

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

LENA MERRITT,	:	APPEAL NO. C-090056
	:	TRIAL NO. A-0701987
Plaintiff-Appellant,	:	
	:	<i>DECISION.</i>
vs.	:	
BIG D & LULU, INC., d.b.a. HYDE	:	
PARK TAVERN & GRILLE	:	
	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 13, 2009

*Bryan C. Berger and Berger, Cox & Nienaber, for Plaintiff-Appellant,*

*Thomas J. Gruber, Michael P. Cussen, and McCaslin, Imbus & McCaslin, for  
Defendant-Appellee.*

Please note: This case has been removed from the accelerated calendar.

**SUNDERMANN, Judge.**

{¶1} Plaintiff-appellant, Lena Merritt, appeals the summary judgment entered by the Hamilton County Court of Common Pleas in favor of defendant-appellee, Big D & Lulu, Inc., d.b.a. Hyde Park Tavern & Grille (“the Tavern”), in a personal-injury action.

{¶2} One evening, Merritt had dinner at the Tavern. During her visit, she went into the restroom. As she was walking toward the sinks, she slipped and fell on a puddle of water, sustaining injuries.

{¶3} After she had fallen, Merritt noticed that water was overflowing from the toilet in a nearby stall and that it had covered a portion of the area between the entrance to the restroom and the sinks. She testified in her deposition that she did not know how large the area of water was when she had slipped but that it had gotten “a lot larger” after she had fallen.

{¶4} The Tavern presented evidence that its practice was to inspect the restrooms every hour but that no employee had discovered or had been made aware of the water on the floor until after Merritt had fallen.

{¶5} The Tavern filed a motion for summary judgment. The trial court granted the motion on the basis that Merritt had failed to demonstrate that the Tavern had possessed actual or constructive notice of the dangerous condition.

{¶6} In a single assignment of error, Merritt now argues that the trial court erred in granting summary judgment in favor of the city.

{¶7} Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that

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reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.<sup>1</sup> This court reviews the granting of summary judgment de novo.<sup>2</sup>

{¶8} To recover on a claim of negligence, the plaintiff must prove that the defendant owed the plaintiff a duty, that the defendant breached that duty, and that the breach of the duty proximately caused the plaintiff's injury.<sup>3</sup> A premises owner generally owes an invitee a duty of ordinary care to maintain the premises in a reasonably safe condition so that the invitee is not unnecessarily and unreasonably exposed to danger.<sup>4</sup>

{¶9} And to establish the liability of a business owner to an invitee who allegedly slipped on a substance on the floor, the plaintiff must demonstrate that the owner put the substance on the floor, that it had actual knowledge of the substance's presence but failed to remove it or to warn the invitee, or that the substance had been on the floor long enough for the owner to have had constructive notice of its presence, thus creating a duty to warn the invitee or to remove it.<sup>5</sup>

{¶10} In the case at bar, Merritt does not contend that the tavern had created the dangerous condition or that it had possessed actual knowledge of the danger. Rather, she argues that the water had been on the floor for a sufficient time to have given the Tavern constructive notice of its presence.

{¶11} We are not persuaded by this argument. Merritt was unable to say how long the water had been on the floor. But she asks this court to assume, from

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<sup>1</sup> See *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.

<sup>2</sup> *Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶6.

<sup>3</sup> *Wellman v. E. Ohio Gas Co.* (1953), 160 Ohio St. 103, 113 N.E.2d 629, paragraph three of the syllabus.

<sup>4</sup> *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474.

<sup>5</sup> See, e.g., *Kolsto v. Old Navy Inc.*, 1st Dist. No. C-030739, 2004-Ohio-3502, ¶4.

the area of the floor that the water covered, that the toilet had been overflowing for a sufficient period of time to have given rise to constructive notice.

{¶12} This argument, though, flies in the face of Merritt’s own testimony. Merritt did not know how much water had been present when she had entered the restroom. She could testify only that the area covered by the water had gotten “a lot larger” during the time that she had been in the restroom. The only reasonable inference to be drawn from this testimony is that the toilet had begun to overflow shortly before Merritt had entered the restroom; otherwise, a large amount of water would have accumulated *before* her entrance. Thus, Merritt did not demonstrate that the danger had been present for a sufficient time to have given rise to constructive notice.

{¶13} In challenging the summary judgment, Merritt relies heavily on this court’s decision in *Wesley v. McDonald’s Restaurants of Ohio, Inc.*<sup>6</sup> In *Wesley*, a restaurant patron slipped and fell on a puddle of water outside the restroom door.<sup>7</sup> The evidence showed that the entire area of the restroom floor had covered in two inches of water and that the water had seeped under the door of the restroom into the main area of the restaurant.<sup>8</sup> In holding that summary judgment was improper, this court held that the amount of water in the restroom and its seepage under the door created a genuine issue of fact with respect to whether there had been constructive notice.<sup>9</sup>

{¶14} The case at bar is distinguishable from *Wesley*. In this case, the water had covered a relatively small area of the restroom at the time of Merritt’s fall and

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<sup>6</sup> (June 2, 1993), 1st Dist. No. C-920233.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

had covered a substantial area only *after* her fall. Moreover, the water had not seeped into the main area of the Tavern, and there was accordingly no notice to employees simply walking past the restroom that the toilet had overflowed. Under these circumstances, summary judgment was properly entered in favor of the Tavern.

{¶15} We overrule the assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

**CUNNINGHAM, J.**, concurs.  
**HILDEBRANDT, P.J.**, dissents.

**HILDEBRANDT, P.J.**, dissenting.

{¶16} Because I believe there were genuine issues of fact concerning the Tavern's constructive notice, I respectfully dissent. Merritt's deposition testimony established that there was a considerable amount of water on the floor—enough to cover the floor from the stall to the area near the sinks—at the time of her fall. Although the water did not cover the entire floor and did not seep under the door, a reasonable trier of fact could have nonetheless concluded that the condition put the Tavern on constructive notice of the danger.

{¶17} And while the majority takes pains to distinguish our decision in *Wesley*, I do not believe that the conditions in this case were qualitatively different. The amount of water was less in this case, but the difference did not warrant a conclusion that the Tavern, as a matter of law, did not have constructive notice. Merritt established that the condition had existed for a sufficient period of time to overcome a motion for summary judgment. Accordingly, I respectfully dissent.

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Please Note:

The court has recorded its own entry on the date of the release of this decision.