[Cite as *Besack v. Kroger Co.*, 2023-Ohio-2497.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jamie Besack, as Executrix of the Estate of Edward Besack,	:	
Plaintiff-Appellant,	:	No. 22AP-341
v.	:	(C.P.C. No. 20CV-3048)
The Kroger Company,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 20, 2023

On brief: *Kisling, Nestico & Redick, LLC, Christopher J. Van Blargan*, and *Michael J. Maillis*, for appellant. **Argued:** *Christopher J. Van Blargan*.

On brief: *Dickie, McCamey & Chilcote, P.C.*, and *Mary Barley-McBride*, for appellee. **Argued:** *Mary Barley-McBride*.

APPEAL from the Franklin County Court of Common Pleas

BOGGS, J.

{¶ 1} Plaintiff-appellant, Jamie Besack, as Executrix of the Estate of Edward Besack, appeals the Franklin County Court of Common Pleas entry of summary judgment in favor of defendant-appellee, The Kroger Company ("Kroger"), on Edward Besack's negligence claim and the trial court's denial of Besack's motion to sanction Kroger for alleged discovery violations and/or to compel discovery.[1] For the following reasons, we reverse the trial court's judgment.

[1] Besack died on June 5, 2022, during the pendency of this appeal. Jamie Besack, the administrator of Edward Besack's estate, was substituted as the appellant on October 4, 2022. We refer to them interchangeably as "Besack."

I. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} Besack sued Kroger to recover for injuries he sustained when he slipped and fell on a grape while shopping inside a Kroger grocery store in Dublin, Ohio, on September 10, 2019. Besack alleged that he "stepped on a grape located in a main aisle between the produce section and [the] registers on the store's linoleum floor, slipped, and fell, suffering a fracture of his left humerus." (May 5, 2020 Compl. at ¶ 6.) Besack alleged that "Kroger's employees knew or, through the exercise of reasonable diligence, should have known of [the] produce spill that caused [his] fall." *Id.* at ¶ 9.

{¶ 3} Besack also alleged that Kroger was negligent in "failing to take adequate precautions to prevent produce such as grapes and cherries from falling on the store's floor," in "[f]ailing to utilize anti-skid mats in areas near the produce department," in "[f]ail[ing] to adequately monitor areas near the produce section for spills," and in "[f]ail[ing] to remove produce from the store's floor and/or [to] clean up spills." *Id.* at ¶ 10. Besack maintains that, as a direct and proximate result of Kroger's negligence, he suffered serious physical injury that required surgery and that he incurred medical expenses, lost wages, physical, mental, and emotional pain and suffering, loss of ability to perform everyday activities, and inconvenience.

{¶ 4} The facts surrounding Besack's fall are undisputed. Besack entered the Kroger store to purchase wine. Surveillance video shows him walking through the produce section toward the wine department and then, less than two minutes later, walking back through the produce section toward the checkout with his wine selection, when he slipped on a grape and fell to the ground.

{¶ 5} Discovery has been contentious throughout this case, particularly with respect to Besack's efforts to obtain the incident report created by Kroger employees regarding his fall, to obtain information contained in incident reports concerning similar falls, and to question a Kroger representative pursuant to Civ.R. 30(B)(5).[2] Kroger initially objected to Besack's discovery requests related to incident reports, stating, "Incident Reports are not discoverable." (Apr. 12, 2021 Pl.'s Mot. to Compel at 2, 5; Ex. 1-A at 2.) It

[2] Civ.R. 30(B)(5) states: "A party, in the party's notice [of deposition], may name as the deponent a public or private corporation, a partnership, or an association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization."

later clarified the grounds for its objection—that incident reports are prepared in anticipation of litigation and/or are subject to attorney-client privilege. Kroger claimed that Besack's request for information related to other slip-and-fall incidents were "overly broad, burdensome and irrelevant." *Id.* at 2.

{¶ 6} With respect to discovery, Besack filed and the trial court addressed (1) a motion to compel responses to written discovery and deposition attendance, (2) a motion for an order requiring Kroger to submit its incident report regarding his fall for an in-camera inspection, (3) a motion for a hearing to show cause why Kroger should not be held in contempt and for sanctions or for an extension of time to respond to Kroger's motion for summary judgment, and (4) a renewed motion for Civ.R. 37 sanctions and/or to compel discovery. We more completely address the parties' discovery disputes in our discussion of Besack's third assignment of error.

{¶ 7} Kroger moved for summary judgment on December 17, 2021, the deadline established by the trial court for filing dispositive motions, while discovery was ongoing. Kroger argued that it was entitled to judgment as a matter of law because there was no evidence that it breached its duty of care to Besack. Pursuant to Civ.R. 56(F), and based on Besack's arguments that he had not yet been permitted to depose a proper Civ.R. 30(B)(5) witness regarding issues of notice and duty and that Kroger had not yet complied with a court order to produce written discovery, the trial court extended Besack's time to respond to Kroger's motion. It ordered Besack to file his memorandum in opposition within 30 days after completion of his deposition of a Civ.R. 30(B)(5) Kroger representative, which the court "strongly encourage[d]" Kroger to locate.[3] (Jan. 25, 2022 Order at 1.)

{¶ 8} On March 17, 2022, Besack deposed Kroger's Columbus division asset-protection manager, James A. Giebler, whom Kroger produced as a Civ.R. 30(B)(5) witness to testify to the issues listed in Besack's notice of deposition, including "[p]roduce department customer safety and/or risk management measures including but not limited to display, placement, produce packaging, and floor mats for Kroger stores in general and

[3] Besack had previously deposed Richard Prodoehl, a Kroger produce category manager responsible for grapes, whom Kroger had produced as a Civ.R. 30(B)(5) witness to testify about issues listed in a notice of deposition filed October 20, 2021. Those issues included produce display planning and setup, produce packaging, produce sales decisions, Kroger's annual grape sales by month, produce-department customer-safety and/or risk-management measures, Kroger's history of slip-and-fall injuries, and Kroger's policies and procedures regarding the preparation and retention of incident reports. Besack maintained that Prodoehl was not qualified to testify regarding the safety and display issues set out in the notice of deposition.

the Kroger store [Dublin store] in particular." (Mar. 14, 2022 Civ.R. 30(B)(5) Notice of Dep. at 1-2.) During his deposition, Giebler also testified about Kroger's policies regarding preparation of incident reports. He stated that Kroger requires preparation of an incident report as a normal course of business with respect to any "incident of safety concern," regardless of whether litigation is anticipated. (Apr. 14, 2022 Giebler Dep. at 88.) Giebler receives a quarterly, written summary of reported incidents, including slips and falls, in Columbus Kroger stores, and he uses that information to coach store teams on safe store operation.

{¶ 9} After deposing Giebler, Besack filed his memorandum in opposition to Kroger's motion for summary judgment, but he also filed a renewed motion for sanctions and/or to compel, in which he argued that Giebler, like Prodoehl, was not qualified or prepared to testify as to certain issues listed in Besack's notice of deposition. Specifically, he argued that Giebler was unable to testify about Kroger's safety measures beyond the two pages of written rules that Kroger had previously provided in discovery and that Kroger's counsel had improperly instructed Giebler not to answer questions regarding best practices. Besack also argued that Giebler's testimony about Kroger's preparation and use of incident reports refuted Kroger's claims that its incident reports are shielded from discovery by either attorney-client privilege or the attorney work-product doctrine.

{¶ 10} The trial court denied Besack's renewed motion for sanctions and/or to compel, and it granted Kroger's motion for summary judgment. With respect to discovery, the trial court found that Kroger's production of Giebler as a Civ.R. 30(B)(5) witness complied with Besack's notice of deposition and that Besack provided no basis for revisiting the court's prior decision regarding incident reports. With respect to the motion for summary judgment, the trial court held that Besack failed to demonstrate a genuine issue of material fact as to whether Kroger caused the grape to be in Besack's path or had notice of the grape on the floor, because Besack's arguments "rely on speculation, not evidence, about how the grape came to be on the floor and how long it had been there." (May 10, 2022 Entry at 13.) The trial court rejected as speculative Besack's arguments that the type of display Kroger had used for the grapes and Kroger's placement of that display in a high-traffic area without taking safety precautions created an unreasonable risk of harm to

Kroger's customers, based on a lack of evidence that Kroger knew grapes regularly fell from such displays, posed a fall risk, and regularly caused falls in Kroger stores.

{¶ 11} On appeal, Besack raises three assignments of error:

> [1.] The trial court erred in granting Kroger summary judgment based on Besack's failure to demonstrate Kroger had actual or constructive knowledge of the particular grape that caused his fall where Besack claimed Kroger's negligent set-up of the grape display increased the risk of spills and falls negating this requirement.
>
> [2.] In granting Kroger summary judgment, the trial court erred in failing to consider evidence cited by Besack in a related, contemporaneous motion referenced in his Memorandum in Opposition to Summary Judgment and decided in the same judgment entry.
>
> [3.] The trial court abused its discretion in refusing to sanction Kroger for its failure to produce incident reports or compilations of incident report data, or compelling Kroger to produce for deposition a qualified corporate representative as required by Civ.R. 30(B)(5).

(Appellant's Brief at ii, iii.) For ease of discussion, we will address those assignments of error out of order, beginning with the third.

II. ANALYSIS

A. Discovery issues

{¶ 12} Besack's third assignment of error challenges the trial court's denial of his renewed motion for sanctions and/or to compel discovery, which he filed contemporaneously with his memorandum in opposition to Kroger's motion for summary judgment. In his renewed motion, Besack argued that Giebler's deposition testimony that Kroger requires the creation of incident reports in the ordinary course of its business, without regard to whether litigation is anticipated belied Kroger's ongoing contention that its incident reports are protected by attorney-client privilege and/or the attorney work-product doctrine. Besack also argued that Giebler's quarterly receipt of incident report summaries refutes Kroger's claim that it would be unduly burdensome to compile summary information from reports regarding other slip-and-fall incidents in Kroger stores. Finally, Besack argued that Giebler, like Prodoehl before him, was unable to (or was instructed by counsel not to) testify to all the issues listed in Besack's notice of deposition.

1. History of discovery disputes between Besack and Kroger

{¶ 13} To contextualize Besack's arguments and the trial court's decision denying his renewed motion for sanctions and/or to compel discovery, we first look more fully at the history of the parties' ongoing discovery disputes.

{¶ 14} Besack first submitted discovery requests to Kroger in April 2021. As relevant here, he requested copies of any incident report that was prepared in relation to his fall and for specified information from incident reports created in relation to other falls caused by produce on the store's floor in the two years preceding his fall. Kroger admitted that a store manager had prepared an incident report on the date of Besack's fall, but it objected to producing any incident report, stating, "Incident Reports are not discoverable." (Apr. 12, 2021 Pl.'s Mot. to Compel at 2; Ex. 1-A at 2.) Kroger later clarified that its objection was based on attorney-client privilege and/or the attorney work-product doctrine.

{¶ 15} Besack filed motions to compel discovery and for an in-camera inspection of the incident report regarding his fall. In support of his motion to compel, Besack cited *Diallo v. The Kroger Co.*, Franklin C.P. No. 10CV-8204, another slip-and-fall case, where deposition testimony indicated that Kroger prepares incident reports as a matter of course, whether or not litigation is anticipated, and that those reports are not always submitted to Kroger's lawyers.

{¶ 16} Alternatively, Besack argued that, even if the reports themselves were shielded from production, the factual information contained in the reports remains discoverable. Kroger broadly responded, "Ohio courts have universally and repeatedly determined that incident reports are protected from discovery." (Apr. 26, 2021 Def.'s Memo in Opp. to Pl.'s Mot. for an Order for In Camera Inspection at 2.) Kroger claimed, without any evidentiary support, the incident report regarding Besack's fall was created in anticipation of litigation and is in the possession of Kroger's counsel, for use in counsel's preparation of a defense.

{¶ 17} The trial court denied Besack's motion for an in-camera inspection, but it granted in part and denied in part Besack's motion to compel "[f]or the reasons stated" during an untranscribed status conference/hearing on June 10, 2021. (June 10, 2021 Order.) The record thus contains none of the trial court's reasoning for its decisions on Besack's discovery motions and no explanation of the extent to which the court granted

Besack's motion to compel. Besack maintains the trial court denied his request for an order compelling production of Kroger's incident reports[4] but that it ordered Kroger to produce the factual information from those reports, including the existence and causes of prior falls, as the attorney work-product doctrine did not shield that information. (Apr. 18, 2022 Renewed Mot. of Pl. for Civ.R. 37 Sanctions and/or to Compel at 4-5; Appellant's Brief at 14-15.)

{¶ 18} After Kroger filed its motion for summary judgment, Besack moved the trial court for a hearing requiring Kroger to show cause for why it should not be held in contempt, for sanctions, or for an extension of time to respond to Kroger's summary judgment motion. Besack's motion related primarily to Kroger's alleged failure to produce for deposition a qualified corporate representative pursuant to Civ.R. 30(B)(5), but Besack also argued that Kroger had failed to comply with the trial court's June 10, 2021 order to provide Besack with written discovery concerning prior falls. The trial court denied Besack's motion for a show-cause hearing, but it "strongly encourage[d]" Kroger to locate and produce a Civ.R. 30(B)(5) witness, and it extended Besack's time to respond to Kroger's motion for summary judgment until 30 days after completion of the Civ.R. 30(B)(5) deposition. (Jan. 25, 2022 Order at 1.) The court's entry did not address Kroger's alleged noncompliance with the June 10, 2021 order to provide Besack with written discovery.

{¶ 19} Following his deposition of Giebler, Besack filed his memorandum in opposition to Kroger's motion for summary judgment, and simultaneously filed a renewed motion for sanctions and/or to compel. He argued that Giebler was not a proper Civ.R. 30(B)(5) witness, as Giebler was not qualified or prepared to testify as to certain issues listed in Besack's notice of deposition, and that Kroger's counsel improperly instructed Giebler not to answer questions concerning best practices. He also argued that Giebler's testimony established the baselessness of Kroger's consistent assertion of attorney-client privilege and/or the attorney work-product doctrine to justify its refusal to produce the incident report for his fall and to produce information from other slip-and-fall incident reports. Besack requested that, as a remedy for Kroger's alleged discovery abuses, the court should either allow inferences adverse to Kroger relating to the withheld discovery or that

[4] Kroger agrees that the trial court concluded that Besack was not entitled to the incident reports. (May 2, 2022 Memo in Opp. to Pl.'s Renewed Mot. for Civ.R. 37 Sanctions and/or to Compel at 9.)

the court should compel discovery and delay ruling on Kroger's motion for summary judgement until after Kroger complies and Besack has an opportunity to submit new evidence in opposition to summary judgment.

{¶ 20} In the same entry in which it granted Kroger's motion for summary judgment, the trial court denied Besack's renewed motion for sanctions and/or to compel discovery, finding that Giebler was a compliant Civ.R. 30(B)(5) witness, that the court had previously addressed the discoverability of Kroger's incident reports, and that Besack had "not provided a basis for revisiting th[at] issue." (May 19, 2022 Entry at 3.) It is that order that Besack challenges in his third assignment of error.

2. Application of attorney-client privilege and the attorney work-product doctrine to Kroger's incident reports

{¶ 21} The trial court consistently, if sometimes implicitly, rejected Besack's arguments that Kroger had not demonstrated that either attorney-client privilege or the attorney work-product doctrine entitled Kroger to withhold its incident reports. As stated above, the record contains no rationale for the trial court's denial of Besack's motions for an in-camera inspection of the incident reports and to compel discovery. And in denying Besack's renewed motion for sanctions and/or to compel discovery, the trial court stated only that Besack "ha[d] not provided a basis for revisiting the issue." (May 19, 2022 Entry at 3.) The trial court's decision denying Besack's renewed motion for sanctions and/or to compel did not address the merits of Besack's arguments regarding the effect, if any, of Giebler's testimony regarding Kroger's preparation and use of incident reports on the applicability of attorney-client privilege or the work-product doctrine.

{¶ 22} Since we do not know the basis for the trial court's denial of Besack's motions regarding Kroger's incident reports, we look to Kroger's objections to Besack's discovery requests. Kroger objected to Besack's discovery requests for production of its incident reports, or information contained therein, on the basis of the attorney-client privilege and/or the attorney work-product doctrine. Because attorney-client privilege and the attorney work-product doctrine differ in their origins, purposes, and practice, we will consider them separately.

a. Attorney-client privilege

{¶ 23} " 'The attorney-client privilege is one of the oldest recognized privileges for confidential communication.' " *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, ¶ 16, quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). " 'Its purpose is to encourage full and frank communication between attorneys and their clients' " and it " 'recognizes that sound legal advice or advocacy * * * depends upon the lawyer's being fully informed by the client.' " *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 20, quoting *Upjohn Co. v. United States*, 441 U.S. 383, 389 (1981). "Under the attorney-client privilege, '(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.' " *Id.* at ¶ 21, quoting *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir.1998). The attorney-client privilege is codified in R.C. 2317.02(A), and for those cases not covered by the statute, application of the privilege is governed by common law. *Id.* at ¶ 17.

{¶ 24} The burden of showing that documents sought in discovery are protected under the attorney-client privilege rests with the party seeking to withhold them. *Peyko v. Frederick*, 25 Ohio St.3d 164, 166 (1986), citing *Waldmann v. Waldmann*, 48 Ohio St.2d 176, 178 (1976); *Drummond v. State Farm Mut. Auto Ins. Co.*, 10th Dist. No. 22AP-100, 2023-Ohio-283, ¶ 36. Whether a statement is protected by attorney-client privilege is a question of law that appellate courts review de novo. *State v. Brunson*, ___ Ohio St.3d ___, 2022-Ohio-4299, ¶ 26.

{¶ 25} For a document to constitute a communication protected by attorney-client privilege, "it is essential that it be brought into being primarily as a communication to the attorney." *In re Klemann*, 132 Ohio St. 187, 192 (1936). " 'A document of the client *existing before it was communicated* to the attorney is not within the present privilege so as to be exempt from production. But a *document* which has come *into existence as a communication* to the attorney, being itself a communication, is within the present privilege.' " (Emphasis sic.) *Id.*, quoting 5 Wigmore *on Evidence*, Section 2318 at 67 (2dEd.). The document at issue in *Klemann* was a casualty report created by the

defendant's employer, as required by its insurance policy, and forwarded it to its insurance agent, who in turn forwarded it to the insurance company's attorney. The Supreme Court of Ohio held that the casualty report "was brought into being as a communication [to counsel], not in the ordinary course of [the insured employer's] business." *Id.* at 192. It reasoned that the report became the insurance company's property upon receipt by its agent and then constituted a communication from client to attorney when it was transmitted to its attorney for the purpose of preparing a defense against a possible lawsuit. *Id.* at 193-94.

{¶ 26} *Klemann* does not stand for the proposition that all corporate incident reports submitted to the corporation's attorney are subject to attorney-client privilege. To read it that way would be to blatantly ignore the Supreme Court of Ohio's recognition that, for a document to be protected by the attorney-client privilege, "it is essential that it be brought into being primarily as a communication to the attorney." *Klemann* at 192. Indeed, the Supreme Court later reiterated that an otherwise non-privileged report created in the general course of a client's business does not become privileged simply because the client turns it over to his attorney. *In re Keough*, 151 Ohio St. 307, 314 (1949). "It would lead to an absurd result if a report or document, relevant, material, competent, and nonprivileged in the possession of a client, which had come into existence in the general course of the client's business, could be made privileged by turning it over to the client's lawyer." *Id.*

{¶ 27} Several Ohio appellate courts have refused to find corporate statements or reports privileged simply because they were transmitted to the corporation's legal counsel.[5] In *Westfield Ins. Group v. Silco Fire & Sec.*, 5th Dist. No. 2018CA00122, 2019-Ohio-2697, for example, the court of appeals held that attorney-client privilege did not apply to a written statement by a technician employed by the defendant, regarding an accidental discharge of a fire suppression system while the technician was inspecting and testing the

[5] *But see contra, e.g., Joyce v. Rough*, 6th Dist. No. L-09-1089, 2009-Ohio-5731, ¶ 10 ("[A]ccident reports were given by TARTA to its legal counsel for the purpose of preparing a defense to the instant lawsuit. As a result, they are privileged."); *Baker v. Meijer Stores L.P.*, 12th Dist. No. CA2008-11-136, 2009-Ohio-4681, ¶ 16 ("accident report is protected by attorney-client privilege, because it was turned over to Meijer's attorneys in order to mount a defense to the Bakers' lawsuit."); *Witt v. Fairfield Pub. School Dist.*, 12th Dist. No. CA95-10-169, 1996 Ohio App. LEXIS 1564, *19-20 (Apr. 22, 1996) (statements obtained by defendant school district's insurance company and passed on to the district's attorney were subject to attorney-client privilege).

system on behalf of his employer. The court of appeals stated that the defendant "ha[d] not presented any evidence to support its contention" that the statement, which was written a week after the incident and a year before litigation commenced, "was made for [the defendant's] insurer or for its attorney." *Id.* at ¶ 49. Similarly, in *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App.3d 28, 2003-Ohio-3358, ¶ 18, the Eighth District rejected a claim of attorney-client privilege because the party asserting the privilege "provided no evidence that would indicate that the contested documents were prepared for [its] insurer and subsequently transmitted to its attorneys" and because "the contested documents were prepared before [the party] notified its insurer of any pending fear of litigation." *See also Nageotte v. Boston Mills Brandywine Ski Resort*, 9th Dist. No. 26563, 2012-Ohio-6102, ¶ 12-13 (witness statements were not privileged when evidence indicated the statements "were not brought into being primarily as a communication to the parties' attorney and that the document existed before it was communicated to the attorney and was not prepared at the direction of the attorney").

{¶ 28} Kroger presented no evidence to establish that it prepares its incident reports generally, or that it prepared the incident report concerning Besack's fall, as communications to or at the direction of counsel. To the contrary, the only evidence in the record with respect to the creation of incident reports is the testimony from Giebler that incident reports are prepared in the ordinary course of Kroger's business, without regard to whether litigation is anticipated. There is no indication in the record that Kroger provides all its incident reports to its attorney for use and retention. To the contrary, beyond the statement of Kroger's counsel that she had possession of the incident report regarding Besack's fall, there is nothing in the record to suggest that incident reports regarding similar slips and falls were ever provided to Kroger's counsel. Application of the attorney-client privilege in a corporate context must be determined on a case-by-case basis. *MA Equip. Leasing I, LLC v. Tilton*, 10th Dist. No. 12AP-564, 2012-Ohio-4668, ¶ 24, citing *Upjohn Co.*, 449 U.S. 383 at 396. Therefore, Kroger's conclusory claims that incident reports are privileged as a matter of course were insufficient to meet its burden to establish that the specific documents that it withheld from Besack were protected by the attorney-client privilege.

b. Work-product doctrine

{¶ 29} The attorney work-product doctrine is a far more recent legal development than attorney-client privilege. *Squire, Sanders & Dempsey, L.L.P.,* 2010-Ohio-4469, at ¶ 54. The doctrine, as currently understood, stems from the United States Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), in which the court stated that even the most liberal contours of discovery could not justify "unwarranted inquiries into the files and the mental impressions of an attorney." *Id.* at 510. The Supreme Court recognized that "[p]roper preparation of a client's case demands that [the attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 511. Such work, it stated, may be reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed * * * the 'work product of the lawyer.' " *Id.* The court reasoned that there were such materials open on demand to opposing counsel, "much of what is now put down in writing would remain unwritten," and "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and the preparation of cases for trial," all of which would "poorly serve[]" clients' interests and the cause of justice. *Id.*

{¶ 30} The Supreme Court of Ohio has described the work-product doctrine as providing "a *qualified* privilege protecting the attorney's mental processes in preparation of litigation, establishing 'a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary.' " (Emphasis sic.) *Squire, Sanders & Dempsey, L.L.P.* at ¶ 55, quoting *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir.2005). The privilege recognized by the doctrine is qualified because discovery of attorney work-product may be had "upon a showing of good cause if it is directly at issue in the case, the need for the information is compelling, and the evidence cannot be obtained elsewhere." *Id.* at ¶ 60.

{¶ 31} Civ.R. 26(B)(3) describes the work-product doctrine as generally shielding from discovery "documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative," but the Supreme Court has recognized that it also applies to intangible work product. *Squire, Sanders & Dempsey, L.L.P.* at ¶ 56. The Staff Notes to Civ.R. 26

acknowledge both that protection as work-product "does not attach to a document or thing by merely giving it to an attorney" and that "[r]ecords kept in the ordinary course of business are not privileged" under the work-product doctrine. 1970 Staff Notes to Civ.R. 26(B)(3).

{¶ 32} As with attorney-client privilege, the burden of showing that a document is protected as attorney work-product rests with the party seeking to withhold it. *Drummond* at ¶ 36. To determine whether a document was prepared in anticipation of litigation, we ask " '(1) whether a document was created because of a party's subjective anticipation of litigation, as contrasted with an ordinary business purpose, and (2) whether that subjective anticipation of litigation was objectively reasonable.' " *In re Special Grand Jury Investigation*, 10th Dist. No. 18AP-730, 2019-Ohio-4014, ¶ 13, quoting *United States v. Roxworthy*, 457 F.3d 590, 594 (6th Cir.2006). Whether the work-product doctrine applies in a particular circumstance is a discretionary decision for the trial court, *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo*, 6 Ohio St.3d 270, 271 (1983), which we review for abuse of discretion. *Drummond* at ¶ 40. An abuse of discretion occurs when a court's judgment is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 33} Kroger argued in the trial court that its incident reports were "work product made in anticipation of litigation." (Apr. 26, 2021 Memo. in Opp. to Pl.'s Mot. for an Order Requiring Def. The Kroger Co. to Submit an Incident Report for In Camera Inspection at 2-3.) It stated, again without any evidentiary support, that "[e]ach of the incident reports [is] produced to [Kroger's] Legal Department and eventually provided to counsel to allow counsel the necessary information to prepare its defense," because "[a]s every retailer has learned in this age of frequent litigation, any incident, no matter how insignificant, can lead to litigation." (May 2, 2022 Memo. in Opp. to Pl.'s Renewed Mot. for Civ.R. 37 Sanctions and/or to Compel at 9.)

{¶ 34} In *In re Special Grand Jury Investigation*, this court considered a claim that the attorney work-product doctrine shielded from discovery an incident report concerning abuse of a rehabilitation center resident. The Ohio Attorney General's Medicaid Fraud Control Unit subpoenaed all internal documents relating to the rehabilitation center's investigation of a self-reported incident of abuse of a resident, but the rehabilitation center

claimed the requested documents, including an incident report, were protected by the work-product doctrine. The incident report had been completed by the nightshift supervisor who was on duty at the rehabilitation center when the alleged abuse occurred. The rehabilitation center appealed to this court after the trial court held that the withheld documents were not protected by the work-product doctrine and ordered their production. Contrary to what Kroger asks us to do here, this court did not simply accept that the work-product doctrine applied to incident reports as a matter of course. Instead, we considered whether the particular report at issue in *In re Special Grand Jury Investigation* had been prepared in anticipation of litigation, and we concluded that it had not.

{¶ 35} The supervisor, we noted, had created the report on standardized forms on the date of the incident, prior to any conversation between the rehabilitation center and its attorney. The withheld documents, including the incident report, contained "a basic review of the alleged abuse incident and documentary evidence and witness statements regarding the events surrounding that incident," the type of information the rehabilitation center would have been required to use in the ordinary course of its business to comply with its legal duty to report the incident. *Id.* at ¶ 19. We stated, "based on the timing, title, and contents of these documents, they appear to have been prepared in the normal course of business in response to the alleged abuse incident."[6] *Id.* at ¶ 16. Accordingly, we held that the trial court did not abuse its discretion by determining that the documents were not prepared in anticipation of litigation and were therefore not subject to protection by the work-product doctrine. *Id.* at ¶ 20.

{¶ 36} In *Baker v. Meijer Stores L.P.*, 12th Dist. No. CA2008-11-136, 2009-Ohio-4681, the court of appeals considered the discoverability of an accident report completed by a store detective after a customer slipped and fell on an automatic door's sensor mat while exiting a Meijer grocery store. Meijer, which had forwarded the accident report to its corporate office, claimed the report was protected by both attorney-client privilege and the work-product doctrine. The trial court agreed with Meijer that the accident report was not discoverable and granted summary judgment in favor of the defendants. On appeal, the Twelfth District addressed the applicability of attorney-client privilege and the work-

[6] Unlike the trial court here, the trial court in *In re Special Grand Jury Investigation* conducted an in-camera review of the withheld documents to evaluate the work-product claims. *See id.* at ¶ 5.

product doctrine; it concluded that the accident report was subject to attorney-client privilege, but it held, "[b]ased on our previous decisions, it is clear the accident report is *not* shielded by the work-product doctrine." (Emphasis added.) *Id.* at ¶ 16, citing *Witt v. Fairfield Pub. School Dist.*, 12th Dist. No. CA95-10-169, 1996 Ohio App. LEXIS 1564, *18 (Apr. 22, 1996) (witness statements obtained by defendant's insurance carrier more than a year before litigation was commenced were not prepared in anticipation of litigation and were not protected by the work-product doctrine), *Hunter v. Wal-Mart Stores, Inc.*, 12th Dist. No. CA2001-10-035, 2002-Ohio-2604, ¶ 38-39 (work-product doctrine did not protect incident report and witness statements prepared shortly after the underlying accident and well before the filing of a lawsuit), and *Molden v. Davey Tree Co.*, 11th Dist. No. 89-T-4201, 1990 Ohio App. LEXIS 3212, *5 (Aug. 3, 1990) ("it is difficult to assume that" material prepared shortly after the underlying accident and almost two years before suit was filed "was prepared with an eye toward litigation").

{¶ 37} Kroger's bare assertions that an incident report, or even *its* incident reports, are prepared as a matter of course in anticipation of litigation are unpersuasive and do not satisfy its burden of demonstrating the applicability of the work-product doctrine. Beyond those unsupported assertions, there is nothing in the record to suggest that the incident report concerning Besack's fall (or any other incident report created by Kroger in similar circumstances) was prepared in anticipation of litigation. A Kroger employee completed the incident report concerning Besack's fall immediately thereafter, nearly eight months before Besack filed a complaint against Kroger, and there is no suggestion that the employee did so at the direction of legal counsel. Moreover, any question as to the applicability of the work-product doctrine dissipated in the face of Giebler's deposition testimony that Kroger requires the preparation of such reports in the ordinary course of its business, regardless of whether litigation is anticipated. Giebler further testified that he receives and uses quarterly, written summaries of reported incidents in Kroger's Columbus stores to coach store teams on safely operating their stores. Applying the standard we employed in *In re Special Grand Jury Investigation*, we conclude that Kroger failed to demonstrate that its incident reports were "created because of [Kroger's] subjective anticipation of litigation," *Id.* at ¶ 13, and that the trial court abused its discretion to the extent it concluded otherwise.

{¶ 38} We do not know the basis for the trial court's conclusion that Besack was not entitled to discovery of the requested incident reports in this case because (1) there is no transcript of the June 10, 2021 hearing at which the trial court made that decision, (2) the trial court's June 10, 2021 discovery order does not include the trial court's reasoning, and (3) the trial court's May 19, 2022 entry denying Besack's renewed motion to compel and/or sanction states only there is no "basis for revisiting the issue."

{¶ 39} Indeed, Kroger itself has not been consistently clear whether it was relying on the attorney-client privilege, the attorney work-product doctrine, or both, in withholding its incident reports. But having determined that Kroger has not demonstrated that its incident reports are protected by either the attorney-client privilege or the attorney work-product doctrine, we must conclude that the trial court erred not granting Besack's renewed motion to compel/and or sanction with respect to those reports.

3. Civ.R. 30(B)(5) witness

{¶ 40} Besack's argument under his third assignment of error also extends to the trial court's denial of his renewed motion to compel and/or sanction for Kroger's alleged failure to produce a competent representative to fully testify to the issues listed in Besack's March 14, 2022 notice of deposition. As relevant here, the notice of deposition sought testimony regarding "[p]roduce department customer safety and/or risk management measures including but not limited to display placement, produce packaging, and floor mats for Kroger stores in general and the [Dublin store] in particular." (Sept. 1, 2021 Notice of Dep.; Oct. 20, 2021 Notice of Dep.; Mar. 14, 2022 Notice of Dep.) With respect to Kroger's production of Giebler as a Civ.R. 30(B)(5) witness, the trial court's entry denying Besack's renewed motion contains no analysis. It states only, "[a]fter review of the deposition transcripts the parties provided, the Court finds Kroger produced a Civ.R. 30(B)(5) witness which complied with the notice" of deposition. (May 19, 2022 Entry at 3.)

{¶ 41} Besack maintains that Giebler was not prepared or competent to testify about Kroger's produce department customer safety and/or risk management measures beyond two pages of written rules previously provided to Besack in discovery. He also argues that Kroger's counsel improperly instructed Giebler not to answer questions about best practices. Like other discovery issues not implicating privilege, we review the trial court's decision regarding the Civ.R. 30(B)(5) deposition under the abuse of discretion standard.

{¶ 42} Giebler initially testified that the written rules regarding safety in Kroger's produce departments, which had been provided to Besack in discovery, were "the sum total" of Kroger's safety "rules, policies, and procedures relating to its produce department[s]." (Giebler Dep. at 36-37.) Yet his later testimony regarding Kroger's use of floor mats in its produce departments belied that assertion. For example, Giebler testified that Kroger recommended utilization of floor mats in various locations where water can get on the floor and create a risk of falls, including in front of the produce wet rack where vegetables are misted. (Giebler Dep. at 54-55.) Those recommendations are not included in the written rules regarding produce department safety.

{¶ 43} Additionally, Giebler acknowledged that he was not prepared to testify about display placement or produce packaging—measures upon which the Civ.R. 30(B)(5) notice of deposition expressly sought testimony—because they were "not in [his] realm." *Id.* at 52. Giebler did not deny that Kroger employs customer safety and/or risk management measures with respect to display placement or produce packaging. Kroger's response to Besack's interrogatory concerning safety measures or precautions utilized to reduce the risk of produce falling on the floor or customer's slipping on such produce itself suggests the existence of those measures, as Kroger responded that it displays produce in cases designed for the type of produce being displayed. (Apr. 18, 2022 Renewed Mot., Ex. 2 at 3.)

{¶ 44} When Besack asked Giebler about "best practices" that Kroger follows "in addition to * * * rules, requirements [and] procedures," Kroger's counsel not only objected, but also instructed Giebler not to answer any question regarding best practices for customer safety in Kroger stores' produce departments. (Giebler Dep. at 42.) Kroger's counsel asserted that "customer safety and/or risk management measures," as set out in Besack's notice of deposition, does not encompass best practices directed to achieve those goals. (Giebler Dep. at 45.)

{¶ 45} Kroger's counsel had been aware for some time that Besack sought to depose a Civ.R. 30(B)(5) witness who could testify as to best practices. All three of Besack's Civ.R. 30(B)(5) notices sought testimony regarding "[p]roduce department customer safety and/or risk management measures including but not limited to display placement, produce packaging, and floor mats for Kroger stores in general and the [Dublin store] in particular." (Sept. 1, 2021 Notice of Dep.; Oct. 20, 2021 Notice of Dep.; Mar. 14, 2022 Notice of Dep.)

That request never changed, and Kroger's counsel was demonstrably aware that Besack understood it to encompass testimony regarding best practices, even prior to Besack's deposition of Richard Prodoehl in October 2021. (Jan. 6, 2022 Memo in Resp.; Mary Barley-McBride Aff. ¶ 17-18, 20-21.) In fact, Besack's counsel questioned Prodoehl without objection by Kroger's counsel about "industry standards or best habits" with respect to the display of grapes, but those issues were beyond Prohdoel's responsibilities as a category manager. (*See* Prodoehl Dep. at 18-20.) After the Prodoehl deposition, Besack's attorney reiterated in a November 18, 2021 email to Kroger's attorney his request to depose a Civ .R. 30(B)(5) witness "with knowledge of best practices for display of grapes including display cases, floor matting, or other precautions related to safety." (Jan. 6, 2022 Memo. in Resp., Ex. 2 at 2.) And in its January 6, 2022, memorandum in opposition to Besack's motion for a hearing to show cause, Kroger acknowledged Besack's ongoing efforts to depose a Kroger corporate representative about best practices. Yet when Kroger produced Giebler to testify, its counsel instructed him not to answer any question about best practices.

{¶ 46} Courts do not favor instructions from counsel to a deponent not to answer questions. *Montgomery v. Zacher*, 10th Dist. No. 91AP-55, 1991 Ohio App. LEXIS 4549, *5-6 (Sept. 24, 1991). Disfavor of that practice is consistent with Civ.R. 30(C)(2), which states:

> An objection made at the time of the examination whether to evidence, a party's conduct, the officer's qualifications, the manner of taking the deposition, or to any other aspect of the deposition shall be noted on the record, but the examination still proceeds, the testimony taken subject to any objection. An objection shall be stated concisely in a nonargumentative and nonsuggestive manner. *A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by a court, or to present a motion under Civ.R. 30(D).*

(Emphasis added.) Thus, it is generally improper for counsel to instruct a deponent not to answer a question posed at a deposition in a civil case. *Rossman v. Rossman*, 47 Ohio App.2d 103, 104 (8th Dist.1975), fn. 2. Kroger's counsel did not claim that Besack's questions regarding best practices sought privileged information or violated a court ordered limitation on discovery. Nor did she instruct Giebler not to answer so that she

could file a motion pursuant to Civ.R. 30(D) to limit or terminate the deposition. The instruction was therefore improper.

{¶ 47} Giebler admitted that he was not competent to testify to specific issues listed in the notice of deposition, and Kroger's counsel unreasonably instructed Giebler not to answer other questions that were within the scope of the deposition as understood by the attorneys prior to the deposition. Upon review of Giebler's deposition transcript, the notice of deposition, and the correspondence between the parties' attorneys concerning the deposition, it is clear that Kroger's production of Giebler, especially in light of counsel's instructions that he not answer Besack's questions regarding best practices, was insufficient to satisfy Kroger's obligation to present a witness or witnesses to testify as to matters known or available to Kroger with respect to the topics listed in the notice of deposition. At a minimum, the trial court should have ordered Kroger to produce a witness or witnesses competent to testify as to each of the topics listed in the notice of deposition and to allow Besack's counsel to question Giebler (or another competent witness) about best practices related to produce department safety without undue interference by Kroger's counsel. Thereafter, it should have afforded Besack additional time to respond to Kroger's motion for summary judgment. The trial court's denial of Besack's renewed motion for sanctions and/or to compel discovery with respect to the Civ.R. 30(B)(5) deposition is unreasonable and amounts to an abuse of discretion.

4. Conclusion

{¶ 48} For these reasons, we sustain Besack's third assignment of error, challenging the trial court's denial of his renewed motion for sanctions and/or to compel, to the extent the trial court denied Besack's request for an order compelling discovery, both with respect to the incident reports and to a Civ.R. 30(B)(5) deposition.

B. Summary judgment

{¶ 49} Besack's first and second assignments of error challenge the trial court's entry of summary judgment in favor of Kroger on his negligence claim.

{¶ 50} Summary judgment is appropriate only when the moving party demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment

is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997). 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. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party cannot discharge that burden with a conclusory assertion that the nonmoving party has no evidence to prove its case; it must point to evidence of the types listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support its claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond with specific facts that demonstrate the existence of a genuine issue for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

{¶ 51} To prove a claim in negligence, a plaintiff must establish the existence of a duty, a breach of that duty, and an injury resulting proximately from the breach. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). In cases of premises liability, the scope of the duty the owner or occupier of property owes to a visitor depends on the visitor's status vis-à-vis the owner or occupier. *Carlson v. Ohio Dept. of Transp.*, 10th Dist. No. 11AP-175, 2011-Ohio-5973, ¶ 5. An owner or lessee of a store owes the store's customers, who are business invitees, a duty of ordinary care to maintain the premises in a reasonably safe condition so as not to expose customers unnecessarily or unreasonably to danger. *Austin v. Woolworth Dept. Stores*, 10th Dist. No. 96APE10-1430, 1997 Ohio App. LEXIS 1970 (May 6, 1997); *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 203 (1985). A shopkeeper is not, however, an insurer of customer's safety. *Id.*

{¶ 52} In *Johnson v. Wagner Provision Co.*, 141 Ohio St. 584, 589 (1943), the Supreme Court of Ohio considered a case involving a customer's slip-and-fall on mayonnaise that another customer had dropped on the floor of a food market less than three minutes earlier. *Id.* at 585-87. The court stated:

> To be entitled to recover in cases of the character presently before us, it is necessary for a plaintiff to show:
>
> 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. at 589. This court has repeatedly cited that test in cases involving customer slips and falls in retail establishments. *See, e.g., Liggins v. Giant Eagle McCutcheon & Stelzer*, 10th Dist. No. 17AP-383, 2019-Ohio-1250, ¶ 15 (slip on olive oil that had fallen from another customer's cart); *Mercer v. Wal-Mart Stores, Inc.*, 10th Dist. No. 13AP-447, 2013-Ohio-5607, ¶ 14 (slip on water leaking from the ceiling); *Sharp v. Andersons, Inc.*, 10th Dist. No. 06AP-81, 2006-Ohio-4075, ¶ 9 (slip on a grape lying on the checkout aisle floor); *Barker v. Wal-Mart Stores, Inc.*, 10th Dist. No. 01AP-658, 2001 Ohio App. LEXIS 5965 (Dec. 31, 2001) (slip on clear liquid that spilled from a bottle that had cracked open on the floor).

{¶ 53} Under the test announced in *Johnson*, if the shopkeeper created the hazard that caused the plaintiff's injury, the plaintiff need not demonstrate that the shopkeeper had actual or constructive knowledge of the hazardous condition. *Byrd v. Arbors East Subacute & Rehab Ctr.*, 10th Dist. No. 14AP-232, 2014-Ohio-3935, ¶ 10. But when someone other than the shopkeeper creates the hazard, the plaintiff must establish that the shopkeeper had, or in the exercise of reasonable care should have had, notice of the hazard and failed to remove or warn against it. *Id.* at ¶ 11.

{¶ 54} Relying on this court's decisions in *Barker* and *Sharp*, the trial court agreed with Kroger's argument that it was entitled to judgment as a matter of law because there is no evidence that it breached its duty of care to Besack. The trial court held that Besack failed to present evidence to meet its reciprocal burden of demonstrating a genuine issue of material fact as to "how the grape came to be on the floor and how long it had been there" before Besack slipped and fell. (May 19, 2022 Entry Granting Def.'s Mot. for Summ. Jgmt. at 13.) In other words, the trial court held that Besack failed to demonstrate a genuine issue of material fact as to whether Kroger had constructive knowledge of the hazard.

{¶ 55} Neither *Barker* nor *Sharp* bars Besack's claim because Besack, unlike the plaintiffs in those cases, maintains that Kroger created the hazardous condition, separate from any claim that Kroger failed to remove or warn of a hazard of which it had actual or

constructive knowledge. Barker slipped and fell on a clear liquid that had spilled from a cracked bottle of recreational vehicle wash onto the floor of a Wal-Mart store. *Barker* at *1. Barker did not claim that Wal-Mart created the hazard; he alleged only that Wal-Mart had actual or constructive knowledge of the fluid on the floor and negligently failed to remove it or warn of its presence. The trial court granted summary judgment for Wal-Mart, finding no genuine issue of material fact concerning whether Wal-Mart had actual or constructive knowledge of the hazard. On appeal, Barker unsuccessfully construed the hazard as "merchandise being knocked off shelves and landing on the floor of the aisle," rather than the spilled liquid itself, but even then he argued only that Wal-Mart had knowledge of the hazard, not that Wal-Mart created it. *Id.* at *9. Although we stated, "[w]here no evidence shows how a slippery substance came to be on the floor or how long it had been there, a plaintiff cannot show that the store breached a duty of ordinary care," that statement must be read in the context of the issue before us in that case—whether the evidence demonstrated a genuine issue of material fact as to Wal-Mart's *knowledge* of the hazard. *Id.* at *14.

{¶ 56} The plaintiff in *Sharp* filed suit against the defendant after she slipped and fell on a red grape in the checkout aisle after paying for her purchases. Like the plaintiff in *Barker*, she did not allege that the defendant created the hazard but claimed only that the grape had existed on the floor for a sufficient length of time to reasonably justify the inference that the defendant's failure to remove it or warn of its presence was attributable to a lack of ordinary care. *Sharp* at ¶ 9. We held that her claim failed because she "had 'no idea' how long the grape had been on the ground prior to her fall," *id.* at ¶ 18, and evidence of how long a hazard existed is mandatory "[i]n cases involving constructive notice," *id.* at ¶ 12. We concluded that evidence of three recent grape sales in the same checkout aisle did not provide a basis for a jury to conclude that the grape on which Sharp slipped originated from one of those purchases; only "pure speculation" supported her position that the grape fell from one of those purchases. *Id.* at ¶ 22.

{¶ 57} Besack's claim differs from those presented in *Barker* and *Sharp*. Besack not only claims that Kroger had actual or constructive knowledge that the grape on which he slipped was on the floor. He also bases his negligence claim on the allegation that Kroger *created* the hazardous condition—a theory that does not require evidence that Kroger had

actual or constructive knowledge of the grape on the floor. *See Byrd* at ¶ 10. Besack does not base his theory that Kroger created the hazard on the suggestion that a Kroger employee placed the grape on the floor, but contends, instead, that Kroger's mode of operation created the hazard. Besack explained his theory as early as April 2021, in his motion to compel discovery: "a property owner is also liable for negligence when its methods of operation foreseeably cause or increase the risk to customers. The risk of small fruit, and particularly grapes, falling on a grocery store's floor and creating a slip hazard is so common that it has given rise to a line of cases and modified grocery store practices."[7] (Apr. 12, 2021 Mot. to Compel at 2, fn. 1.)

{¶ 58} Besack's arguments are analogous to those raised by the appellant in *Szerszen v. Summit Chase Condos.*, 10th Dist. No. 09AP-1183, 2010-Ohio-4518. There, a condominium tenant slipped and fell on water that had overflowed from his kitchen sink and pooled on the floor. The sink had overflowed due to a sludge blockage in the stack lines, which the property owner and condominium association were required to maintain. *Id.* at ¶ 2. The tenant claimed the defendants had created the hazard based on their failure to maintain the stack lines, and we acknowledged, "if [defendants] caused the hazardous condition – that is, caused water to be spilled onto appellant's floor – by failing to maintain the stack lines, then [defendants] breached their duty to appellant by creating the hazard." *Id.* at ¶ 22. "The relevant issue is whether defendants' actions or inactions brought about a hazardous condition, regardless of the means by which it did so." *Id.* And we determined that "[w]hether [defendants'] lack of proper maintenance led directly to the creation of a dangerous condition * * * is for a fact finder to resolve." *Id.* at ¶ 23.

{¶ 59} In granting Kroger's motion for summary judgment, the trial court rejected Besack's argument that Kroger created a hazardous condition and an unreasonable risk to its customers in the way it displayed grapes and by placing its grape display in a high-traffic area without taking precautions. It did so not because it believed such a claim is not viable

[7] Besack cites several cases from other states in which the courts have endorsed such a theory. *See, e.g., Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292 (Tex.1983) (display of green grapes in an open, slanted bin above a green linoleum floor could be found to have resulted in an unreasonable risk to customers); *Lingerfelt v. Winn-Dixie Tex., Inc.*, 645 P.2d 485, 488 (Okla.1982) ("When a shopper has shown that circumstances were such as to create the reasonable probability that a dangerous condition (e.g., uncovered, heaped strawberries), would occur, the invitee need not also prove that the business proprietor had notice of the specific hazard (spilled strawberries) in order to show the proprietor breached his duty of due care to the invitee"), citing *Bozza v. Vornado, Inc.*, 42 N.J. 355 (1964).

under Ohio law, as Kroger posits here, but rather based on its finding that Besack failed to present evidence that Kroger had knowledge that grapes regularly fall from displays, pose a high fall risk, and regularly cause falls and injuries. Yet that is the very type of evidence Besack was seeking in his thwarted discovery efforts—specifically through his requests for incident reports (or the factual information contained in them) and for a thorough Civ.R. 30(B)(5) deposition. Whether that discovery will uncover sufficient evidence to establish a genuine issue of material fact as to whether Kroger breached its duty of care to Besack remains to be seen. However, in light of Kroger's failure to provide the incident report concerning Besack's claim, the factual information contained in its incident reports concerning similar slips and falls, and to produce a witness to testify to all the issues upon which Besack requested testimony in his Civ.R. 30(B)(5) notice of deposition, entry of summary judgment based on Besack's failure to present evidence in support of his claim was, at least, premature.

III. CONCLUSION

{¶ 60} For these reasons, we reverse the trial court's judgment and remand this matter to the trial court for further proceedings consistent with this decision.

Judgment reversed; and
cause remanded.

JAMISON and EDELSTEIN, JJ., concur.