[Cite as *Studniarz v. Sears Roebuck & Co.*, 2010-Ohio-3049.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JEFFREY STUDNIARZ, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-L-159**
- vs -	:	
SEARS ROEBUCK & COMPANY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 003175.

Judgment: Affirmed.

Paul H. Hentemann, Northmark Office Building, 35000 Kaiser Court, #305, Willoughby, OH 44094-4280 (For Plaintiffs-Appellants).

Keith A. Savidge and *Jessica Handlos*, Seeley, Savidge, Ebert & Gourash Co., L.P.A., 26600 Detroit Road, Cleveland, OH 44145-2397 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Jeffrey Studniarz appeals from a judgment of the Lake County Court of Common Pleas which granted Sears Roebuck & Company ("Sears") summary judgment regarding his complaint for negligence against Sears. He alleged that as he was shopping for men's pants in a Sears store, a bar on a hanger accidentally sprung open and struck him in the eye. For the following reasons, we affirm the trial court's judgment.

{¶2} **Substantive Facts and Procedural History**

{¶3} The incident leading to the complaint occurred while Mr. Studniarz was shopping for pants in the men's department in a Sears store at the Great Lakes Mall in Mentor, Ohio. After he tried on two pairs of pants, neither of which fit, he moved to another rack. In his deposition he described what happened next:

{¶4} "*** I walked up to the other rack that had some pants on sale for, like, $25. When I looked at those pants, I picked them up just to look at the color and I look at – I say the length, but was looking at the tag. I set it down [on the rack] and as I set it down, I did not remove them from the hanger; I just merely picked the hanger up and set it down and that's when it unclasped and stuck me in the left eye." Mr. Studniarz was able to drive home after the incident but later sought optical care. He claims permanent eye damage resulted from the incident.

{¶5} The hanger in question has a clip on the left side and a swivel on the right side. The cross-bar is where the pants are secured and hung. The rack of pants was chest high, and Mr. Studniarz is 5'10" tall. He alleged the incident occurred when he put the hanger back on the rack: when the hanger made contact with the metal bar of the rack, the clip in the hanger suddenly became unclasped and the weight of the pants "pulled the top swinging secure bar down toward the floor as the pants slid off." The swing bar "continued swinging on an upward motion extending nearly 1-1/2' from the rack" and struck him in the left eye.

{¶6} Apparently these hangers were used exclusively for a style of men's pants called Flex pants. When Sears discontinued sales of the Flex pants, it also stopped using the Flex pants' hangers. Sears did not design or manufacture these hangers. No

evidence was presented to show that Sears was aware of any earlier problems with the hangers.

{¶7} Mr. Studniarz filed a complaint alleging Sears was "negligent in maintaining clothes hangers that were susceptible to defective design." Sears filed a motion for summary judgment. In responding to Sears' motion, Mr. Studniarz for the first time claimed Sears is also liable as a seller of defective product. He attached to his answer brief an affidavit from an expert, Kent Godsted, who opined that the hanger has a potentially dangerous design. He stated the following:

{¶8} "When the hanger is used for its intended purpose, to display pants for sale, the upper bar is bowed considerably outward, putting pressure on the latching mechanism because the pant thickness is larger than the gap provided by the hanger design. The result is that when the latch is released, either purposely or inadvertently, the upper bar swiftly rotates outward, due to the elastic energy stored in the upper bar, the freedom of the upper bar to rotate relative to the lower bar and the weight of the pants on the upper bar.

{¶9} "The result is that when pants are hung on the hanger for display the latch is the only restraint to the upper bar and pants freely rotate outward. The person holding the hanger has no knowledge of the potential danger and so is at risk."

{¶10} The trial court granted summary judgment in favor of Sears, concluding that even if the hanger had posed a potential hazard to the customers, no evidence existed that Sears had actual or constructive notice of the hazard. As for Sears' liability as a seller of a defective product, the court determined no evidence was presented to show the hanger was a product for sale.

{¶11} Mr. Studniarz now appeals, raising the following assignment of error:

{¶12} "The trial court erred in granting summary judgment where genuine issues of material fact existed, see Affidavits of Jeffery Studniarz and Kent Godsted."

{¶13} **Standard of Review**

{¶14} This court reviews de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id. citing *Parenti v. Goodyear Tire & Rubber Co*. (1990), 66 Ohio App.3d 826, 829.

{¶15} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. 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 but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that 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. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio- 4374, ¶40.

{¶16} **Duty**

{¶17} "In order to establish an actionable claim for negligence, the plaintiff must establish: (1) the defendant owed a duty to him; (2) the defendant breached that duty; (3) the defendant's breach of duty proximately caused his injury; and (4) he suffered damages." *Frano v. Red Robin Int'l., Inc*., 181 Ohio App.3d 13, 2009-Ohio-685, ¶17 (citations omitted).

{¶18} "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." *Adelman v. Timman* (1996), 117 Ohio App.3d 544, 549.

{¶19} "While negligence actions involve both questions of law and fact, the existence of a duty is in the first instance a question of law for the trial court." *Frano* at ¶65, citing *Clemets v. Heston* (1985), 20 Ohio App.3d 132, paragraph one of the syllabus.

{¶20} Here, more specifically, Mr. Studniarz was a business invitee on the premises of Sears. "Owners or lessees of stores owe a duty to the patrons of the store

to exercise ordinary care to prevent accident and injury to the patrons while in the store, but they are not insurers against all accidents and injuries to such patrons while in the store." *Parras v. Standard Oil Co.* (1953), 160 Ohio St. 315, 318 (citation omitted).

{¶21} "A shopkeeper owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 203.

{¶22} "In Ohio, the owner of a store or some other similar place of business has a duty to exercise ordinary care and to protect customers by maintaining the premises in a safe condition. This duty includes the obligation to maintain the premises in a reasonably safe condition and to warn invitees of any latent defects of which the owner has or should have knowledge." *Kornowski v. Chester Props., Inc.*, 11th Dist. No. 99-G-2221, 2000 Ohio App. LEXIS 3001, *8-9 (citations omitted).

{¶23} "The occupier 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 occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier 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).

{¶24} 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* at *13, citing *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357,359.

{¶25} Here, Sears owes its business invitees a duty of ordinary care in maintaining its premises, including the display area, in a reasonably safe condition and to warn them of any latent defects which it has or should have knowledge. *Kornowski*. In this case, Sears' duty would include undertaking reasonable inspections of its display of merchandise to discover potential dangerous conditions and taking reasonable precautions to protect its customers from dangers which were foreseeable. *Ferguson*. Its obligation of reasonable care extended to anything that could threaten its invitee with an unreasonable risk of harm. Id.

{¶26} Mr. Studniarz presented no evidence to show Sears received previous complaints regarding the Flex hanger or was otherwise aware of any potential danger of the hangers. He also failed to present evidence showing that a reasonable inspection would have uncovered the alleged hazard posed by the hangers. In fact, Mr. Studniarz's own expert, Kent Godsted, stated that a person holding the hanger would have no knowledge of the potential danger of the hanger. Mr. Studniarz failed to demonstrate Sears had superior knowledge that the hanger could become accidentally unclasped.

{¶27} Therefore, Sears had no actual knowledge of any potential danger of the hanger and neither could it be charged with the knowledge. Accordingly, it had no duty to warn its customers of the hanger's potential danger.

{¶28} Furthermore, under Ohio law, "the existence of a duty depends on the injury's foreseeability. *Frano* at ¶65, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75. "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." Id. Here, Sears could not have foreseen that when the clip of the hanger became accidentally unclasped, the hanger's top bar would swing upward to strike the hanger's holder in the eye.

{¶29} Sears had the duty to exercise ordinary care to prevent accident and injury to its customers, but it is not an insurer against all accidents and injuries. Because no evidence was presented to show Sears knew or should have known the potential danger posed by the Flex hangers, Sears had no duty to warn its customers or otherwise protect them from the alleged risk of harm. Without the existence of a duty, Sears is not legally liable for Mr. Studniarz's alleged injury. No genuine issue of material fact exists in this negligence matter and Sears is entitled to summary judgment.

{¶30} As to the claim that Sears is liable as a seller of a defective product, the evidence shows the hanger was not a product for sale in this case but only a device for merchandise display. Mr. Studniarz likewise fails to present evidence to create a genuine issue of material fact for Sears' liability as a seller under a theory of product liability.

{¶31} For the foregoing reasons, the trial court properly granted summary judgment in favor of Sears. The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.