[Cite as *Tholen v. Wal-Mart,* 2010-Ohio-3256.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

DIANE THOLEN,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-03-090
	:	O P I N I O N
- vs -		7/12/2010
	:	
WAL-MART,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-01-0398

McIntosh & McIntosh, A. Brian McIntosh, 1136 St. Gregory Street, Suite 100, Cincinnati, Ohio 45202, for plaintiff-appellant

Reminger Co., L.P.A., Robert W. Hojnoski, 525 Vine Street, Suite 1700, Cincinnati, Ohio 45202, for defendant-appellee

YOUNG, P.J.

{¶1} Plaintiff-appellant, Diane Tholen, appeals the decision of the Butler County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Wal-Mart. We affirm the decision of the trial court.

{¶2} On April 24, 2007, Tholen entered a Wal-Mart located on the west side of Hamilton, Ohio to visit the vision center located inside the store. Tholen was

familiar with the Wal-Mart, and stated during her deposition that she frequented the store approximately once each week for five years. Tholen entered the store through the front door and was walking in front of a row of cash registers when she slipped on "a couple of french fries on the floor" and fell.

{¶3} According to Tholen's deposition, immediately before she fell, she passed a McDonald's located at the front of the Wal-Mart. Tholen also stated that she did not see the french fries before she fell, but that they were visible when she got up. According to her deposition, Tholen had "no idea" how long the french fries had been on the floor before she fell.

{¶4} Immediately after she fell, a Wal-Mart cashier and another customer helped Tholen up and asked if she was injured. Tholen responded that she was not injured, that she did not need to see a manager, and that she did not wish to file an injury report. However, during her visit to the vision center, Tholen felt pain in her arm and hand, and eventually requested to see the manager in order to fill out an injury report. After filling out the report with the help of Wal-Mart's manager, Tholen drove herself home and eventually received medical attention and had surgery to repair a torn rotator cuff.

{¶5} In January 2008, Tholen filed a personal injury complaint claiming that Wal-Mart was negligent in failing to keep the area free from peril, and that the peril constituted an unreasonably dangerous condition that proximately caused her injury. Wal-Mart moved for summary judgment, but Tholen did not file a memorandum in opposition. The trial court granted Wal-Mart's motion, and Tholen later filed a motion to set aside the entry granting summary judgment, claiming that Wal-Mart failed to provide a security video that showed her fall. The trial court overruled Tholen's

motion, finding that Wal-Mart did not engage in any misconduct in not providing the video, and that even with the video, Tholen did not have a meritorious claim. Tholen now appeals the trial court's decision to grant summary judgment to Wal-Mart, raising the following assignment of error.

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT BASED SOLELY ON APPELLANT'S LACK OF RESPONSE."

{¶7} In her assignment of error, Tholen argues that the trial court erred in granting summary judgment in favor of Wal-Mart. This argument lacks merit.

{¶8} Initially, we note that Wal-Mart moved this court to dismiss the appeal because Tholen filed an appellate brief that does not comport with several requirements of App.R. 16(A) or the local rules of this court. However, it is "a basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3. Although the brief is nonconforming, we have decided to exercise our discretion and consider Tholen's appeal, and now decide this case on its merits.

{¶9} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R. 56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, that being adverse to the non-moving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day*

Warehousing Co. (1978), 54 Ohio St.2d 64.

{¶10} Tholen essentially argues that the trial court granted Wal-Mart's motion based solely on the fact that she failed to file a memorandum in opposition. In support of her argument that the trial court erred by doing so, Tholen cites *Morris v. Ohio Casualty Ins. Co.,* (1988), 35 Ohio St.3d 45, 47, which states that "it might appear that the non-moving party must respond to an adverse motion for summary judgment or face the entry of judgment against him. However, this Court has stated that even where the non-moving party fails completely to respond to the motion, summary judgment is improper * * *." The court went on to explain that "the lack of response by the opposing party cannot, of itself, mandate the granting of summary judgment." Id.

{¶11} However, Tholen truncated the quotation from *Morris* and read in isolation the statement that summary judgment is improper where the nonmoving party fails completely to respond to a motion for summary judgment. The rest of the supreme court's holding states that "summary judgment is improper *unless* reasonable minds can come to only one conclusion and that conclusion is adverse to the nonmoving party." Id. (Emphasis added.) Therefore, even without a response from Tholen, summary judgment is proper if no genuine issues of material fact remain to be litigated, Wal-Mart is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion adverse to Tholen.

{¶12} Despite Tholen's argument that the trial court based its entire decision on the fact that she failed to file a memorandum in opposition, the trial court's decision and entry references Wal-Mart's arguments and the appropriate legal standard regarding summary judgment. By reviewing the applicable facts and law,

the trial court did not grant summary judgment based only upon the fact that Tholen failed to file a memorandum in opposition. After reviewing the record, we find that the trial court properly granted summary judgment to Wal-Mart.

{¶13} In order to establish an actionable negligence claim, the plaintiff must show "the existence of a duty, a breach of that duty, and an injury proximately resulting therefrom." *Hunter v. Wal-Mart Stores, Inc.,* Clinton App. No. CA2001-10-035, 2002-Ohio-2604, ¶16. Specific to the breach element in a slip-and-fall case, "in order to avoid summary judgment * * * an appellant must present evidence showing one of the following: (1) that one or more of the appellees was responsible for placing the hazard in her path; (2) that one or more of the appellees had actual notice of the hazard and failed to give appellant adequate notice of its presence or remove it promptly; or (3) that the hazard had existed for a sufficient length of time as to warrant the imposition of constructive notice, i.e., the hazard should have been found by one or more of the appellees." *Baker v. Mejier Stores LP*, Warren App. No. CA2008-11-136, 2009-Ohio-4681, ¶30.

{¶14} Without filing an affidavit or memorandum in opposition to Wal-Mart's motion for summary judgment, Tholen did not set forth any evidence or facts specific to Wal-Mart's breach of duty. "A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, 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 on the essential element(s) of the nonmoving party's claims. * * * [I]f the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if

the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Notwithstanding the fact that Tholen did not file a brief or affidavit to help meet her reciprocal burden, her deposition testimony establishes that she is unable to prove any of the three above-mentioned factors specific to breach in a slip-and-fall case.

{¶15} Tholen testified that she fell "just in front of the McDonald's" located in the Wal-Mart, and that she was unaware that the french fries were on the floor until after she fell. When asked if she knew how long the fries had been on the floor, she replied, "I had no idea." Wal-Mart's counsel then asked, "do you have any reason to believe that any of the Wal-Mart employees or McDonald's employees were aware of the fries being at that location before your fall?" Tholen stated again, "I have no idea." Tholen went on to testify that none of the Wal-Mart employees indicated that they were aware of the french fries, or expressed an intention to clean them up.

{¶16} From this testimony, it is apparent that Wal-Mart did not have actual or constructive knowledge of any hazardous condition, and that there is no evidence to establish the length of time the french fries had been on the floor before Tholen's fall. See *Community Mut. Ins. Co. v. Cafaro Co.* (July 19, 1996), Trumbull App. Nos. 95-T-5337, 95-T-5350, 1996 WL 649164 at *2 (affirming summary judgment where appellant "failed to raise a genuine issue of fact as to whether the french fry had been on the floor for a sufficient length of time so that appellee should have had notice of its existence"). Even construing the evidence in a light most favorable to Tholen, reasonable minds could not conclude how long the french fries were the on floor, and thus whether they were there long enough to "justify an inference that defendant's

failure to remove it or warn customers was negligent." *Hunter* at ¶30, citing *Johnson v. Wager Provision Co*. (1943), 141 Ohio St. 584, 589.

{¶17} Based on Tholen's deposition testimony, no genuine issues of material fact remain, and her negligence claim fails. Because Tholen failed to present sufficient evidence that would preclude summary judgment for Wal-Mart, we find no error in the trial court's decision. Tholen's single assignment of error is overruled.

{¶18} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.