[Cite as *Occhipinti v. Bed Bath & Beyond, Inc.*, 2011-Ohio-2588.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

SANDRA OCCHIPINTI, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2010-L-109**
- vs -	:	
BED BATH & BEYOND, INC.,	:	5/27/11
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 002687.

Judgment: Affirmed.

Neil R. Wilson, Neil R. Wilson Co., L.P.A., FirstMerit Bank Building, 56 Liberty Street, #205, Painesville, OH 44077 (For Plaintiffs-Appellants).

Gregory G. Guice, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115-1093 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} This is an accelerated-calendar appeal, taken from a final judgment of the Lake County Court of Common Pleas. Appellants, Carmen and Sandra Occhipinti, husband and wife, seek reversal of the trial court's decision granting summary judgment in favor of appellee, Bed Bath & Beyond, Inc., on her negligence claim and his derivative claim for loss of consortium. As the sole basis for their appeal, appellants assert that the trial court erred in not applying the correct legal standard for determining whether appellee had acted negligently in maintaining its store premises.

{¶2} Appellee is a private corporation licensed to conduct business in the state of Ohio. As its primary business dealing, appellee owns and operates a chain of retail stores. One of the stores is located on Mentor Avenue in Mentor, Lake County, Ohio.

{¶3} Sandra Occhipinti is a Mentor resident who is the sole proprietor of a small kitchen/bath design company. For both business and personal reasons, Ms. Occhipinti had visited and made purchases at appellee's Mentor store on a number of occasions prior to the event leading to the underlying litigation.

{¶4} On August 26, 2007, Ms. Occhipinti went by herself to the Mentor store to purchase a storage item for her daughter. After browsing in the store for only five minutes, she saw the item she wanted in a box which was located on a shelf a few inches above her head. Directly in front of the shelf was a round metal bar that ran vertically and would normally be attached to the sides of the shelving structure.

{¶5} As Ms. Occhipinti grabbed the box and attempted to bring it down from the shelf, the metal bar became dislodged and fell unto the bridge of her nose. As a result, Ms. Occhipinti suffered a laceration to her face which required an immediate trip to a local emergency room and numerous follow-up visits to various doctors.

{¶6} Approximately twenty-three months after the incident, appellants instituted a civil negligence action against appellee, seeking general damages in excess of $25,000. Appellants asserted that appellee had acted negligently in failing to maintain the store premises in a reasonably safe condition. Appellants further alleged that appellee negligently failed to warn Ms. Occhipinti of the dangerous condition in an area of the store where customers were commonly allowed to go.

{¶7} After answering the complaint and taking the deposition of Ms. Occhipinti,

appellee moved the trial court for summary judgment *as to all aspects of the complaint.* In asserting that it had not violated any duty of care in regard to Ms. Occhipinti, appellee first argued that appellants could not provide any evidence indicating that the metal bar on the shelf posed an unreasonable danger at the time of the incident. In support of this point, appellee noted that, during her deposition, Ms. Occhipinti was unable to give any explanation concerning why the bar had fallen, and stated that she may have touched the bar while bringing down the box. Second, appellee maintained that, even if an unreasonably dangerous condition existed, it could not be held responsible because there was nothing to show that it had had actual or constructive knowledge of the condition. As to this point, the motion emphasized that, since Ms. Occhipinti did not know why the metal bar became dislodged, appellants could not prove that appellee had prior knowledge that the bar might fall.

{¶8} The only evidence appellee presented in support of its summary judgment motion was a complete copy of Ms. Occhipinti's deposition. In responding to the dispositive motion, appellants did not submit any new materials, but instead also relied upon the testimony in the deposition.

{¶9} As the substance of their response brief, appellants essentially contended that, since the metal bar had come down while Ms. Occhipinti was simply attempting to grab a box on the shelf, logic dictates that she had been exposed to an unreasonable danger. In this regard, appellants stated that any defect in the bar or its attachment to the shelving structure had not been observable, and that she had not done anything to harm or dislodge the bar. They also emphasized that, prior to the incident, the shelf and bar had been under appellee's exclusive control.

{¶10} After appellee filed a reply brief, the trial court granted appellee's motion for summary judgment, and final judgment was issued against appellants as to their entire complaint. In holding that appellants had failed to establish a breach of appellee's duty of ordinary care in maintaining the store premises, the trial court first concluded that no evidence had been presented showing that appellee or its employees created or caused the condition allowing the metal bar to dislodge and fall. Second, the trial court concluded that there was no evidence that appellee had actual or constructive knowledge that the bar was unsecure and posed a danger.

{¶11} In appealing the summary judgment ruling, appellant raises the following assignment of error for review:

{¶12} "The trial court erred in granting the motion of the appellee for summary judgment and dismissing [appellants'] complaint."

{¶13} In contending that the order of summary judgment was inappropriate, appellants submit that the trial court applied an improper standard for deciding if a breach of duty had occurred under the facts of this action. According to appellants, the trial court predicated its ruling upon the finding that the problem with the metal bar was an open and obvious danger from which Ms. Occhipinti should have been able to protect herself. They maintain that the premise of this analysis was incorrect because Ms. Occhipinti could not have readily detected the defect in the placement of the bar. In light of this, appellants further argue that the trial court should have focused its analysis upon the fact that Ms. Occhipinti did nothing to cause the bar to fall.

{¶14} Upon reviewing the substance of the appealed judgment, appellants have mischaracterized the basis of the trial court's ruling. Although the second paragraph of

the final judgment referred to the "open and obvious" doctrine, the trial court never made an express finding on that point. Instead, the determination that no breach of duty had occurred was based upon the undisputed fact that appellee and its employees had not created, and did not have any knowledge of, any hazard related to the metal bar. After considering this analysis in light of our prior precedent regarding this issue, we conclude that the trial court followed the appropriate standard for deciding the controlling legal question in this case.

{¶15} To prevail on a civil negligence claim, a plaintiff must prove: (1) the defendant owed a duty of care; (2) the defendant breached that duty; (3) the breach was the proximate cause of injury; and (4) she sustained damages. *Furano v. Sunrise Inn of Warren, Inc.*, 11th Dist. No. 2008-T-0132, 2009-Ohio-3150, at ¶11. Regarding the first element of such a claim, this court has emphasized that "'[t]he existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability.'" *Studniarz v. Sears Roebuck & Co.*, 11th Dist. No. 2009-L-159, 2010-Ohio-3049, at ¶18, quoting *Adelman v. Timman* (1996), 117 Ohio App.3d 544, 549. In addition, we have held that the determination of the existence of a duty is a question of law based upon the facts of the case. *Studniarz*, 2010-Ohio-3049, at ¶19.

{¶16} Under the undisputed facts of our case, Ms. Occhipinti was a customer in appellee's retail store when the underlying incident took place. Under Ohio law, it is well-established that the owner of a store owes a certain degree of care to a business invitee:

{¶17} "A shopkeeper possesses the duty to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition, so that the business invitee

will not be unreasonably or unnecessarily exposed to danger. *** However, the shopkeeper is not an insurer of the invitees' safety. *** Although a shopkeeper must warn its invitees of latent or concealed dangers if the shopkeeper knows or has reason to know of the hidden dangers, a shopkeeper is not expected to warn invitees of dangers that are obvious and apparent. *** It is only where it is shown that the owner had superior knowledge of the particular danger which caused the injury that liability attaches, because in such a case the invitee may not reasonably be expected to protect herself from a risk she cannot fully appreciate. ***." (Citations omitted.) *Gartland v. Garcia*, 153 Ohio App.3d 523, 2003-Ohio-3277, at ¶7.

{¶18} In expounding upon the basic scope of a shopkeeper's duty of care to its customers, this court has stated:

{¶19} "'The [owner of a store] 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 [owner] must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the [owner] 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).

{¶20} "Moreover, a duty to warn only arises where there are actual dangers on

the premises and the owner's knowledge of those dangers is superior to that of the business invitee. *Kornowski [v. Chester Props., Inc.*, 11th Dist. No. 99-G-2221, 2000 Ohio App. LEXIS 3001,] at *13, citing *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 359, ***." *Studniarz*, 2010-Ohio-3049, at ¶23-24.

{¶21} In *Studniarz*, the plaintiff was injured while shopping in a retail store when the cross-bar on a clothes hanger suddenly sprang open and caught him in the eye. In upholding the granting of summary judgment in favor of the retailer, the *Studniarz* court began its analysis by restating, as quoted above, the governing law for the duty of care as to a business invitee. Applying that law to the facts of that case, the *Studniarz* court noted that, in responding to the summary judgment motion, the plaintiff failed to submit any evidence showing that: (1) the retailer received prior complaints regarding that type of hanger; (2) the retailer was otherwise aware that the hanger could be dangerous; or (3) a reasonable inspection would have disclosed the potential hazard posed by the hanger. Based upon this, it held that, since the plaintiff failed to demonstrate that the retailer had superior knowledge concerning the threat posed by the hanger, the retailer had no duty to warn its customers.[1]

{¶22} This court employed a similar analysis in *Johnson v. Marc Glassman, Inc.*, 11th Dist. No 2005-L-107, 2006-Ohio-1790. The plaintiff in *Johnson* slipped on a clear liquid while walking down an aisle in a retail store. In appealing the entry of summary judgment in favor of the store owner on his negligence complaint, the plaintiff asserted that a breach of the duty could be inferred from the fact that a mop and bucket were

1. As a separate basis for its holding, the *Studniarz* court also concluded that the retailer had no duty to warn because it was not foreseeable that the bar at issue would swing upward when a clip on the hanger accidentally became unclasped. Id. at ¶28-29.

found in an aisle adjacent to where he had slipped. In holding that the foregoing was not sufficient to create a genuine issue of material fact, this court concluded that the mere presence of the mop and bucket was too uncertain or speculative to raise a reasonable inference. As part of our analysis of this point, this court stated:

{¶23} "'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.' *Estate of Mealy v. Sudheendra*, 11th Dist. No. 2003-T-0065, 2004-Ohio-3505, at ¶31, citing *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 67-68, ***. The fact that a party slipped and fell on the defendant's premises is, of itself, insufficient to create an inference that the premises are unsafe or to establish negligence. There must be some evidence showing that a negligent act or omission of the defendant caused the plaintiff to slip and fall. Id., 2004-Ohio-3505, at ¶30, citing *Green v. Castronova* (1966), 9 Ohio App.2d 156, 162, ***." *Johnson*, 2006-Ohio-1790, at ¶19.

{¶24} After addressing the "inference" issue, the *Johnson* court then considered whether the remainder of the evidentiary materials demonstrated that the owner of the store owed any duty to the plaintiff regarding the liquid on the floor. In holding that there had been no duty to warn, the *Johnson* court based its decision upon the fact that the plaintiff "offered no evidence that [the store] caused the puddle on the floor, that it had any awareness that the puddle existed, or that the puddle had existed for a sufficient amount of time that constructive notice of the puddle could be imputed to [the store]." Id. at ¶37.

{¶25} Despite the fact that *Johnson* involved a "slip and fall" situation, it must be emphasized that the outcome of this court's legal analysis did not turn upon whether the hazard created by the liquid was open and obvious. Instead, like the legal discussion in *Studniarz*, the *Johnson* analysis focused upon whether the shopkeeper had superior knowledge of the dangerous condition, either by actually creating the problem or by having actual or constructive notice of the problem. Accordingly, *Studniarz* and *Johnson* stand for the proposition that when the existence of a defect or dangerous condition cannot be readily ascertained, a shopkeeper can only be held liable for an injury if the plaintiff produces evidence that the shopkeeper created, or had actual or constructive knowledge of, the condition. Absent the above, there is no superior knowledge to relay to the customer.

{¶26} As was noted above, appellants tried to argue that the mere fact that the bar fell upon Ms. Occhipinti was sufficient to raise a genuine issue of fact that appellee or its employees were negligent. However, if this type of standard were followed, a shopkeeper would essentially become the insurer of an invitee's safety as to all potential problems. Under the governing case law, liability cannot be based solely on the fact that an accident has occurred.

{¶27} Our review of the limited materials before the trial court readily shows that no evidence was presented indicating that appellee or its employees created or had actual or constructive notice of the condition of the metal bar. Accordingly, the record demonstrates that appellants did not produce evidence that appellee had superior knowledge as to a potential threat posed by the metal bar. Under such circumstances, appellee did not owe Ms. Occhipinti any additional duty of care in relation to her use of

the shelving structure and the metal bar.

{¶28} As a separate point, appellants contend that the trial court erred in failing to apply the doctrine of res ipsa loquitor. Specifically, they state that the circumstantial evidence in the case would have supported the inference that appellee had acted negligently. As to this point, appellants maintain that it must be assumed that the shelving structure was under the exclusive control of appellee.

{¶29} In support of their "res ipsa loquitor" argument, appellants cite the opinion of the Fourth Appellate District in *Hansen v. Wal-Mart Stores, Inc.*, 4th Dist. No. 07CA2990, 2008-Ohio-2477. However, as part of its legal analysis of the application of the doctrine in "shopkeeper" actions, the *Hansen* court indicated that, under Ohio law, a retail store owner cannot be considered to have exclusive control over an item when the public also has access to it. Id. at ¶22. In the instant case, Ms. Occhipinti's description of her own accident readily demonstrated that the public had access to the metal bar. Thus, the doctrine of res ipsa loquitor had no application to the facts of this case.

{¶30} A moving party is entitled to summary judgment when: "(1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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." *Johnson*, 2006-Ohio-1790, at ¶13. In light of the foregoing, this court concludes that appellee was entitled to summary judgment because a reasonable person could only conclude that, under the undisputed facts, appellee had no duty to warn Ms. Occhipinti of any danger associated with the metal bar. In turn, as appellants would not have been able to establish every element of their claim, judgment in favor of appellee was

warranted.

{¶31} As the trial court did not err in granting summary judgment for appellee, the sole assignment of error is not well-taken. For this reason, the judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.