[Cite as *Brymer v. Giant Eagle, Inc.*, 2011-Ohio-4022.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JENNIFER BRYMER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2010-L-134
- vs -	:	
		8-12-11
GIANT EAGLE, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 10 CV 000508.

Judgment: Affirmed.

Michael J. Feldman, Lallo & Feldman Co., L.P.A., Interstate Square Building I, 4230 State Route 306, Suite 240, Willoughby, OH 44094 (For Plaintiff-Appellant).

Shana A. Samson, Rademaker, Matty, McClelland & Greve, L.L.C., 55 Public Square, Suite 1775, Cleveland, OH 44113-1901 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Jennifer Brymer appeals from a judgment of the Lake County Common Pleas Court which granted summary judgment in favor of Giant Eagle, Inc. (Giant Eagle). Ms. Brymer filed a negligence action against Giant Eagle after she slipped on a piece of wax paper in front of the store's bakery. For the following reasons, we affirm the judgment of the trial court.

{¶2} **Substantive Facts and Procedural History**

{¶3} While shopping with her husband at a Giant Eagle store in Painesville, Ohio, Ms. Brymer slipped on a piece of wax paper and fell in front of the store's bakery. She filed the instant complaint, alleging Giant Eagle was negligent in creating a hazard on its premises and causing her to sustain serious injury. Giant Eagle filed a motion for summary judgment, which the trial court granted. Ms. Brymer now appeals from that judgment, presenting the following assignment of error for our review:

{¶4} "The trial court committed prejudicial error in granting defendant-appellee's motion for summary judgment because there are facts that remain to be litigated."

{¶5} **Standard of Review**

{¶6} We review de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id. citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶7} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element

of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment 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 Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶8} "In order to establish an actionable claim for negligence, the plaintiff must establish: (1) the defendant owed a duty to him; (2) the defendant breached that duty; (3) the defendant's breach of duty proximately caused his injury; and (4) he suffered damages." *Frano v. Red Robin Int'l., Inc.*, 181 Ohio App.3d 13, 2009-Ohio-685, ¶17, citing *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565; *Bond v. Mathias* (Mar. 17, 1995), 11th Dist. No. 94-T-5081, 1995 Ohio App. LEXIS 979, *6.

{¶9} **Duty of Care Owed to Business Invitee**

{¶10} Ms. Brymer was a business invitee on the premises of Giant Eagle. "A shopkeeper owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio

St.3d 203, 203, citing *Campbell v. Hughes Provision Co.* (1950), 153 Ohio St. 9. "In Ohio, the owner of a store or some other similar place of business has a duty to exercise ordinary care and to protect customers by maintaining the premises in a safe condition. This duty includes the obligation to maintain the premises in a reasonably safe condition and to warn invitees of any latent defects of which the owner has or should have knowledge." *Kornowski v. Chester Props., Inc.* (June 30, 2000), 11th Dist. No. 99-G-2221, 2000 Ohio App. LEXIS 3001, *8-9 (citations omitted).

{¶11} "'The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use.'" *Ferguson v. Eastwood Mall* (Dec. 4, 1998), 11th Dist. No. 97-T-0215, 1998 Ohio App. LEXIS 5823, *4, quoting *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 52, quoting Prosser on Torts (4 Ed.), 392-393 (1971).

{¶12} Finally, the courts have stressed that "[t]he mere happening of an accident gives rise to no presumption of negligence, and where one is accidently injured while he is a business guest upon the premises of another, the burden is upon the person injured to show negligence upon the part of such other before he can recover damages from such other." *Parras v. Standard Oil Co.* (1953), 160 Ohio St. 315, paragraph one of syllabus.

{¶13} **Proof of Liability in Slip-and-Fall Cases Involving a Foreign Item on the Floor**

{¶14} Specifically, where a business invitee slips on a foreign substance or item on the floor, the case law is well-settled that plaintiff must establish one of the following three conditions in order to prevail: (1) that "the defendant through its officers or employees was responsible for the hazard complained of"; (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 reasonable to justify the inference that the failure to warn against it or remove it was attributable to a want of ordinary care." *Day v. Finast Supermarkets* (May 14, 1999), 11th Dist. No. 97-T-0229, 1999 Ohio App. LEXIS 2192, *2-3, citing *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, 589. See, also, *Combs v. First National Supermarkets, Inc.* (1995), 105 Ohio App.3d 27; *Perry v. Harvard Marathon, Inc.*, 8th Dist. No. 86633, 2006-Ohio-2592, ¶17-21; *Kolsto v. Old Navy, Inc.*, 1st Dist. No. C-030739, 2004-Ohio-3502, ¶4; *Catanzano v. The Kroger Company* (Jan. 11, 1995), 1st Dist. No. C-930761, 1995 Ohio App. LEXIS 22, *6.

{¶15} **The Instant Case**

{¶16} In this case, in its motion for summary judgment, Giant Eagle submitted deposition testimony showing its employees monitor the floors for cleanliness. A store manager, on duty the evening of the incident, testified that the store's porter department personnel are trained to go through certain areas of the store to look for debris on the floor, and furthermore, an incentive program had been instituted to encourage the employees to remove debris from the floor. When an employee is observed cleaning up debris off the floor of their own volition, the employee would be given a ticket entitling

her to monthly drawings for gift cards. The store's bakery head clerk testified that the bakery clerks would pick up items left on the floor around the bakery area whenever they saw them. Under the incentive program, she would issue a "safety coupon" which goes into drawings for $25 gift cards. Because of the incentives, employees are eager to pick things up off the floor. The bakery head clerk also testified there is an employee from the store's cleaning crew whose job it is to look for debris on the floor; in addition, small garbage cans are placed around displays of food samples for disposal of garbage.

{¶17} With this deposition testimony, Giant Eagle satisfied its initial burden of demonstrating the absence of a genuine issue of fact regarding the store's exercise of ordinary care in maintaining its premises in a reasonably safe condition and preventing its customers from being unnecessarily or unreasonably exposed to danger.

{¶18} Ms. Brymer failed to carry her reciprocal burden demonstrating the existence of a genuine issue for trial. In order to prove Giant Eagle's liability in this slip-and-fall case involving a foreign item on the floor, she must establish one of the three conditions precedent as outlined in *Johnson* and *Combs*. Ms. Brymer did not present evidence to show the store or its employees created a dangerous condition by placing the wax paper on the floor. No one, including Ms. Brymer, knew how the wax paper ended up on the floor. Moreover, Ms. Brymer did not allege Giant Eagle had actual knowledge of the presence of the wax paper.

{¶19} **Constructive Notice**

{¶20} Finally, Ms. Brymer failed to establish that Giant Eagle had constructive notice of the presence of the wax paper on the floor. "[C]onstructive notice requires proof by direct or circumstantial evidence that the store in the exercise of ordinary care had or should have had notice of the condition or foreign substance because of the

length of time of its presence on the floor." *Catanzano* at *6, citing *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31; *Hardgrove v. Isaly Dairy Co*. (1942), 139 Ohio St. 641; *J.C. Penny Co. v. Robison* (1934), 128 Ohio St. 626. To demonstrate plaintiff had constructive notice, plaintiff must show that the "danger had existed for a sufficient length of time reasonable to justify the inference that the failure to warn against it or remove it was attributable to a want of ordinary care." *Finast Supermarkets* at *3. "'The standard for determining sufficient time to enable the exercise of ordinary care requires evidence of how long the hazard existed.'" *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, ¶10, quoting *Combs at* 30, citing *Anaple v. The Standard Oil Co.* (1955), 162 Ohio St. 537, 541.

{¶21} In *Finast Supermarkets*, plaintiff fell in the produce department and a baggage leaf was found on the floor next to where she fell. She claimed she must have slipped on the leaf and her attention was distracted from the floor by the various produce displays. This court affirmed summary judgment in favor of the store because, among other reasons, plaintiff could not present evidence showing how long the leaf had been on the floor and thus failed to establish constructive notice. Id. at *4. Similarly here, Ms. Brymer could not present evidence as to how long the wax paper had been on the floor before the incident or any evidence as to the condition of the wax paper (i.e. was it dirty or tattered from which one could infer that the paper had been on the floor for some time). Thus, she failed to show Giant Eagle had constructive notice of the wax paper's existence, which would have justified an inference that the store failed to exercise ordinary care to remove it or warn against it.

{¶22} Consequently, Ms. Brymer failed to present evidence creating a genuine issue of material fact regarding any of the three conditions precedent to recovery in her slip-and-fall case involving a foreign item on the floor.

{¶23} **Plaintiff's Allegations**

{¶24} Ms. Brymer agrees that the *Johnson* standard applies in this case. However, she insists the evidence she presented has created genuine issues of material fact regarding whether she satisfied one of the three conditions. She points to her allegations that Giant Eagle "was negligent in its failure to have an enforceable policy to clean debris off the floors and that it did not have sufficient garbage cans throughout the store to remedy the foreseeably dangerous condition of wax paper in its aisles."

{¶25} To support these allegations, Ms. Brymer cites deposition testimony from the bakery department head clerk and the store manager indicating the store often places sample food in wax paper, yet there is no store policy regarding cleaning the garbage cans near the counters and sample food stands. She also cites their testimony showing the employees are expected to pick up debris when they see it on an as-needed basis, but there is no regularly-scheduled inspection to monitor the food areas for debris.

{¶26} The broad allegations that Giant Eagle has no enforceable store policy to clean debris off the floor and that it does not place sufficient garbage cans throughout the store, even if supported by testimony, do not go to any of the three conditions precedent required for proving negligence in a slip-and-fall case involving an item on the floor. These allegations by Ms. Brymer simply do not relate to whether Giant Eagle's employees placed the wax paper on the floor; whether Giant Eagle had actual notice of

the wax paper's presence on the floor; or whether the wax paper was on the floor long enough for the store to have constructive notice of its presence. Therefore, Ms. Brymer's allegations do not create a genuine issue of material fact regarding the elements of a slip-and-fall case involving a foreign item on the floor.

{¶27} **Conclusion**

{¶28} As the moving party, Giant Eagle satisfied its initial burden of identifying the portions of the record demonstrating the absence of a genuine issue of fact on Ms. Brymer's negligence claim. She, however, failed to carry the reciprocal burden setting forth specific facts showing there is a genuine issue for trial. Therefore, the trial court properly entered summary judgment in favor of Giant Eagle. The assignment of error is without merit.

{¶29} Judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.