[Cite as *Moody v. Pilot Travel Ctrs., L.L.C.*, 2012-Ohio-1478.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

LOWELL MOODY, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2011-07-141
	:	O P I N I O N
- vs -		4/2/2012
	:	
PILOT TRAVEL CENTERS, LLC, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV10-08-3397

Timothy R. Evans, 29 North D Street, P.O. Box 687, Hamilton, Ohio 45013, for plaintiff-appellant, Lowell Moody and plaintiff, Judith Moody

Donald J. Richardson and Jennifer R. Becker, 1300 East Ninth Street, Suite 1950, Cleveland, Ohio 44114, for defendant-appellee, Pilot Travel Centers & Pilot Corporation

Robert D. Kehoe and Kathleen A. Cole, 810 Sycamore Street, Suite 217, Cincinnati, Ohio 45202, for defendant-appellee, Ohio Bureau of Workers Compensation

RINGLAND, J.

{¶ 1} Plaintiff-appellant, Lowell Moody, appeals the decision of the Butler County Court of Common Pleas granting summary judgment to defendant-appellee, Pilot Travel Centers, LLC.

{¶ 2} On the afternoon of August 11, 2006, Moody, a truck driver, stopped at a Pilot

Truck Stop on I-71 near London, Ohio to get fuel for his truck. It was not raining. The truck had two fuel tanks, one on each side. Moody exited his truck and began pumping fuel into the fuel tank on the driver's side. He then walked around the front of the truck to the passenger's side and began pumping fuel into the fuel tank on the passenger's side. As he was walking around the front of the truck back to the driver's side, he slipped and fell on a substance that was "very slick."

{¶ 3} A color photograph taken by a Pilot employee shortly after the fall shows the area in front of the truck where Moody fell. The photograph depicts a fairly large spill on the ground both in front of the truck and underneath the truck's front left tire. The spill is of a different and darker color than the ground, has an oily appearance, and bears signs that another vehicle previously drove through it. When asked if he knew what kind of substance it was, Moody replied, "from what I understand, it was water and diesel fuel." In its decision, the trial court noted, "It is unclear whether the slick substance was an oil or grease spill or a mixture of diesel fuel and water. The exact substance, while a question of fact, is not a material question of fact." As a result of the fall, Moody suffered serious injuries to his left shoulder.

{¶ 4} In 2010, Moody and his wife filed a complaint against Pilot alleging negligence and loss of consortium. Pilot later moved for summary judgment which the trial court granted on June 2, 2011. The trial court found that the spill was an open and obvious hazard which Moody had an opportunity to observe. The trial court also found that Pilot neither created nor had actual or constructive knowledge of the hazard before Moody's fall.

{¶ 5} This appeal follows.

{¶ 6} In a single assignment of error, Moody argues the trial court erred in granting summary judgment to Pilot. Specifically, Moody asserts that the spill was not an open and obvious hazard, and that Pilot had constructive knowledge of the hazard "as there were a

number of employees at the station whose job was to maintain the lot."

{¶ 7} On appeal, a trial court's decision granting summary judgment is reviewed de novo. *Burgess v. Tackas*, 125 Ohio App.3d 294, 296 (8th Dist.1998). Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. *See* Civ.R. 56(C); *see also*, *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once this burden is met, the nonmoving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial. *Id.*

{¶ 8} A successful negligence action requires a plaintiff to establish that (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. *Hughes v. Forsyth-Moto, Inc.*, 4th Dist. No. 09CA3118, 2010-Ohio-1078, ¶ 11.

{¶ 9} Neither party disputes that Moody was a business invitee on Pilot's premises. As a property owner, Pilot has "a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent and hidden dangers." *Armstrong v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 5. However, a property owner or occupier "has no duty to warn against hazards which are known or open and obvious; an invitee is reasonably expected to discover and guard against such dangers." *Preble v. Superamerica*, 6th Dist. No. S-94-033, 1995 WL 612918, *1 (Oct. 20, 1995); *Hughes* at ¶ 13. The rationale behind this doctrine is that "the open and obvious nature of the hazard itself serves as a warning." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644 (1992).

{¶ 10} In a slip and fall case involving oil spills, "'courts generally have been unwilling to attach liability for conspicuous oil spills located in an area of the premises where a patron would reasonably expect to encounter them.'" *Hughes*, 2010-Ohio-1078 at ¶ 15, quoting *Pokrivnak v. Par Mar Oil Co.*, 4th Dist. No. 99CA31, 2000 WL 1717556, *2 (Nov. 6, 2000). "Oil or grease on a parking garage floor has been held to be an open and obvious danger where the facts indicate that nothing blocked the plaintiff's view of the oil, the area was distinct from its surrounding areas, and the plaintiff was able to describe the size of the puddle." *Preble* at *1.

{¶ 11} In addition, in a slip and fall case, to establish that the property owner or occupier failed to exercise ordinary care, the invitee must show that:

> the owner of the premises or his agent was responsible for the hazard of which the invitee has complained; (2) at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its existence or to remove it promptly; or (3) the hazard existed for a sufficient length of time to justify the inference that the failure to warn against it or remove it was attributable to a lack of ordinary care.

Price v. United Dairy Farmers, Inc., 10th Dist. No. 04AP-83, 2004-Ohio-3392, ¶ 6.

{¶ 12} If the invitee cannot establish that the owner or its agent created the hazard or had actual knowledge of the hazard, "evidence showing the length of time during which the hazard existed is necessary to support an inference that the owner had constructive knowledge of the hazard such that the failure to remove or warn of the hazard was a breach of ordinary care." *Id.* at ¶ 7. Absent proof that the owner or its agent created the hazard, or had actual or constructive knowledge of the hazard, no liability may attach. *Id.*

{¶ 13} In the case at bar, we find that the slick substance upon which Moody fell was an open and obvious hazard. The photograph shows that the spill occurred in an area open to vehicular traffic, and close to the fuel pumps that a patron should reasonably expect that an oil or fuel spill may be present. The spill was not hidden and was fairly large. The spill

was already on the ground when Moody first walked around the front of the truck to the passenger's side. Moody fell when he retraced his steps around the front of the truck on his way back to the driver's side. Moody acknowledged that nothing prevented him from seeing the spill had he looked down as he was walking. Moody also testified that "it [was] very obvious [the spill] was there." See *Hughes*, 2010-Ohio-1078; *Preble*, 1995 WL 612918; *Plock v. BP Products N.A. Inc.*, 6th Dist. No. L-05-1423, 2006-Ohio-5472.

{¶ 14} There is no evidence that Pilot created the hazard. There is also no evidence Pilot had actual knowledge of the hazard before Moody's fall. Moody asserts Pilot had constructive knowledge of the hazard "as there were a number of employees at the station whose job was to maintain the lot." Jason Touhey, the manager of the Pilot Truck Stop at the time of the incident, testified in his deposition that (1) he would personally walk around the gas station every morning between 7 and 8 o'clock to make sure it was clean; (2) two similar "walks" were done by the co-manager later in the day, first around 4 or 5 p.m., then around 11 p.m.; and (3) there were several employees whose job was to maintain the lot and keep it clean.

{¶ 15} However, Moody did not present any evidence that Pilot had constructive knowledge of the hazard. Touhey testified he did not know how long the spill had been on the ground before the fall. In turn, Moody admitted he did not know how long the spill had been there before his fall. He also did not know if anyone at Pilot was aware of the spill before he fell. See *Price*, 2004-Ohio-3392 (evidence of how long a hazard existed is necessary to support an inference that the store had constructive knowledge of the hazard so that the failure to remove or warn of the hazard was a breach of ordinary care); *Ashbaugh v. Family Dollar Stores*, 4th Dist. No. 99 CA 11, 2000 WL 146391 (Jan. 20, 2000).

{¶ 16} We therefore find that the trial court properly granted summary judgment in favor of Pilot. The assignment of error is overruled.

{¶ 17} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.