IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

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| MILDRED STILES, | ) | CASE NO. CV 2013 12 5710 |
| | ) | |
| Plaintiff, | ) | JUDGE TAMMY O'BRIEN |
| | ) | |
| VS. | ) | |
| | ) | |
| MARC GLASSMAN, INC., | ) | **JUDGMENT ENTRY** |
| | ) | |
| Defendant. | ) | **(Final and Appealable)** |
| | ) | |

This matter comes before the Court on the Motion for Summary Judgment filed by Defendant Marc Glassman ("Defendant" or "Marc's"). The Court has considered Marc's Motion, the Brief in Opposition filed by Plaintiff Mildred Stiles ("Plaintiff"), Marc's Reply Brief, the facts of this matter, Civ.R. 56(C), and applicable law. Upon due consideration, and upon a finding of no remaining issues of material fact, the Court GRANTS Marc's Motion for Summary Judgment.

In light of the Court's ruling, the final pretrial scheduled for September 30, 2014 at 8:30 a.m. is CANCELLED. The jury trial scheduled for October 14, 2014 at 9:00 a.m. is also CANCELLED.

## ANALYSIS

### 1. Factual Background.

This litigation arises out of a slip and fall that occurred on August 17, 2012 at Marc's Sagamore Hills store. *See* Complaint at ¶2. *See also* M. Stiles Depo. at 9. Plaintiff went shopping at Marc's on August 17, 2012 with her mother. M. Stiles Depo. at 10. Plaintiff's mother was in the car and not with Plaintiff when the slip and fall occurred. *Id. See also* M. Smith Depo. at 4.

Plaintiff testified that she was very familiar with this Marc's location and that she usually went shopping every week at this store. M. Stiles Depo. at 10. Plaintiff slipped after picking-up

a watermelon and trying to put the watermelon into her cart. *Id.* at 13 ("I * * * picked up a watermelon, went to put it inside my cart, and that's when I slipped.")

Plaintiff claims that, because her pants were wet after falling, she slipped and fell in water. *Id.* at 18-19. Plaintiff testified:

Q. * * * What caused your fall?

A. I slipped in water.

Q. And how do you know that it was water?

A. Because my pants were wet. When I went down and laid there, the whole left side of my pants were wet. * * * .

Q. Do you know how the water got on the floor.

A. No.

Q. And what color was the liquid or the water that you saw?

A. It was clear.

Q. And what color was the floor?

A. I couldn't tell you. Like a - - I really don't know.

Q. After you fell, could you see the water on the floor?

A. * * * I did not see the water personally, but I felt the water. * * *

* * *

Q. Did you ever see any water on the floor?

A. I wasn't looking for it, no. No.

Q. So you did not see water on the floor?

A. No. I don't know if water - - it had to be there for my pants to be wet. But, no, I wasn't looking for it. And I didn't notice it.

* * *

Q. * * * So the area where you fell, you did not see any water, yourself?

A. No.

*Id.* at 18-19, 20. Plaintiff does not know how long the water was on the floor and she did not see the alleged liquid before falling. *Id.* at 22. Plaintiff testified:

Q. Did you see the liquid on the floor before you fell?

A. No.

Q. Why not?

A. Because I was looking at the watermelons. I was just walking. When I parked the - - parked the cart and I started picking up the watermelons right away. I had no idea it was on the front side where I was.

Q. If you had been watching where you were walking, would you have seen the liquid?

A. I really don't know. Probably. * * *

*Id.* at 22.

Plaintiff acknowledged that there was nothing obstructing her view of the floor and that, had she seen the liquid, she would have avoided stepping into it. *Id.* at 23. Plaintiff further testified that she has no idea how long the liquid was on the floor before falling and that she does not know if Marc's knew the liquid was on the floor before she fell. *Id.* Plaintiff testified:

Q. Do you think Marc's knew the liquid was on the floor before you fell?

A. I don't know. I can't answer that.

Q. So as we sit here today, you have no evidence that you can give me that Marc's knew the liquid was on the floor before you fell; is that a correct statement?

A. Yes.

Q. Do you know who put the liquid on the floor?

A. No.

Q. Do you have any evidence that the liquid was on the floor as a result of any Marc's employees?

A. I have no idea.

Q. During the time that you parked the cart and walked around the watermelon display and then walked back to your cart, before you fell, did you ever notice any water on the floor?

A. Not to my knowledge. I was not looking for water. I did not even look down.

Q. Did you sense that the floor was slippery before you fell?

A. No, not when I walked around here. No. * * *

*Id.* at 24.

Although she uses a cane when walking, Plaintiff was not using her cane when she fell. *Id.* at 25. Plaintiff's cane was in her shopping cart when she fell because she "couldn't pick up the watermelon with my cane in my hand." *Id.* at 25.

Plaintiff's mother, Mildred Smith, arrived at the scene approximately fifteen (15) minutes after Plaintiff fell. M. Smith Depo. at 5. Ms. Smith testified that she saw her daughter lying on the floor and that she also saw the water on the floor. *Id.* at 5-6. Ms. Smith testified:

Q. Did you see the water on the floor?

A. Yes.

Q. And where did you see water on the floor?

A. It was around the carton that the watermelons were in.

* * *

A. And when you came back to see Mildred lying on the floor, you could see the liquid on the floor?

A. Yes.

Q. And can you describe for me the size of the liquid that you saw on the floor?

A. Not actually the size. All I know, there was just water, you know.

Q. Was it a puddle or a streak?

A. It was more like a puddle.

Q. And how big was the puddle?

A. Like I said, I'm not good at judgment. But it was just around the carton there.

Q. Was the puddle big enough that you could see it when you came back to - -

A. You could see the water on the floor * * *.

Q. And how far were you from the water when you first saw it?

A. Maybe a foot or so.

Q. But as you were standing there, you could see the water on the floor?

A. Yes, yes. * * *

Q. * * *. * * * you could easily see the water on the floor?

A. Yes, walking back there.

Q. So as you walked back and approached Mildred, you could see - -

A. Right.

Q. - - the water on the floor?

A. Right.

*Id.* at 6-7.

Plaintiff alleges that she was injured in the August 17, 2012 slip and fall. *See* Complaint. Plaintiff alleges that, as a direct and proximate result of Marc's negligence, she "sustained severe injuries, suffered pain of mind and of body and was otherwise injured" and that she "has incurred hospital and medical expense." *Id.* at ¶¶6-7. Plaintiff's Complaint was filed on December 9, 2013.

Marc's filed an Answer on December 23, 2013. In its Answer, Marc's denies the material allegations of the Complaint. Among other defenses, Marc's asserts that "[t]he damages of which the Plaintiff complains are the direct and proximate result of Plaintiff's own acts and/or omissions" and that "[a]ny and all losses alleged by Plaintiff are solely attributable to the actions and/or inactions of Plaintiff." *Id.*, Defenses at ¶¶5, 10.

Marc's argues in Motion for Summary Judgment that it is entitled to judgment as a matter of law because Plaintiff slipped on an open and obvious condition and because Plaintiff failed to file the required expert report. Marc's Motion for Summary Judgment was filed on June 3, 2014.

Plaintiff filed a Brief in Opposition to Marc's Motion for Summary Judgment on August 1, 2014. Plaintiff maintains in her Brief in Opposition that this case is not appropriate for application of the "open and obvious" doctrine and that, even if appropriate, the hazard at issue was not obvious to Plaintiff. With respect to the production of an expert witness, Plaintiff asserts that she identified "Dr. Krahe as her expert in discovery months ago." *See* Plaintiff's Brief in Opposition at 10. Plaintiff acknowledges that she never produced "a narrative report from Dr. Krahe." *Id.*

Marc's submitted a Reply Brief on August 12, 2014. Marc's maintains in its Reply that, when determining whether a danger is open and obvious, Ohio law utilizes an objective rather than a subjective standard. Marc's further reiterates that, contrary to the Court's Order, Plaintiff never produced the required medical expert report.

**2. <u>Standard of Review – Motion for Summary Judgment.</u>**

In reviewing a motion for summary judgment, the Court must consider the following: (1) whether there is no genuine issue of material fact to be litigated; (2) whether in viewing the evidence in a light most favorable to the non-moving party it appears that reasonable minds could come to but one conclusion; and (3) whether the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996); *Wing v. Anchor Media, L.T.D.*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). If the Court finds that the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986).

Civ.R. 56(C) states the following, in part, in regards to summary judgment motions:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of the evidence in the pending case, and written stipulations of fact, if any timely filed in the action, 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.

Where a party seeks summary judgment on the ground that the nonmoving party cannot prove its case, the moving party 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. *Dresher*, 75 Ohio St.3d at 293, 662 N.E.2d 264. The *Dresher* court continued,

> 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. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which 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. However, if 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.

*Banks v. Ross Incineration*, 9th Dist. No.98CA007132 (Dec. 15, 1999).

**3. Analysis.**

Neither party disputes that Plaintiff was a business invitee of Marc's on August 17, 2012. As a business invitee, Marc's owed Plaintiff a duty to maintain the premises in a reasonably safe condition and to warn Plaintiff of unreasonably dangerous and latent conditions. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). *See also Perry v. Eastgreen Realty Co.*, 53 Ohio St.2d 51, 53, 372 N.E.2d 335 (1978). Although a premises owner is not an insurer of the safety of its business invitees, a duty exists to warn invitees of known latent or concealed defects. *Perry*, 53 Ohio St.2d at 52, 372 N.E.2d 335. Liability for failure to protect a business invitee against injuries is based on the premises owner's superior knowledge of the specific condition that caused the injury. *Debie v. Cochran Pharmacy-Berwick, Inc.*, 11 Ohio St.2d 38, 227 N.E.2d 603 (1967).

The underlying facts are similar to those that were before the Ninth District in *Andamasaris v. Annunciation Greek Orthodox Church*, 9th Dist.No. 22191, 2005-Ohio-475. In *Andamasaris*, the plaintiff fell while attending a wedding reception at the defendant-facility. The plaintiff alleged that, because her dress was wet after she fell, she must have fallen on water, pop, beer, or some other beverage. The lower court granted summary judgment in favor of the defendants and the Ninth District affirmed. In affirming summary judgment, the Ninth District noted as follows:

> * * * Ms. Andamasaris was a business invitee. In general, an owner or occupier of premises owes a business invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily exposed to danger. * * * However, premises owners 'are not insurers against all accidents and injuries to such patrons,' * * *, and the mere fact that an invitee falls while on the premises does not give rise to a presumption of negligence. * * *
>
> * * *

> An owner is under no duty to protect its customers from dangers known to the customer, or otherwise so oblivious and apparent that a customer should reasonably be expected to discover them and protect herself from them. * * *
>
> The rationale behind this open and obvious doctrine is that the open and obvious nature of the hazard itself serves as a warning, and allows the owner to expect visitors to discover the danger and take appropriate actions to protect themselves. * * *. Where a condition is patent or obvious, the invitee is expected to protect herself, unless the condition is unreasonably hazardous. * * *. The presence of wet floors is not such an unreasonably hazardous condition, but rather, it is a frequently encountered condition that a reasonable person would be expected to recognize and exercise caution to protect herself from harm. * * * .
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> * * * Ms. Andamasaris * * * conceded that her view was not obstructed and she merely failed to look where she was walking. Thus, * * * in failing to observe this wet condition, and by her own admission, this was due to her own inattentiveness. Simply put, the fact that she stepped in an obvious wet spot because she was not looking makes it irrelevant whether the liquid had been on the floor for 45 minutes or 45 seconds, she would have slipped and fallen either way.
>
> By her own account, Ms. Andamasaris suffered an unfortunate accident. She stepped in some liquid, slipped, fell and broke her leg. Under the conditions presented, we find that this liquid was not such an unreasonably hazardous condition that it would impose a duty of care on the Church as the premises owner. * * * . Similarly, as a matter of law, the open and obvious nature of the liquid obviates a duty. * * *. We cannot conclude that the trial court erred in granting summary judgment. * * *

*Id.* at ¶¶13-17.

Similarly, the plaintiff in *Tenney v. Todaros Party Center, Inc.*, Summit County Court of Common Pleas Case No. CV 2005 11 6441 (May 26, 2006), alleged that she slipped and fell on water or some liquid in the defendant's restroom. Like the Ninth District in *Andamasaris*, the *Tenney* court found that the liquid in the defendant's restroom was not such an unreasonably hazardous condition that it would impose a duty of care on the defendant as the premises owner. *Id.* at 7. The court further found that, as a matter of law, the open and obvious nature obviated a duty. *Id. See also Silva v. Burger King Corp., et al.*, Summit County Court of Common Pleas Case No. CV 2010 12 8085 (Oct. 26, 2011) (summary judgment in favor of defendant Burger King granted).

Ohio law is clear as it pertains to slip and fall incidents. Even if a condition is not open and obvious, the mere fact that a person slipped and fell is not sufficient to establish negligence. *Burkhead v. Eesley*, 107 Ohio App. 519, 160 N.E.2d 297 (June 18, 1958). It is incumbent upon the plaintiff to identify or explain the reason for the fall and to affirmatively identify the

condition complained of. *See Cleveland Athletic Assoc. v. Bending*, 129 Ohio St. 152, 194 N.E. 6 (1934); *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 582 N.E.2d 1040 (12th Dist. 1989); *Parras v. Standard Oil Co.*, 160 Ohio St. 315, 116 N.E.2d 300 (1953); *Green v. Franchise Management & Dev.*, 5th Dist.No. 99-CA50-2, *5 (Feb. 12, 2000). Where the plaintiff cannot identify or explain the reason for the fall, a finding of negligence is precluded such that summary judgment is proper. *See Stamper*, 65 Ohio App.3d 65, 582 N.E.2d 1040. *See also Harshaw v. Trotwood Foodtown, Inc.*, 12th Dist.No. 15125 (Jan. 24, 1996) (affirming summary judgment in favor of the defendant where the plaintiff, who alleged that she fell on a slippery substance on the floor, could not identify the cause of the fall); *Green*, 5th Dist.No. 99-CA50-2 (summary judgment in favor of the defendant affirmed where, although the plaintiff claimed she fell on a floor that had been made wet by mopping, the plaintiff could not identify what caused her to fall); *Shepherd v. Mt. Carmel Health*, 10th Dist.No. No. 99AP-197 (Dec. 2, 1999) (defendant's motion for summary judgment affirmed on appeal where plaintiff could only speculate about the cause of her fall).

Plaintiff's deposition testimony establishes that her view was not obstructed and that she merely failed to look where she was walking. Depo. of M. Stiles at 18-19, 20. Thus, by her own admission, Plaintiff's failure to observe a wet condition was due to her own inattentiveness. *See Andamasaris*, 9th Dist.No. 22191, 2005-Ohio-475 at ¶16. Like the Ninth District in *Andamasaris*, the Court finds that the liquid was not such an unreasonably hazardous condition that it would impose a duty of care upon Marc's as the premises owner. *Id.* at ¶17.

The Court further finds that summary judgment is appropriate considering that Plaintiff is merely speculating as to the cause of her fall. Defendant assumes that, because her pants were wet, she must have fallen on water. *Id.* at ¶18. As previously set forth, Ohio law is well established that if a plaintiff cannot identify or explain the reason for her fall, a finding of negligence is precluded and summary judgment is appropriate.

Lastly, the Court finds that summary judgment is appropriate because Plaintiff failed to produce and file an expert report as required by the Court's February 21, 2014 Order. As set forth in the Court's February 21, 2014 Order, Plaintiff's expert "shall be identified and reports filed on or before **May 1, 2014**." *See* February 21, 2014 Order at 1. Plaintiff acknowledges that she "does not have a narrative report" from her expert, Dr. Krahe. *See* Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment. Because an expert report has not been produced, Plaintiff has failed to establish that her alleged injuries are a direct and proximate result of Marc's negligence. Summary judgment is therefore appropriate.

## CONCLUSION

WHEREFORE, for the reasons set forth above and upon due consideration, the Court GRANTS Defendant Marc Glassman, Inc.'s Motion for Summary Judgment.

This is a final appealable order and there is no just cause for delay.

IT IS SO ORDERED.

JUDGE TAMMY O'BRIEN

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties notice of this judgment and its date of entry on the Journal.

JUDGE TAMMY O'BRIEN

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