[Cite as *Pesci v. William Miller & Assoc.*, 2011-Ohio-6290.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Cynthia S. Pesci et al.,	:	
Plaintiffs-Appellants,	:	
		No. 10AP-800
v.	:	(C.P.C. No. 08CVC-10-14451)
William Miller and Associates, LLC c/o William M. Miller,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 8, 2011

Barkan Neff Handelman Meizlish, and *Stanford A. Meizlish*, for appellants.

Caborn & Butauski Co., *LPA*, and *Joseph A. Butauski*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by plaintiffs-appellants, Cynthia S. Pesci and Michael D. Pesci, from a decision and entry of the Franklin County Court of Common Pleas, granting summary judgment in favor of defendant-appellee, William Miller and Associates, LLC.

{¶2} On February 1, 2007, appellant Cynthia S. Pesci (individually "Pesci") slipped and fell immediately upon entering the main entrance of an office building where she worked. On October 9, 2008, appellants filed a complaint against appellee, the

owner and operator of the commercial building. The complaint alleged that appellee was negligent in failing to maintain the premises in a reasonably safe condition, and failing to give warning of latent or concealed perils.

{¶3} The following factual background is taken from the trial court's decision and entry ruling on the summary judgment motion. At the time of the accident, Pesci was an employee of Lincoln National Life ("Lincoln"). Lincoln's offices, located at 7650 Rivers Edge Drive, have been at this location since Pesci began her employment in the Fall of 2000. Pesci works at the office five to six days per week, and uses the main entrance approximately 95 percent of the time.

{¶4} Upon entering the first set of doors from the outside, the flooring (in February of 2007) consisted of marble tile for approximately 12 to 15 inches, and then inlaid carpet. This particular flooring existed for two to three years prior to Pesci's fall. Prior to the incident at issue, Pesci had previously slipped on the marble tile in the lobby a few times, but had never fallen. Pesci had never complained to the building owner or management about the condition of the floor, and she is unaware of anyone else ever falling.

{¶5} Pesci fell at the entrance of the building on February 1, 2007, upon returning to work from lunch. On the morning of the incident, Pesci used the main entrance when she entered the building to begin her work day; she also used the main entrance when she left the building for lunch. In her deposition, Pesci testified that it had snowed the days prior to her fall, and that snow from the parking lot had been tracked into the building throughout the days prior to her accident. Pesci admitted that water or slush had been tracked onto the marble flooring area on the day she fell, and that water or

slush was present when she entered work in the morning. Pesci denied having any difficulties with slipperiness that morning. According to Pesci, upon entering the building after returning from lunch, the floor was in the same condition as it had been when she arrived that morning and when she left for lunch.

{¶6} Pesci did not recall seeing any slush or a puddle of water on the floor at the time of her fall; she believes, however, that water or slush was present because she noticed the carpet was wet when she was lying on the floor, and because there was always moisture in this area from the doors and people walking inside the building. Pesci testified that the condition of the floor on the date she fell was not any different than any other time when she entered or exited the building when it was wet or snowy outside.

{¶7} During her deposition, Pesci stated that she did not know the reason for her fall except that she slipped on the floor. Pesci believes the floor was slippery due to either moisture on her feet or on the tile, and that the moisture from her feet could have resulted from her own shoes as she walked across the parking lot. Pesci stated that she had stepped in that same area of the floor countless times when it was wet prior to the incident without falling, and she was unable to say what was different on the date she fell.

{¶8} On July 10, 2009, appellee filed a motion for summary judgment. On January 15, 2010, appellants filed a memorandum contra appellee's motion for summary judgment. On August 2, 2010, the trial court filed a decision and entry granting summary judgment in favor of appellee. In its decision, the trial court determined that appellee had no duty to warn Pesci of the condition of the floor because the presence of moisture at the entranceway, resulting from slush or snow tracked inside due to the weather, was open and obvious.

{¶9} On appeal, appellants set forth the following single assignment of error for this court's review:

> The trial court erred in granting summary judgment in favor of Defendant-Appellee when the case presents genuine issues of material fact and Defendant-Appellee was not entitled to judgment as a matter of law.

{¶10} Under their single assignment of error, appellants assert that the trial court erred in granting summary judgment in favor of appellee because genuine issues of material fact remain. Appellants argue that the evidence indicates the risk of harm was not open or obvious to Pesci at the time she fell. Appellants further contend that appellee had superior knowledge of a dangerous condition, and that the trial court ignored the issue of whether the floor was unreasonably dangerous when wet.

{¶11} Pursuant to Civ.R. 56(C), "summary judgment shall be granted when the filings in the action, including depositions and affidavits, 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." This court's review of a trial court's decision granting summary judgment is de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.,* 95 Ohio St.3d 314, 2002-Ohio-2220, ¶24.

{¶12} In order to establish a negligence claim, a plaintiff must prove "(1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, and (3) that the breach of the duty proximately caused the plaintiff's injury." *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184. A business owner "ordinarily owes its invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers." *Hill v. W. Res.*

Catering, Ltd., 8th Dist. No. 93930, 2010-Ohio-2896, ¶10. See also *Cummin v. Image Mart, Inc.,* 10th Dist. No. 03AP-1284, 2004-Ohio-2840, ¶5 ("[t]he owner must warn the invitee of unreasonably dangerous latent or hidden conditions that the invitee cannot reasonably be expected to discover"). The liability of a business owner for failure to protect a customer from injuries on its premises is "generally predicated * * * on the owner's superior knowledge of the specific condition that caused the injury." *Kolsto v. Old Navy, Inc.,* 1st Dist. No. C-030739, 2004-Ohio-3502, ¶3, citing *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38; *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 497. However, a business owner is not an insurer of the safety of its customers. *Kolsto* at ¶3.

{¶13} As noted under the facts, the trial court determined that the hazard presented by water or slush tracked into the entryway of the building was open and obvious. Under Ohio law, "[t]he open-and-obvious doctrine provides that premises owners do not owe a duty to persons entering those premises regarding dangers that are open and obvious." Id. at ¶9, citing *Armstrong v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, ¶14. The rationale underlying the doctrine "is 'that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.' " *W. Res. Catering* at ¶9, quoting *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42. When applicable, "the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims. * * * It is the fact that the condition itself is so obvious that it

absolves the property owner from taking any further action to protect the plaintiff." Id. at ¶10.

{¶14} In general, "[o]pen-and-obvious dangers are those not hidden, concealed from view, or undiscoverable upon ordinary inspection." *Thompson v. Ohio State Univ. Physicians, Inc.,* 10th Dist. No. 10AP-612, 2011-Ohio-2270, ¶12, citing *Lydic v. Lowe's Cos., Inc.,* 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. However, an individual "does not need to observe the dangerous condition for it to be an 'open-and-obvious' condition under the law; rather, the determinative issue is whether the condition is observable." Id. at ¶12. Thus, "[e]ven in cases where the plaintiff did not actually notice the condition until after he or she fell, this court has found no duty where the plaintiff could have seen the condition if he or she had looked." Id.

{¶15} The Supreme Court of Ohio has held that, "[o]rdinarily, no liability attaches to a store owner or operator for injury to a patron who slips and falls on the store floor which has become wet and slippery by reason of water and slush tracked in from the outside by other patrons." *Boles v. Montgomery Ward & Co.* (1950), 153 Ohio St. 381, paragraph two of the syllabus. See also *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718, 723-24 ("[e]verybody knows that the hallways between the outside doors of * * * buildings and the elevators or business counters inside the building during a continued rainstorm are tracked all over by the wet feet of people coming from the wet sidewalks, and are thereby rendered more slippery than they otherwise would be").

{¶16} Various Ohio courts have held that tracked in water or snow near the entrance of a building constitutes an open and obvious condition for which liability does not attach. See *Blair v. Vandalia United Methodist Church*, 2d Dist. No. 24082, 2011-

Ohio-873, ¶43 (area just inside the entrance to the church, which was naturally wet from rain tracked in by members of the voting public, was not a latent or hidden defect, and defendant did not have a duty to post a warning for the open and obvious condition; by her own admission, plaintiff "was aware that the floor in and around the church entrance might be slippery because it was raining outside," and plaintiff "acknowledged as much in her deposition testimony"); *Towns v. WEA Midway, LLC,* 9th Dist. No. 06CA009013, 2007-Ohio-5121, ¶14 ("appellant knew it had been raining when she entered the mall and presumptively knew as a result of the rain that the floor might be wet and slippery. Therefore * * * appellee met its burden * * * to show the absence of a genuine issue of material fact as to whether the dampness on the floor where appellant slipped and fell was an open and obvious danger"); *Johnson v. Serv. Ctr. Invest. Trust* (Dec. 2, 1999), 8th Dist. No. 75256 (in light of weather conditions, plaintiff "should have been aware or anticipated the presence of water on the floor inside the mall because on a rainy day, one can expect to find water on the floor in such heavily trafficked areas"); *Lupica v. Kroger Co.* (May 29, 1992), 3d Dist. No. 9-91-48 (the fact that water during a rainstorm has blown into the front of a store on account of the opening of the door, and incoming shoppers carry in moisture on their feet, causing the floor inside the door to become more slippery than is the dry floor in other parts of the store, "will not give rise to a cause of action against the owner or lessee of the store in favor of a later incoming patron who slips or falls on such damp floor and is injured by such fall").

{¶17} In a case decided by this court, *Schmitt v. Duke Realty, LP*, 10th Dist. No. 04AP-251, 2005-Ohio-4245, the plaintiff slipped and fell as a result of water that had accumulated on the floor from rain tracked inside by individuals entering the building.

Under the facts of that case, the plaintiff slipped and fell 15 to 20 steps inside the door as opposed to slipping immediately inside the door, and we concluded that reasonable minds could differ with respect to the open and obvious nature of the water on the floor, thus finding summary judgment inappropriate. This court recognized, however, "[h]ad the water in this case been only a few steps inside the door of the building, we would agree with the trial court that the water, as a matter of law, was an open and obvious hazard," and that "reasonable minds could not differ about whether someone entering the building should be charged with the knowledge that the floor might be wet." Id. at ¶18.

{¶18} In the instant case, the record supports the trial court's findings that Pesci knew of the condition of the floor caused by slush and snow being tracked inside the entrance to the building. According to the deposition testimony of Pesci, water had been tracked onto the marble floor near the entranceway on the day she fell. Pesci noted that "it had snowed the days before," and there were "people going in and out * * * and moisture from what was dripping down, but there had been snow in the parking lot so whatever is tracked in and out throughout those days." (Pesci Depo. at 75.) Pesci stated that, when she returned from lunch on the day of the incident, "I was in the parking lot coming back through and people going in and out of the main entrance there, there's moisture there." (Pesci Depo. at 80.)

{¶19} When asked whether she observed water or slush on the area where she fell, Pesci responded: "I wasn't looking down at the floor, but no. Not that I recall." (Pesci Depo. at 76.) She stated, however, that she was aware there was moisture on the floor because "there was always constant moisture there from the doors and the runoff and people walking in and out." (Pesci Depo. at 78.) Pesci, who had worked at the building

approximately six years prior to the fall, was aware of this condition "[s]ince I worked in the building." (Pesci Depo. at 78.) Pesci stated that moisture on her shoes could have been from walking across the parking lot.

{¶20} Pesci further acknowledged that, inasmuch as water was always in the tile area during bad weather conditions, she would typically take extra care or caution when walking across the tiles because she knew they were slippery. According to Pesci, "we all knew that * * * you had to be careful." (Pesci Depo. at 94.)

{¶21} Thus, the evidence before the trial court on summary judgment indicated that Pesci was aware of moisture at the entranceway of the building from tracked in snow and slush, and she knew there was moisture on her shoes from walking through the parking lot. Pesci also acknowledged she would typically take more caution when traversing across the tiles because she knew they might be particularly slippery. Further, while Pesci stated she did not look down prior to falling, she was aware the tiles were wet at the time. See *Francill v. The Andersons, Inc.* (Feb. 15, 2001), 10th Dist. No. 00AP-835 (plaintiff's admission that, if she had looked down she probably would have observed water on floor demonstrated that the water was open and obvious hazard). Upon review, we find no error with the trial court's determination that no genuine issue of material fact remained as to whether the natural accumulation of water from melted snow, tracked into the immediate entrance of the building from outside, presented an open and obvious condition.

{¶22} Appellants further contend that appellee had superior knowledge of a hazardous condition presented by the marble flooring, citing to the deposition testimony of William Miller, the owner of the building. During his deposition, Miller stated that he had

received "a couple two or three phone calls that somebody had slipped" in the building prior to the incident at issue. (Miller Depo. at 34.) Miller stated that he had no information as to where the slips occurred, and the record contains no evidence of a previous fall or injury at the entrance.

{¶23} Appellants have also submitted, as supplemental authority, the case of *Donato v. Honey Baked Ham Co.* (Oct. 29, 1999), 11th Dist. No. 98-L-200, in which a plaintiff, while purchasing a ham at defendant's store, slipped and fell on the floor during inclement weather. The trial court granted summary judgment in favor of defendant, and on appeal the plaintiffs argued that summary judgment was inappropriate because reasonable minds could differ as to whether the alleged "unusually slippery" nature of defendant's floor was a latent or concealed peril. On appeal, the court reversed the trial court's grant of summary judgment, finding that the deposition testimony of a former manager of the store raised an issue for trial that the defendant may have had superior knowledge of a latent or concealed danger. Under the facts of *Donato,* the former manager provided deposition testimony that the floors were very slippery when wet, that he had "fallen a number of times," and that other "employees have fell" while mopping the floor. The witness further stated that the plaintiff was "not the first customer" who had fallen in the store.

{¶24} In the present case, such evidence of superior knowledge is lacking. As noted, while Miller received two or three reports of individuals slipping somewhere in the building, the facts in this case indicate no reports of any prior injuries or of anyone ever falling in the lobby area. Further, as found by the trial court, the facts of the instant case indicate that Pesci "had knowledge of the slipperiness of the floor, especially on rainy and

snowy days." Upon consideration of the deposition testimony of Miller, and in light of the testimony of Pesci, who indicated that she was aware that moisture was present on the floor when snow and rain occurred, and that she knew to exercise caution when walking on the floor, the record supports the trial court's finding that appellee's knowledge of the slippery condition was no greater than that of Pesci. See *Vandalia United Methodist Church* at ¶43 (even if defendant possessed prior knowledge of wet condition of entryway, its knowledge was no greater than that of plaintiff, who acknowledged that she was aware the floor at the entrance might be slippery because it was raining outside).

{¶25} In arguing that summary judgment was not proper, appellants further assert that Pesci fell because the flooring itself was unreasonably dangerous and that it did not conform to the Ohio Building Code or the American National Standards Institute ("ANSI"). In support, appellants point to an affidavit they submitted in opposition to the motion for summary judgment. In the affidavit, Michael Kauffman, a mechanical engineer, stated that he conducted slip-resistance testing on a sample of the flooring from the building in which Pesci slipped. Kauffman opined that the surface upon which Pesci fell was "unreasonably dangerous due to its slipperiness when wet," and that Pesci would not have been able to discover the unreasonably dangerous condition by means of an ordinary inspection. (Kauffman Affidavit at ¶18.) Kaufmann averred that his testing revealed an average dry slip-resistance, on a scale of 0 to 1.0, of 0.845, and an average wet slip-resistance of 0.215. According to Kaufmann, in the building industry, "it is generally accepted that a slip-resistance value of 0.5 is the minimum considered safe for pedestrian ambulation." (Kaufmann Affidavit at ¶16.)

{¶26} In addressing this issue, the trial court held that neither the Ohio Building Code nor the ANSI require a slip-resistance value of 0.5. The court noted that the Ohio Building Code only requires that walking surfaces have a slip-resistant surface, while the ANSI requires that walkway surfaces " 'be slip resistant under expected environmental conditions and use.' " The court cited Kaufmann's own testing as evidence that "the floor at issue complied with both the OBC and ANSI as it had slip resistance when wet and dry." The court further noted that Kaufmann failed to cite any materials or regulations that would require a value of 0.5 for wet slip resistance.

{¶27} The record supports the trial court's determination that there is no evidence of a violation of the Ohio Building Code. As noted by the court, the Ohio Building Code does not require a slip-resistance value of 0.5. Rather, the Ohio Building Code states: "Walking surfaces of the means of egress shall have a slip-resistant surface." Ohio Building Code (2007 ed.), 1003.4. By Kaufmann's own admission, the floor had a slip-resistant surface, including a dry-slip resistance value greater than 0.5.[1]

{¶28} Further, under Ohio law, "a violation of a building code does not constitute negligence per se and is not conclusive proof of a party's negligence." *Stein v. Honeybaked Ham Co.,* 9th Dist. No. 22904, 2006-Ohio-1490, ¶16, citing *Chambers* at 568. Ohio courts have held that summary judgment may be granted in cases where building code violations are open and obvious "because the open-and-obvious nature of the defect obviates the premises owner's duty to warn." *Johnson-Steven v. Broadway Sunoco,* 8th Dist. No. 89544, 2008-Ohio-691, ¶15.

[1] Kaufmann did not opine that industry standard required a minimum slip resistance of 0.5 when wet.

{¶29} Here, we agree with the trial court that the affidavit of Kauffman does not support a finding that appellee failed to comply with the provisions of the Ohio Building Code or the ANSI. We further note that the conclusory allegation of Kaufmann, that Pesci could not have reasonably discovered the unreasonably dangerous condition, is at odds with Pesci's own deposition testimony that (1) she was aware of the presence of moisture on the floor; (2) she did not need anyone to tell her that the tiles were slippery; and (3) she knew to take more caution when traversing that area of the floor. Even accepting that appellants could show a violation of the building code, as previously discussed, the entranceway presented an open and obvious condition, and appellee did not possess superior knowledge of the hazard. See *Johnson-Steven* at ¶16 ("[b]ecause the condition that caused her fall was open and obvious, despite any alleged Building Code violation, the trial court properly granted summary judgment to [defendant]").

{¶30} Because we agree with the trial court that no genuine question of material fact exists as to whether the condition of the entranceway presented an open and obvious condition, or whether appellee had superior knowledge of an allegedly dangerous condition, we conclude that the trial court properly granted summary judgment in favor of appellee. Accordingly, appellants' sole assignment of error is not well-taken.

{¶31} Based upon the foregoing, appellants' single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.

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