one leg sliding forward on something slippery, causing her to fall to the floor as her legs split apart. She did not see any substance on the floor before she fell. After she fell, she saw small splotches of cloudy water on her left side. The owners of the store, Dick and Dennis Patty, who were working in a different area of the store, were called to the scene. Swick stated that Dick Patty said, "I bet that's ham juice from that ham." Dennis Patty denied that Dick made this statement. Dick is now deceased. There were no other persons in the area at the time of the fall, except two cashiers. One of the cashiers, Ashley, stated in her deposition that she did not see any substance on the floor before Swick's fall. Neither Swick nor any of the store's employees had any knowledge of any other customer buying a ham near the time of the fall. It was not established that anyone working at Patty's Market on the day of the incident had any specific knowledge of any spilled substance on the floor at the time of Swick's fall. No one

working at Patty's Market cleaned up any spilled substance after Swick's fall. Swick's only evidence of the defendant's knowledge of a spill was her testimony of the statement made by Dick Patty regarding a leaky ham.

{¶ 4} Swick was unable to get up from her fall, so an ambulance was called. In the emergency department, x-rays confirmed that no bones were broken, so she was released and advised to follow up with her primary care physician. Swick sought medical treatment for injuries to her right leg hamstring muscle and knee. After an MRI, she was referred to an orthopedic surgeon, and had surgery.

II. Course of the Proceedings

{¶ 5} Swick originally brought an action against Patty's Market in May, 2012. After numerous discovery proceedings, the trial court overruled a motion for summary judgment filed by Patty's Market. Swick filed a voluntary dismissal in November 2013. Swick refiled her action against Patty's Market in November 2014. The complaint alleges that Patty's Market was negligent in failing to maintain the store in a reasonably safe condition, in failing to remove or remedy a known dangerous and hazardous condition on the premises, and in failing to warn Swick of the danger. In her complaint, Swick alleges that as a result of the negligence, she suffered severe bodily injury and that her husband suffered a loss of consortium. Swick seeks economic and non-economic damages.

{¶ 6} Swick's status as a business invitee is not disputed. It is also not disputed that she fell while shopping at Patty's Market. However, Patty's Market denies that it had any knowledge of a hazardous condition at the time of the fall, and alleges that any condition was open and obvious to Swick.

{¶ 7} After interrogatories were propounded and depositions were taken, Patty's Market moved for summary judgment. The trial court sustained the motion for summary judgment, concluding that Swick had not produced evidence that anyone at Patty's Market had prior knowledge of the actual hazard where Swick's fall occurred. The court concluded that even if Patty's statement could support a reasonable inference that Patty had knowledge of a leaky ham somewhere in the store, the statement did not give rise to a reasonable inference that he knew, or should have known, before Swick fell, about the slippery spot near the checkout lane. The trial court rendered summary judgment in favor of Patty's Market and dismissed the complaint. From the summary judgment rendered against her, Swick appeals.

III. The Standard of Review

{¶ 8} When reviewing a summary judgment, an appellate court conducts a de novo review. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." (Citations omitted). *Harris v. Dayton Power & Light Co.*, 2d Dist. Montgomery No. 26796, 2016-Ohio-517, ¶ 8. De novo review requires an "independent review of the trial court's decision without any deference to the trial court's determination." *Jackson v. Internatl. Fiber*, 169 Ohio App.3d 395, 2006-Ohio-5799, 863 N.E.2d 189, ¶ 17 (2d Dist.), quoting *State ex rel. AFSCME v. Taft*, 156 Ohio App.3d 37, 2004-Ohio-493, 804 N.E.2d 88, ¶ 27 (3d Dist.). De novo review means that the appellate court uses the same standard that the trial court should have used, and we examine the

evidence to determine whether as a matter of law no genuine issues exist for trial. *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 119-120, 413 N.E.2d 1187 (1980).

{¶ 9} “Civ. R. 56 defines the standard to be applied when determining whether a summary judgment should be granted.” *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 880 N.E.2d 88, 2008-Ohio-87, ¶ 11. Summary judgment is proper when: (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) upon viewing the evidence in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 8, citing *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12.

{¶ 10} “To prevail on its motion for summary judgment seeking to dismiss a claim, the movant must demonstrate the absence of a genuine issue of material fact on the essential elements of the non-moving party's claims.” *Omega Riggers & Erectors, Inc. v. Koverman*, 2d Dist. Montgomery No. 26590, 2016-Ohio-2961, ¶ 9. “The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.” *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). However, “if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E)” to set forth specific

facts showing that there is a genuine issue for trial. *Id.*

IV. The Trial Court Correctly Concluded that Swick Could Not Prove All Elements of a Negligence Claim

{¶ 11} For her sole assignment of error, Swick asserts as follows:

THE TRIALCOURT ERRED AS A MATTER OF LAW IN FINDING THAT PLAINTIFFS-APPELLANTS IMPROPERLY RELIED UPON A STACKING OF INFERENCES IN OPPOSING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND IN ULTIMATELY GRANTING THE MOTION FOR SUMMARY JUDGMENT.

{¶ 12} Swick argues that the trial court incorrectly concluded that Swick had not produced enough evidence to support a reasonable inference that Patty's Market had any knowledge of a slippery substance near the checkout lane before Swick's fall. Swick argues that her testimony concerning the statement made by Dick Patty after her fall is sufficient to create a genuine issue of material fact. Patty's Market argues the trial court properly rendered summary judgment, because it established from all deposition testimony that no one at Patty's Market had knowledge of any spill on the floor. We agree. The evidence adduced in support of its motion for summary judgment establishes that Patty's Market had no prior knowledge of a hazardous condition in the store, and the evidence adduced by Swick in opposition to the motion falls short of proving the contrary. Therefore, as a matter of law, Patty's Market owed no duty of care to remove the hazard.

{¶ 13} To prevail on a negligence claim, the plaintiff must demonstrate four elements: (1) a duty requiring the defendant to conform to a certain standard of conduct;

(2) breach of that duty; (3) a causal connection between the breach and injury; and (4) damages. *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 23. At issue in the case before us is whether Patty's Market owed any duty to Swick. Generally, a business owner owes its customers 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, but the owner is not an insurer of the customer's safety. *Dalzell v. Rudy Moschetti, L.L.C.*, 2d Dist. Clark No. 2015-CA-93, 2016-Ohio-3197, ¶ 9-10, citing *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). In *Hidalgo v. Costco Wholesale Corp.*, 9th Dist. Lorain No. 12CA010191, 2013-Ohio-847, ¶ 8, the court identified the elements of a premises liability claim as follows:

To recover for injuries sustained where a business invitee slips and falls on the premises and claims that a foreign substance on a walkway caused her to slip and fall, a plaintiff must demonstrate:

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 reasonably to justify the inference that the failure to warn against it or remove it was attributable to a want of ordinary care.

Id., citing *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584, 589, 49 N.E.2d 925

(1943); *Orndorff v. ALDI, Inc.*, 115 Ohio App.3d 632, 635-636, 685 N.E.2d 1298 (9th Dist.1996).

{¶ 14} Therefore, to establish whether Patty's Market breached any duty to Swick, the record must support a finding that Patty's Market either created the hazard or had prior notice, either actual or constructive, of the hazardous condition that caused Swick's injuries.

{¶ 15} Patty's Market, as the movant, did demonstrate, by deposition testimony, that no one at Patty's Market created the hazard or was aware of a spilled substance on the floor anywhere in the store prior to Swick's fall. Swick did not meet her reciprocal burden of establishing a question of fact in regards to whether Patty's Market created the condition or had actual knowledge of the condition. The trial court properly determined that no evidence was presented to create a genuine issue of fact whether Patty's Market had actual knowledge of a hazardous condition on the floor prior to Swick's fall.

{¶ 16} Even without proof that a business owner created a hazard or had prior knowledge of the hazard, Swick can meet her summary judgment burden by demonstrating that a genuine issue of fact exists whether Patty's Market had constructive knowledge of the hazardous condition prior to her fall. Constructive knowledge can only be established with evidence showing how long the hazard existed, which is necessary to prove that the hazard had existed for a sufficient length of time to justify a reasonable inference that the failure to warn against it, or remove it, was attributable to a want of ordinary care. *Presley v. City of Norwood*, 36 Ohio St.2d 29, 32, 303 N.E.2d 81, 84 (1973). "Without such evidence, it is impossible to determine whether a premises owner should have discovered the hazard upon a reasonable inspection." *Ray v. Wal-Mart Stores, Inc.*,

2013-Ohio-2684, 993 N.E.2d 808, ¶ 47 (4th Dist.). See also *Stanton v. Marc's Store*, 7th Dist. Mahoning No. 15 MA 49, 2015-Ohio-5551, ¶ 19 (summary judgment dismissing negligence action when there was no witness attesting to the substance on the floor at some specified point to suggest that it existed long enough to justify an inference of negligence); *Titenok v. Wal-Mart Stores E., Inc.*, 10th Dist. Franklin No. 12AP-799, 2013-Ohio-2745, ¶ 15 (summary judgment affirmed where the plaintiff presented no evidence as to how long the wet spot existed in the aisle), citing *Sweet v. Big Bear Stores Co.*, 158 Ohio St. 256, 108 N.E.2d 737 (1952) (directed verdict for the defendant was upheld where there was no evidence how long the spinach leaf was on the floor before the fall).

{¶ 17} There was no evidence produced regarding how long the slippery substance was on the floor prior to Swick's fall, from which it could be inferred that Patty's Market had constructive notice of a hazardous condition. The only evidence presented by Swick was the statement made by Dick Patty regarding the possibility of a spilled substance from a leaky ham, but this statement does not indicate any awareness, before Swick fell, that a leaky ham had caused a hazardous condition on the day of the incident. We agree with the trial court that Dick Patty's statement was insufficient to create a reasonable inference that Patty's Market knew that a leaky ham had caused a hazardous condition at the location of the incident before Swick's fall. Without actual or constructive knowledge that leaky hams were causing hazardous conditions, or that a leaky ham had caused a spill at a specific time prior to Swick's fall, Patty's Market had no duty to inspect for such hazards and to warn of, or remove, the hazard. The trial court properly concluded that a reasonable inference could not be made from the existing evidence that Patty's Market had constructive knowledge of a hazardous condition. The trial court's discussion

of whether Swick could establish knowledge of the hazardous condition by improperly stacking inferences was unnecessary when there was no evidence upon which a reasonable inference could be made to establish that Patty's Market had knowledge of a hazardous condition for a sufficient length of time to give rise to a duty to warn against it, or remove it, before Swick's fall. We agree with the trial court that Patty's Market is entitled to summary judgment.

{¶ 18} Swick's sole assignment of error is overruled.

V. Conclusion

{¶ 19} Swick's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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FROELICH and WELBAUM, JJ., concur.

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