[Cite as *McCann v. South East Harley-Davidson*, 2002-Ohio-473.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80089

WILLIAM McCANN, et al.	:	
	:	ACCELERATED DOCKET
Plaintiffs-Appellants	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
SOUTH EAST HARLEY-DAVIDSON	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION:	February 7, 2002
CHARACTER OF PROCEEDING:	Civil appeal from Court of Common Pleas Case No. CV-416479
JUDGMENT:	AFFIRMED.
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiffs-Appellants:	DONALD M. LEVY, ESQ. 55 Public Square Cleveland, Ohio 44113
For Defendant-Appellee:	MICHAEL E. STINN, ESQ. Britton, McGown, Smith, Peters & Kalai 4700 Rockside Road, Ste. 540 Independence, Ohio 44131-6814

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COLLEEN CONWAY COONEY, J.:

This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the lower court, the briefs, and oral arguments of counsel.

Plaintiff-appellant William McCann appeals from the trial court's granting of summary judgment in favor of defendant-appellee South East Harley-Davidson (South East). For the reasons set forth below, judgment is affirmed.

McCann filed a complaint against South East for injuries he sustained in a slip and fall on its premises. South East is in the business of selling Harley-Davidson motorcycles along with other merchandise. Located within its store is a railroad dining car where McCann's wife was the cook manager.

According to McCann's deposition, on January 21, 2000, he and some friends went to the diner to visit his wife while she was working. At about 3:45 p.m., he exited the diner through an entrance/exit which had a landing and four steps. According to McCann, as he stepped onto the landing, he slipped and fell, landing on his hip. The waitresses told him that the landing was wet, but he did not notice any wetness on the floor or on his clothing after the fall. He stated that it had been snowing that day and there was snow on the ground in the parking lot.

South East moved for summary judgment, arguing that there was no evidence as to the cause of McCann's fall, only speculation that the area was wet. McCann argued by way of affidavit that he

slipped because the tile on the landing and stairs was slippery from tracked-in moisture from other patrons.

The trial court granted South East summary judgment, holding that a business owner is not liable for moisture caused by patrons tracking in snow or rain, and that summary judgment is appropriate because McCann was speculative about what caused his fall.

McCann raises one assignment of error on appeal:

I. THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT.

McCann was a business invitee on South East's premises, and accordingly, it owed him a duty to exercise reasonable care in keeping the premises in a safe condition and to warn him of any latent and concealed perils of which it had knowledge. *Perry v. Eastgreen Realty Company* (1978), 53 Ohio St.2d 51, 52-53.

In *Costidakis v. Park Corporation, dba International Exposition Center* (Aug. 12, 1994), Cuyahoga App. No. 66167, unreported, this court addressed a similar factual situation. In that case, a woman had fallen on tile flooring which had become wet and slippery from tracked-in snow. This court affirmed the trial court's granting of summary judgment and held:

> The mere fact that plaintiff fell does not establish any negligence on the part of defendant. *Green v. Catronava* (1966), 9 Ohio App.2d 156, 161. It was incumbent upon plaintiff to show that there was a dangerous or latent condition of the premises that was the cause of her fall. * * * It was not unexpected that the tile would be wet from tracked-in moisture since it was snowing

> outside. There was no evidence here that defendant either created or tolerated a hazardous condition which was not obvious from the surrounding circumstances.

Likewise, in the instant case, it was not unexpected that the tile might be slick from tracked-in moisture. As the Ohio Supreme Court stated in *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 204:

> Owners or lessees of stores * * * are not insurers against all forms of accidents that may happen * * *. It is not the duty of persons in control of such buildings to keep a large force of moppers to mop up the rain as fast as it falls or blows in, or is carried in by wet feet or clothing or umbrellas, for several good reasons, all so obvious that it is wholly unnecessary to mention them all here in detail.

Furthermore, McCann is not even sure what caused his fall. He states that waitresses at the restaurant told him the floor was wet but he did not note any moisture even after his fall. As this court held in *Guyton v. DeBartolo, Inc.* (Nov. 4, 1993), Cuyahoga App. No. 65268, unreported, proximate cause cannot be proven by mere speculation.

McCann's sole assignment of error is overruled.

Judgment affirmed.

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It is ordered that appellee recover of appellants its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE, J. CONCURS;

KENNETH A. ROCCO, P.J. DISSENTS

WITH SEPARATE DISSENTING OPINION

JUDGE
COLLEEN CONWAY COONEY

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NO. 80089

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Plaintiffs-Appellants	:	DISSENTING
	:	
vs.	:	OPINION
	:	
SOUTH EAST HARLEY-DAVIDSON	:	
	:	
Defendant-Appellee	:	

Date: February 7, 2002

KENNETH A. ROCCO, P.J. DISSENTING:

I respectfully dissent from the majority opinion's disposition of this appeal, since a *de novo* review of the evidence presented demonstrates appellee was not entitled to summary judgment on appellant's negligence claim.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The moving party, therefore, is required to sustain its burden affirmatively to show the nonmoving party has no evidence to support the essential elements of his or her claim. *Id.* This court in turn is required to construe the evidence presented by appellee and appellants in a light most favorable to *appellants*. Civ.R. 56(C). I believe the majority opinion does not do so.

The owner of a business premises owes a duty to its invitees to maintain the premises in a reasonably safe condition and to warn the invitee of any latent defects. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. Liability thus is predicated on the business premises' owner's superior knowledge of a condition that can cause injuries to its customers. *Baudo v. Cleveland Clinic Foundation* (1996), 113 Ohio App.3d. 245.

Appellee's motion for summary judgment in this case was supported by neither affidavits nor an expert report with regard to the conditions existing on its premises, but only by appellant McCann's deposition testimony and responses to appellee's interrogatories.

Appellants subsequently opposed the motion by providing several affidavits which, when construed in a light most favorable to them, indicated the following: 1) the newer tile surface of the steps and landing of the dining car platform appellee had installed on its premises was "extremely slippery"; 2) this condition became exacerbated by "tracked-in water"; 3) appellant William McCann had slipped on "water" that had been "tracked-in"; 4) other customers had slipped and fallen on the same surface; therefore, 5) appellee had notice of the slippery condition.

The foregoing evidence demonstrates genuine issues of material fact remain concerning both whether appellee breached its duty of care to appellant William McCann and whether his injuries

proximately were caused by appellee's maintenance of its premises. *Id.; Sadey v. Metromedia Steakhouses Co.* (July 15, 1998), Cuyahoga App. No. 74178, unreported; *LaPonza v. Sears, Roebuck & Co.* (June 28, 1990), Cuyahoga App. No. 58578, unreported. Appellee thus failed to sustain its burden to prove appellants had no evidence to support an essential element of their claim. Consequently, summary judgment for appellee was improper.

I accordingly would sustain appellants' assignment of error, reverse the trial court's order, and remand this case for further proceedings.