[Cite as *Grassnig v. Discount Drug Mart, Inc.*, 2004-Ohio-5555.]

STATE OF OHIO))ss: COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
RICHARD E. GRASSNIG, et al. Appellants v. DISCOUNT DRUG MART, INC. Appellee	C.A. No. 04CA008454 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 02CV132963

DECISION AND JOURNAL ENTRY

Dated: October 20, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BOYLE, Judge.

{¶1} Appellant, Richard E. Grassnig,[1] appeals from the judgment of the Lorain County Court of Common Pleas, granting summary judgment in favor of Appellee, Discount Drug Mart, Inc. This Court affirms.

I.

{¶2} Appellant fell in Appellee's store on February 14, 2001. Appellant suffered serious injuries as a result of the fall, including a broken hip. Thereafter, on October 15, 2002, Appellant filed suit against Appellee alleging that Appellee

was responsible for his fall. However, as Appellant subsequently developed Alzheimer's, he has been unable to testify regarding the events surrounding his fall. Through others, Appellant alleges that upon entering the store, he asked the pharmacist where to locate the item he wished to purchase. He claims that a then-employee of Appellee, Kathy Cole, led him to the item he wished to purchase. Appellant claims that Ms. Cole never warned him of crutches that were lying in the aisle. Appellant further alleges that anyone in the aisle would have had to have stepped over the crutches in order to avoid falling.

{¶3} On October 23, 2003, Appellee filed for summary judgment asserting that Appellant could not demonstrate the cause of his fall and that he could not demonstrate that Appellee had actual or constructive notice of the hazardous condition. The trial court granted Appellee's motion on February 4, 2004. Appellant timely appealed, raising two assignments of error. As both of these errors aver that the trial court erred in granting summary judgment, this Court will address them together.

II.

ASSIGNMENT OF ERROR I

"SUMMARY JUDGMENT WAS IMPROPER BECAUSE THERE IS EVIDENCE OF ACTUAL NOTICE WHEN AN EMPLOYEE CONFRONTS A CRUTCH LYING IN THE AISLE AND PHYSICALLY STEPS OVER IT IN ORDER TO PROCEED."

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[1] Appellant is now represented by his son, Richard W. Grassnig, as he has Alzheimer's and has been deemed incompetent to testify or aid in his case.

ASSIGNMENT OF ERROR II

"SUMMARY JUDGMENT WAS IMPROPER BECAUSE DRUG MART'S ALLEGED LACK OF NOTICE IS NOT SUPPORTED BY CIV.R. 56 EVIDENCE AND IS ACTUALLY REFUTED BY ITS ADMISSION THAT IT DOES NOT KNOW WHAT THE PHARMACY TECHNICIAN OBSERVED."

{¶4} In both of his assignments of error, Appellant avers that the trial court erred in granting summary judgment in favor of Appellee. Appellant asserts that evidence was introduced which created a genuine issue of fact requiring the case to go forward. This Court disagrees.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co*. (1983), 13 Ohio App.3d 7, 12.

{¶6} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶7} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the

record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. at 292-93. Once this burden is satisfied, the nonmoving party bears the burden of offering specific facts to show a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶8} In support of its motion for summary judgment, Appellee utilized the deposition of the store manager, Todd Sevits. In his deposition, Mr. Sevits noted that he never received any information about how or why the crutches were not hanging as they should. Further, Mr. Sevits noted that an eyewitness, a customer at the store, informed him that Appellant had tripped. Appellee contended that as such, Appellant had failed to demonstrate that a hazard existed, and had failed to demonstrate that if a hazard existed that Appellee had actual of constructive notice thereof. As such, Appellee met its initial burden as the party moving for summary judgment. *Dresher*, 75 Ohio St.3d at 292.

{¶9} Appellant responded to Appellee's motion for summary judgment asserting that a reasonable jury could find each of the essential elements of his negligence claim. First, Appellant asserted that in his own answers to

interrogatories he established that the cause of his fall was a crutch lying in the aisle. Further, Appellant averred that since an employee was leading him down the aisle, the employee had to have seen the crutch and as such Appellee had actual notice of the hazard. In support, Appellant utilized the deposition of Mr. Sevits. In his deposition, Mr. Sevits stated that Ms. Cole was helping Appellant locate the items he wanted to buy. Mr. Sevits also noted that when he arrived at the site of Appellant's fall, crutches were lying on the floor and that anyone walking past them would have to step over them. Appellant also utilized the affidavit of Richard W. Grassnig to support his claims.

{¶10} In order to succeed in his claim for damages from a trip and fall, Appellant as a business invitee must establish:

> "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." *Johnson v. Wagner Provision Co*. (1943), 141 Ohio St. 584, 589.

{¶11} In the instant case, Appellant established through his answers to interrogatories that a crutch caused his fall by stating: "I was walking along an aisle in store when I inadvertently stepped on the end of a crutch laying in the aisle." However, Appellant must also demonstrate that Appellee had actual or constructive notice of the hazard in order to avoid summary judgment. Appellant failed to do so.

{¶12} Appellant has never argued that Appellee has constructive notice of the alleged hazard. Instead, Appellant avers that Appellee had actual knowledge of the defect. In support of his claim, Appellant relies on the deposition testimony of Mr. Sevits stating that anyone who walked through the aisle would have to step over the crutches. However, Mr. Sevits described the condition of the aisle as he saw it after Appellant's fall. No evidence was introduced by Appellant of the condition of the floor at the time of Appellant's fall. Accordingly, assuming arguendo that Ms. Cole was with Appellant at the time of the fall, this Court cannot say that Ms. Cole was aware of the hazard merely by her presence in the aisle because the condition of the aisle before Appellant's fall is unknown. As such, Appellant has failed to demonstrate that Appellee had actual or constructive knowledge of the hazard. Appellant's assignments of error are overruled.

III.

{¶13} Appellant's assignments of error are overruled, and the judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into

execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

EDNA J. BOYLE
FOR THE COURT

WHITMORE, P. J.
BATCHELDER, J.
CONCUR

APPEARANCES:

KURT D. ANDERSON. Attorney at Law, 5333 Meadow Lane Court, Elyria, Ohio 44035, for Appellant.

KERRY RANDALL-LEWIS, Attorney at Law, 14650 Detroit Avenue, Suite 450, Lakewood, Ohio 44107, for Appellee.