[Cite as *Calabrese v. Romano's Macaroni Grill*, 2011-Ohio-451.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94385

GAIL CALABRESE, ET AL.

PLAINTIFFS-APPELLANTS

vs.

ROMANO'S MACARONI GRILL, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-655548

BEFORE: Celebrezze, J., Rocco, P.J., and Jones, J.

RELEASED AND JOURNALIZED: February 3, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiffs-appellants, Gail and Jeffrey Calabrese, appeal the trial court's decision granting summary judgment in favor of defendant-appellee, Brinker Ohio, Inc. d.b.a. Romano's Macaroni Grill. After careful review of the record and relevant case law, we affirm.

{¶ 2} On August 6, 2007, Gail Calabrese was dining at Romano's Macaroni Grill with several of her friends. After being seated in the back of the restaurant and ordering a drink, Gail excused herself to go to the restroom. As she was returning to her table, she slipped and fell in the

vestibule area just outside the restrooms, causing injuries to her wrist and head.

{¶ 3} On April 1, 2008, Gail and her husband Jeffrey filed suit against Romano's and Brinker Ohio, Inc. for negligence and loss of consortium. The parties eventually stipulated that Brinker Ohio, Inc. and Romano's Macaroni Grill are a single entity that should be referred to as "Brinker Ohio, Inc. d.b.a. Romano's Macaroni Grill"; thus, appellee will be referred to as "Romano's."

{¶ 4} Romano's filed a motion for summary judgment on May 5, 2008 arguing that Gail was unable to identify what caused her to fall; that she could not prove the "nature, size, or extent of the alleged defect"; and that she could not prove that Romano's had notice of any alleged defect.

{¶ 5} After the parties filed multiple briefs in opposition and reply briefs, the trial judge granted summary judgment in favor of Romano's on November 23, 2009.

Law and Analysis

{¶ 6} To overcome a summary judgment motion in a negligence action, a plaintiff must prove that the defendant breached a duty owed to the plaintiff and that this breach was the proximate cause of the plaintiff's injuries. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 1998-Ohio-602, 693 N.E.2d 271.

{¶ 7} It is undisputed that appellant was a business invitee at the time she entered Romano's. An owner of a premises owes a business invitee a duty of ordinary care; he must maintain the premises in a reasonably safe condition so that patrons are not "unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc.* (1985) 18 Ohio St.3d 203, 480 N.E.2d 474, citing *Campbell v. Hughes Provision Co.* (1950), 153 Ohio St. 9, 90 N.E.2d 694. This duty is predicated on the premise that a business owner has superior knowledge of dangerous conditions that may cause injury to those on the premises. *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 497, 693 N.E.2d 807, citing *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 227 N.E.2d 603. An owner is not, however, an insurer of the patron's safety. *Paschal*, supra, at 203, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus.

{¶ 8} In order to recover in a slip-and-fall case such as this, appellants must 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." *Johnson v. Wagner*

Provision Co. (1943), 141 Ohio St. 584, 589, 49 N.E.2d 925. We will address each of these possibilities in light of the evidence presented to determine if summary was properly granted.

Responsibility for the Hazard

{¶ 9} Appellants argue that Gail slipped and fell due to an accumulation of water on the floor in the vestibule area just outside the Romano's restrooms. According to appellants, this accumulation was caused by a defect in Romano's air conditioning system, which caused the ceiling vents to leak water into the restaurant. In support of this theory, appellants rely on the affidavits of appellants' friends: Barbara Gleason, Jane Denk, Connie Kuzmick, and Shirley Vilinsky. These individuals were dining with Gail on the date in question and testified in their affidavits that just after appellant left for the restroom, they noticed a problem with the restaurant's air conditioning system, which was causing the ceiling vents to drip water onto their table and floor. Appellants rely on this testimony, evidence that Romano's had their air conditioning system repaired one month after Gail's fall, and Gail's assertion that she must have slipped on water, to argue that the ceiling vent in the vestibule area must have been leaking water onto the floor. According to appellants, this means that Romano's was responsible for the hazard that caused Gail to fall.

{¶ 10} Appellants presented no affirmative evidence that the ceiling vent in the vestibule area was leaking water on August 6, 2007. The only evidence presented by appellants that Romano's may have had knowledge of a defect was the affidavits of Gail's

acquaintances stating that the vent above their table was leaking and an invoice from CLS Facility Services dated September 7, 2007 indicating that Romano's requested the air conditioner in the front and back of the store be repaired due to a leak.

{¶ 11} Brian Rowe, who was the assistant manager at Romano's and was working on the date in question, testified that he had no knowledge of the vent in the vestibule area ever leaking. Rowe also testified that he inspected the vestibule area just after Gail's fall and the floor was clean and dry.

{¶ 12} Gail testified in her deposition that she did not actually see water on the floor, but merely assumed that the floor was wet when she fell. Since appellants can only speculate that the vent in the vestibule area was leaking, they have failed to establish a genuine issue of material fact with regard to whether Romano's was responsible for the alleged hazard that caused Gail to fall.

Actual or Constructive Knowledge

{¶ 13} Appellants rely on the alleged leaky vents and the fact that Gail's acquaintances saw wet floor signs outside the restrooms to argue that Romano's had actual or constructive knowledge of the hazard. Despite appellants' contentions to the contrary, they have presented no evidence to establish a genuine issue of material fact in this regard.

{¶ 14} Gail testified in her deposition that she did not notice water on the floor when she fell, nor did she remember her clothes being wet or disheveled. Also, Rowe testified that

he has no recollection of the vent in the vestibule area ever leaking and, upon inspecting the area after Gail's fall, he found the floor to be dry and clean. The invoice from CLS only establishes that Romano's HVAC system was repaired over one month after Gail fell. Finally, appellants presented the affidavit testimony of Shirley Vilinsky and Barbara Gleason, both of whom testified that they observed wet floor signs in the vestibule area after Gail fell.

{¶ 15} Appellants rely on *Lopez ex rel. Kelly v. Cleveland Mun. School Dist.*, Cuyahoga App. No. 82438, 2003-Ohio-4665, to argue that genuine issues of material fact remain with regard to whether Romano's had notice of the leak. This reliance is misguided. In *Lopez*, a student fell at school and was seeking compensation for his injuries. Unlike the case at bar, the student in *Lopez* testified that school maintenance men had placed buckets where there had been a leak in the past and that leaks were observed in that area four to five months before the incident. Id. at ¶10. In this case, however, Gail did not see water when she fell. The only individuals who testified to seeing water in the vestibule area were Vilinsky and Gleason, who did not notice the water until after Gail's incident and did not testify that they noticed water dripping from the ceiling in that area. In addition, Rowe testified that, although Romano's had difficulty with their air conditioning system leaking in the dining room, no such leak was ever reported in the vestibule.

{¶ 16} Appellants also rely on *Tyrrell v. Invest. Assoc., Inc.* (1984), 16 Ohio App.3d 47, 474 N.E.2d 621. In *Tyrrell*, however, the plaintiff fell on an ice patch created by water

dripping off the defendant's canopy. This court reversed the trial court's grant of summary judgment, but only after noting that the defendant's employees knew that water dripped off the canopy, and thus they should have known that this water accumulation could freeze and create an ice patch. Id. at 49 ("There was no evidence that the drug store employees knew about the specific icy patch where plaintiff reportedly fell before the fall occurred. However, there was evidence that the employees knew about the hazard from the dripping canopy which periodically created that condition. The drug store was in a better position to foresee and prevent the resulting hazard than its business invitees. Therefore, the jury could reasonably find that the drug store failed to exercise reasonable care for its customers' safety.").

{¶ 17} In this case, Rowe testified that he had never received reports of a leak in the vestibule area. As such, we cannot find that Romano's was in a better position to foresee such a condition, if it existed, and prevent the resulting hazard to its patrons.

{¶ 18} Appellants correctly argue that they could use circumstantial evidence to prove that Romano's had constructive notice of the water on the floor. *Barna v. Randall Park Assoc.* (Nov. 21, 1991), Cuyahoga App. No. 59157. In *Barna*, the plaintiff slipped and fell due to a puddle created near a shopping center's fountain. Although this court reversed a directed verdict in favor of the shopping center, the evidence showed that the shopping center's employees observed a puddle of water in the same area several days prior to the plaintiff's injury.

{¶ 19} This court has recognized that "an injured party may not rely on mere speculation and conjecture to attempt to demonstrate that a foreign substance had been present for a sufficient period of time to give a shopkeeper or his employees constructive notice of it." *Barnes v. Univ. Hosp. of Cleveland* (July 21, 1994), Cuyahoga App. No. 66799.

{¶ 20} In this case, appellants rely on mere speculation to argue that the vent in the vestibule must have been leaking. They also rely on speculation to argue that, because Gail's acquaintances noticed wet floor signs and saw water on the floor in the vestibule after her fall, Romano's must have had constructive notice of the accumulation on the floor. Such conjecture is insufficient to create a genuine issue of material fact with regard to whether Romano's had constructive notice that water was on the floor in the vestibule area. *Wright v. K-Mart* (Mar. 12, 1987), Cuyahoga App. No. 51709 (holding that the fact that the shopkeeper and a repairman were in the area when plaintiff fell was insufficient to raise inference of knowledge of the hazard). Gail even testified in her deposition that she did not see wet floor signs in the vestibule. If anything, this evidence merely proves that Romano's knew of a water accumulation *after* Gail's fall.

{¶ 21} None of the evidence presented establishes the fact that Romano's or any of its employees had actual or constructive knowledge that the floor was wet, and thus had a duty to warn Gail of the danger. In fact, the testimony of Vilinsky and Gleason merely shows that Romano's learned that the floor may have been wet *after* Gail fell. Based on the evidence

presented by appellants, we see no genuine issue of material fact with regard to whether Romano's had knowledge of the alleged hazard in this case.

Failure to Warn

{¶ 22} Finally, appellants are unable to establish that Romano's had knowledge of the alleged defect for a sufficient period of time, and thus they had a duty to warn of the defect or remove it altogether. As stated above, appellants have not demonstrated that any defect existed. Appellants rely on mere speculation to argue that the vent in the vestibule's ceiling was leaking. Since appellants have not proven the existence of a defect, they have likewise failed to show that Romano's had a duty to warn against or remove that defect.

Conclusion

{¶ 23} While it is unfortunate that Gail was injured, the law requires more than an injury to substantiate a negligence claim in a slip-and-fall case. In order for her to recover from Romano's, she was required to show that Romano's was responsible for the liquid on the floor. Since appellant relied on mere speculation that a defect in Romano's air conditioning system resulted in the liquid on the floor, she has not met this burden. Construing the facts in a light most favorable to appellants, we find that no genuine issue of material fact existed, and Romano's was entitled to judgment as a matter of law. As such, the trial court's grant of summary judgment was proper in this case.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR