

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

EARLIN E. WORLEY

CASE NO. 5-2000-16

PLAINTIFF-APPELLANT

v.

**COOPER TIRE AND RUBBER
CO., ET AL.,**

OPINION

DEFENDANT-APPELLEE

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed.

DATE OF JUDGMENT ENTRY: October 16, 2000

ATTORNEYS:

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Shaw, J. Plaintiff Earlin E. Worley appeals the May 25, 2000 order of the Hancock County Court of Common Pleas granting summary judgment to Cooper Tire & Rubber, et al. on his claim of negligence in this slip-and-fall case. Plaintiff asserts a single assignment of error with the trial court's judgment.

The trial court erred in granting defendant Cooper Tire and Rubber Company's motion for summary judgment.

Our review of the record reveals that the trial court has thoroughly addressed all of the relevant factual and legal issues pertaining to this appeal in its judgment entry granting summary judgment to defendant-appellee. Accordingly, we hereby adopt the final judgment entry of the trial court dated May 25, 2000, incorporated and attached hereto as Exhibit A, as our opinion in this case. For the reasons stated therein, the plaintiff's assignment of error is overruled and the judgment of the Hancock County Court of Common Pleas is affirmed.

Judgment Affirmed.

HADLEY, P.J. and WALTERS, J., concur.

EXHIBIT "A"

HANCOCK COUNTY, OH
FILED

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CATHY PRUSSER WILCOX
CLERK OF COURTS

IN THE COMMON PLEAS COURT OF HANCOCK COUNTY, OHIO

EARLIN E. WORLEY

Plaintiff,

Case No. 97-85-T

v.

JUDGMENT ENTRY

COOPER TIRE AND
RUBBER CO., ET AL.

May 25, 2000

Defendants.

_____ ^
This matter is before the Court for decision and ruling upon the Motion for Summary Judgment filed on behalf of the defendant, Cooper Tire and Rubber Company (hereinafter "Cooper"), by its counsel of record, Robert Walker, Paula Batt Wilson and Gregory Meyers.

Defendant Cooper filed its Motion for Summary Judgment through its counsel of record on June 28, 1999. In support of the aforesaid motion, defendant Cooper filed a memorandum attached thereto as well as an appendix binder containing portions of plaintiff Earlin E. Worley's deposition, marked as Exhibit A; portions of the deposition of James A. Toth, marked as Exhibit B; portions of the deposition of Alden E. Hatch, marked as Exhibit C; portions of the deposition of Jere Crawford, marked as Exhibit D; portions of the deposition of John R. Spoon, marked as Exhibit E; a copy of a photo of the patio area of the Cooper facility where the plaintiff fell, marked as plaintiff's Exhibit 1 and marked as Exhibit F in the defendant's appendix binder; portions of the deposition of David Sacket,

marked as Exhibit G; portions of the deposition of John Ebert, marked as Exhibit H; a copy of a letter signed by John Ebert regarding the plaintiff's fall, marked as plaintiff's Exhibit 4 and marked as Exhibit I in the defendant's appendix binder; portions of the deposition of Dennis E. Orwick, marked as Exhibit J; the affidavit of Paula Batt Wilson dated June 23, 1999, a copy of the Hanco Emergency Medical Service Report dated February 9, 1996, and a copy of an Emergency Department Flow Sheet also dated February 9, 1996, all contained in the defendant's appendix binder as Exhibit K; a copy of a hand drawn diagram of the defendant's facility where the incident occurred, marked as defendant's Exhibit 25 and marked as Exhibit L in the defendant's appendix binder; portions of the deposition of Daniel Clinger, marked as Exhibit M; and copies of several cited legal authorities, marked collectively as Exhibit N.

On July 30, 1999, attorneys Steven P. Collier and Janine T. Avila, on behalf of the plaintiff, Earlin E. Worley (hereinafter "Worley"), filed a Memorandum in Opposition to Defendant Cooper Tire and Rubber Company's Motion for Summary Judgment. In support of the aforementioned memorandum, plaintiff Worley, through counsel, filed an appendix binder containing portions of the deposition of plaintiff Worley, marked as Exhibit A; the affidavit of plaintiff Worley, marked as Exhibit B; the affidavit of Robert T. Young, a copy of the curriculum vitae of Robert T. Young, copies of two (2) letters to Janine T. Avila from Robert T. Young, as well as various test results, and a tile sample collectively marked as Exhibit C; the deposition of Jere Crawford, marked as Exhibit D; the deposition of John Ebert, marked as Exhibit E; the deposition of John R. Spoon, marked as Exhibit F; the deposition of David Sackett, marked as Exhibit G; the deposition of Daniel Clinger, marked

as Exhibit H; the deposition of Robert Clifford, marked as Exhibit I; the deposition of James A. Toth, marked as Exhibit J; and a copy of a cited legal authority, marked as Exhibit K.

Defendant Cooper, through counsel, filed a Reply Memorandum in Support of the Motion for Summary Judgment on August 13, 1999. In support of this memorandum, defendant Cooper filed several cited legal authorities attached thereto and collectively marked as Exhibit A.

The parties, through their counsel, mutually filed a stipulation solely for the purpose of summary judgment on October 12, 1999.

It is upon this status of the record that this matter is before the Court for decision.

STATEMENT OF THE CASE

The pleadings of the parties, including the Motion for Summary Judgment, all responsive and reply pleadings, and the appendix binders containing numerous exhibits, as well as the completed and filed depositions of plaintiff Worley, John R. Spoon, Daniel Clinger, Robert Clifford, Jere Crawford, James A. Toth, John Ebert, and David Sacket, all of which were filed on July 30, 1999; the stipulation regarding plaintiff's Exhibit 5, a tile sample; and the plaintiff's boot which he was allegedly wearing at the time of his fall, marked as Plaintiff's Exhibit 3 and filed on July 30, 1999, set forth the following as the factual basis for this litigation.

On February 9, 1996, the plaintiff herein, Earlin E. Worley, arrived at defendant Cooper's Lake Cascades Distribution Center in Findlay, Hancock County, Ohio. Plaintiff Worley was a truck driver employed by Keystone Lines, Inc., third party defendant herein,

at that time and had driven from his home in Tennessee that day to pick up a load of tires from defendant Cooper's distribution center.

Upon his arrival, plaintiff Worley exited his truck exercising care to avoid a dark-colored substance in the parking lot and at some point walked onto the patio area in front of an interior room of defendant Cooper's facility commonly referred to as the "trucker's lounge." While there is some confusion as to whether the plaintiff walked in and out of the lounge prior to his fall, it is clear that at some point the plaintiff walked into the lounge and fell quickly thereafter.

Jere Crawford, an employee of Diversified Logistics, a company which provides manual labor to load and unload trucks at defendant Cooper's facility, was in the immediate vicinity talking with the plaintiff at the time the plaintiff fell. Crawford had his back to plaintiff and did not witness the plaintiff's fall nor did anyone else. Plaintiff Worley has no recollection of what transpired from the time he fell until some point while he was in the hospital receiving treatment.

At the time of the plaintiff's fall, defendant Cooper's parking lot, patio area, and trucker's lounge were purportedly dry. The plaintiff was wearing a hard-soled boot as required by law and had not walked through any wet substances to the best of his knowledge.

After hearing plaintiff Worley fall, Crawford turned around and saw the plaintiff lying in the doorway with his head and shoulders on the outside patio area and the rest of his body inside the lounge. Plaintiff Worley appeared to be unconscious. Crawford called out for assistance and various people responded. Among those who responded were Cooper

employees, John Ebert and David Sacket. After an emergency service arrived to aid the plaintiff, both men looked at the plaintiff's boots from approximately a foot away to see if there appeared to be anything slippery and/or wet on the soles, and neither detected anything on the soles that would account for the plaintiff's fall. Neither of these men, however, touched the plaintiff's boots during their inspection.

After plaintiff was taken by ambulance from the defendant's facility, David Sacket, John Ebert, and James Toth inspected the area where the plaintiff had fallen to determine what may have caused plaintiff Worley's fall. None of the men noticed any wet/moist substance on the patio or floor. Ebert also inspected portions of the parking lot for possible slippery substances over which plaintiff may have walked, and did not find anything which would help to explain the plaintiff's fall.

CLAIMS OF THE PARTIES

Defendant Cooper contends that summary judgment in this case should be granted to it because the plaintiff cannot explain or identify the cause of his fall other than by speculation. In addition, the defendant maintains that the plaintiff is unable to show that defendant Cooper breached any duty owed to plaintiff Worley in that Cooper had no knowledge of a hazard, specifically foreign substances near the scene of the plaintiff's fall. Furthermore, the defendant contends that even if there were oil or a similar substance in its parking lot, the plaintiff's claim of negligence would still fail because defendant Cooper had no duty to warn plaintiff Worley of an open and obvious danger such as oil.

Plaintiff Worley contends that the defendant Cooper breached its duty of care by

creating a latent defect on the premises, by failing to warn plaintiff of the latent defect, and by failing to remedy the latent defect. Plaintiff claims Cooper created a latent defect by installing a slippery tile floor without an abrasive grit or floor mats to provide friction on a floor traversed by many people, by failing to warn plaintiff of this defect, and by failing to remedy such defect.

In addition, the plaintiff maintains that the defendant failed to inspect its premises to discover potential hazards and likewise failed to take precautionary measures to protect invitees from such foreseeable dangers. Furthermore, plaintiff Worley contends that actual or constructive knowledge on the part of the defendant is not necessary for a negligence claim based upon defendant Cooper's failure to remedy a latent hazard or defect. Therefore, plaintiff Worley contends that summary judgment is not appropriate, as genuine issues of material fact exist on several of these issues.

In response to the plaintiff's contentions, defendant Cooper maintains that installing a tile floor does not constitute negligence on the part of a premises owner. In addition, the defendant contends that its knowledge of any hazard was not superior to the plaintiff's and that it did not create a hazard by failing to use mats. Furthermore, the defendant contends that the plaintiff's expert witness' affidavit is based on speculation by the plaintiff rather than facts actually perceived by the plaintiff. The defendant also maintains that the affidavit constitutes incompetent evidence because the wet coefficient of friction of the tile floor at defendant's facility is irrelevant because the evidence before the Court is that the floor was dry when plaintiff Worley fell.

STANDARD FOR REVIEW

Civil Rule 56(A) and (B) provides that a party seeking affirmative relief and a defending party may move for summary judgment. Subsection (C) states in part that:

"A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

In addition, subsection (C) also states that:

"Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule."

Rule 56(E) further states that:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated herein."

In addition, the Supreme Court of Ohio in its opinion in Osborne v. Lyles (1992), 63 Ohio St., 3d 326 following Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, 327 stated:

"Civ. R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (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."

The party moving for summary judgment bears the burden of showing that no genuine issue exists as to any material fact. Harless v. Willis Day Warehousing Co (1978), 54 Ohio St. 2d

64.

As is set forth in Wing v. Anchor Media (1991), 59 Ohio St. 3d 108, 109 citing Celotex v. Catrett (1986), 477 U.S. 317, 322-323:

"A motion for summary Judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial."

Rule 56(E) of the Ohio Rules of Civil Procedure requires when a party moves for summary judgment negating essential elements for which non-movant will carry burden of proof, responding party must set forth specific facts showing there exists a genuine issue for trial. Kelley v. Cairns & Brothers, Inc. 91993) 89 Ohio App. 3d 598.

In Dresher v. Burt (1996), 75 Ohio St. 3d 280, the Supreme Court of Ohio modified the summary judgment standard as was applied under Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St. 3d 108. Presently, under the new standard,

" . . . the moving party bears the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or a material element of the nonmoving party's claim." Dresher, supra at 296.

In addition,

"if the moving party fails to satisfy its initial burden, the motion for summary must be denied. If the moving party has satisfied its initial burden the nonmoving party has a reciprocal burden outlined in the last sentence of Civil Rule 56(E) . . ." Id. at 293.

CONCLUSIONS OF LAW

A negligence claim requires a showing by the plaintiff that the defendant owed the plaintiff a duty, the defendant breached this duty, and such breach by the defendant was the proximate cause of the plaintiff's injury. Texler v. D.O. Summers Cleaners (1998), 81 Ohio

St. 3d 677, 680. A duty on the part of the premises owner-occupier depends upon the foreseeability of the injury. Id. A property owner-occupier is not an insurer of an invitee's safety, Paschal v. Rite Aid Pharmacy, Inc.(1985), 18 Ohio St. 3d 203, but must exercise ordinary care to protect the invitee by maintaining the premises in a safe condition. Light v. Ohio University (1986), 28 Ohio St. 3d 66, 68. Therefore, liability on the part of the defendant does not arise by the mere fact that the plaintiff was injured on the defendant's property.

The Ohio Supreme Court has held that the owner-occupier of the premises owes no duty to invitees against conditions which are so obvious, apparent, or commonly encountered that an invitee could reasonably be expected to discover and protect himself against them. Sidle v. Humphrey (1968), 13 Ohio St. 2d 45, 49; Simmers v. Bentley Constr. Co. (1992), 64 Ohio St. 3d 642, 644; and Paschal, supra. However, the owner-occupier must "warn his invitees of latent or concealed perils of which he has, or reasonably should have, knowledge." Perry v. Eastgreen Realty Co. (1978), 53 Ohio St. 2d 51, 52. This duty includes situations in which the original construction of the building creates a dangerous condition. Id. at 53. Despite this duty to warn invitees of latent or concealed perils, the use of slippery and/or smooth tile on the floor of a building without a warning to those who traverse the floor does not, in and of itself, constitute negligence. Thomas v. Merchants Nat. Bank (1952), 114 N.E.2d 863, 865.

In the case at bar, the parties agree that the floor on which the plaintiff fell was tile and that this tile did not have an abrasive grit. Nor is there a dispute that there was no warning, verbal or otherwise, given to the plaintiff prior to his fall. This, however, does not

constitute negligence. The evidence before the Court that the plaintiff produced to establish a duty on the part of defendant Cooper was the testimony of Daniel Clinger, the architect for the Lake Cascades facility, that an abrasive tile was to be used on the lounge floor (which it was not) because of the possibility that the floor would be wet at times due to the weather. In addition, the affidavit of plaintiff's expert, Robert T. Young, a tile professional, along with the results of testing he performed on tile similar to that on which the plaintiff fell, states that the tile's wet coefficient of friction revealed that the tile was dangerous when wet. While this arguably might have created a duty on the part of the defendant if the floor had been wet, there is absolutely no evidence before the Court that the floor or plaintiff Worley's boots were wet at the time of the accident.

The absence of a foreign substance, both on plaintiff's boots and defendant's floor, creates a problem not only for the elements of duty and breach, but also for the element of proximate causation.

To establish negligence in a slip and fall case, it is incumbent upon the plaintiff to identify or explain the reason for the fall. Where the plaintiff, either personally or by outside witnesses, cannot identify what caused the fall, a finding of negligence on the part of the defendant is precluded.

Stamper v. Middletown Hospital Assn. (1989), 65 Ohio App. 3d 65, 67-68 (citing Cleveland Athletic Assn. Co. v. Bending (1934), 129 Ohio St. 152, and other cases). The plaintiff has produced the affidavit of Robert T. Young, as previously mentioned, who conducted tests on tile similar to that at the defendant's facility, to support his claim of negligence. Young determined that the wet coefficient of friction of the tile was 0.44, an amount below the American National Standard Institute (ANSI) safety standard of 0.50. However, when dry, the coefficient of friction of the tile was above the ANSI safety standard. Based on these

studies and plaintiff Worley's depositions, Young concluded that the tile floor at Cooper was the cause of the plaintiff's fall.

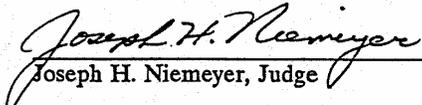
No one, including the plaintiff, who was present when plaintiff Worley fell or who arrived on the scene shortly thereafter noticed any wet and/or slippery substances on the tile floor or on the plaintiff's boots. When Cooper Tire employee Ebert inspected the parking lot and the floor, he did not see anything that could help explain why the plaintiff fell. The only evidence that there was a possible wet and/or slippery substance anywhere in or around the Lake Cascade's facility was the plaintiff's depositions that he saw what appeared to be oil on the parking lot as he exited his truck. However, the plaintiff also testified that he made sure to walk around this spot so as to avoid getting any of the substance on his boots. Other than this and the plaintiff's belief that he must have "picked something up" in the parking lot of the defendant's facility, there is no evidence before the Court to indicate that the floor was wet. Therefore, the evidence is clear that the plaintiff has failed to identify the cause of his accident and that defendant Cooper's tile floor was the proximate cause of his injury. No genuine issue of material fact is before the Court on these issues.

Accordingly, the movant for summary judgment, defendant Cooper, having met the burden of establishing (1) that there is no genuine issue of material fact as to the cause of plaintiff's fall at defendant's facility or that defendant's tile floor was the proximate cause of plaintiff's injury; (2) that the movant is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made which party is entitled to

have the evidence most strongly construed in its favor, it is hereby ORDERED, ADJUDGED, AND DECREED that defendant Cooper Tire and Rubber Company is entitled to summary judgment and accordingly, plaintiff's complaint is dismissed with costs assessed against the plaintiff.

The Court further finds that pursuant to Rule 54(B) of the Ohio Rules of Civil Procedure that this is a final judgment and that there is no just reason for delay.

All until further order of the Court.


Joseph H. Niemeyer, Judge

CERTIFICATE OF SERVICE

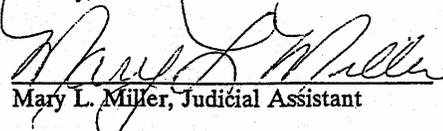
The undersigned does hereby certify that on the 25th day of May, 2000, a time-stamped copy of the foregoing was delivered to the following by ordinary U.S. mail.

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