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Just Peachy: Speculation Does Not Lead to a Reasonable Inference About When a Hazard Arose

By Joseph J. Giacalone **December 13, 2023**

The Michigan Court of Appeals recently released its decision in *Dana Easton v Meijer, Inc.*[1] Plaintiff, Dana Easton, was a business invitee at a Rochester Hills Meijer when she slipped in an aisle on the contents of a cracked container of peaches in liquid. Easton later sued Meijer on a premises liability theory, alleging that Meijer breached its duty to protect her from the unreasonable risk of harm created by the spill.

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> Post *Kandil-ElSayed,* claimants must still present evidence to create a question of fact regarding constructive notice against a premises owner. Since the claimant here did not present sufficient evidence to create a question of fact regarding whether Meijer had constructive notice of the spill, the case was correctly dismissed.

During discovery, Easton produced no evidence to show that a Meijer employee knew of the spill prior to Easton's fall or how long the spill existed before the accident. Therefore, the case focused on whether Meijer had constructive notice of the hazard, meaning "that the hazard was of such character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1 (2016). At the close of discovery, Meijer brought a Motion for Summary Disposition pursuant to MCR 2.116(C)(10), and argued Easton failed to create a genuine issue of material fact as to whether Meijer had notice of the alleged hazard; alternatively, Meijer argued, even if it had notice, the hazard was open and obvious, so Meijer owed Easton no duty to remedy the spill. Easton countered that the spill had existed for a sufficient period because the spilled peach liquid appeared dry around the edges of the spill, and that the peach liquid was not open and obvious because the liquid was invisible on the aisle floor. The trial court granted summary disposition for Meijer and Easton appealed.

On appeal, Easton argued Meijer's employees had the responsibility to check grocery aisles for spills, as well as Easton's statements that the peach juice "looked like around the edges it already started to dry" and it appeared the peach juice "had been there a while." The Court of Appeals found Easton's arguments unpersuasive. The Court of Appeals incorporated *Kandil-ElSayed v F&E Oil Inc*, ___ Mich ___ (2023), as well as precedent prior to *Kandil-ElSayed* to uphold the trial court's summary disposition.

Despite *Kandil-ElSayed v F&E Oil Inc* moving "open and obvious" considerations from the legal issue of duty to the fact-based arena of breach of duty, the Court of Appeals did not abrogate traditional tort principles in *Easton v Meijer*. The *Easton* Court held that in a premises liability action, a plaintiff must prove duty, breach of duty, causation, and harm. In a premises case, the premises possessor has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land.

The *Easton* Court next looked to *Lowrey*, which held that the defendant was not required to offer evidence of "routine or reasonable inspection" to prove that it lacked constructive notice of a hazard on its property. Easton's statements and peach juice-soaked clothing were solely conjecture as to when the hazard formed. Mere conjecture that a hazard had existed for long enough that a business employee should have known of the spill cannot show constructive notice against the business. *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1 (2016).

[1] *Dana Easton v Meijer, Inc*, unpublished opinion of the Court of Appeals, issued November 21, 2023 (Docket No. 363597).[1]

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