[Cite as *Tan v. Marc Glassman, Inc.*, 2019-Ohio-4043.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CYNTHIA TAN, ET AL.	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellants	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2019CA00036
	:	
MARC GLASSMAN, INC., ET AL.	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2018CV00785
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 27, 2019

APPEARANCES:

For Plaintiffs-Appellants:	For Defendant-Appellee:
STEVEN J. BRIAN 81 Maplecrest Street SW North Canton, OH 44720	JACK B. COOPER Millennium Centre – Suite 300 200 Market Ave North P.O. Box 24213 Canton, OH 44701-4213

Delaney, J.

{¶1} Plaintiffs-Appellants Cynthia Tan and Danny Tan appeal the February 13, 2019 judgment entry of the Stark County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

The Incident

{¶2} On January 14, 2015, Plaintiff-Appellant Cynthia Tam was shopping with a grocery cart at the Marc's Belden Village Store located in Canton, Ohio. Tan walked with her grocery cart in a store aisle containing "closeout" items. She did not see any store employees in the aisle. While in the aisle, she stopped to observe a display of accent tables priced at $14.99. She did not know how long the accent tables had been on display in the store. She did not see a customer or employee touch the display of accent tables before she stopped to look at the tables.

{¶3} The accent tables were rectangular shaped, with an open black metal frame base and a tabletop that Tan described as two-inch granite. The measurements of the accent tables were unknown, but Tan guessed the table weighed 80 pounds. She did not lift the accent table. The base of the table appeared to be the same size as the top of the table. In the display, one accent table was stacked upon an identical accent table. Tan did not notice if the either of the accent tables appeared to be damaged, off-balance, or leaning.

{¶4} Tan may have briefly touched one of the accent tables before she started to walk away with her grocery cart. As she walked away, one of the accent tables fell to the ground and struck her in the back of the ankle, causing a cut that did not require stitches. A customer came over after the table struck Tan in the ankle, but Tan was not

aware if the customer saw the table fall. The store manager spoke with Tan after the incident and took an accident report. Tan heard the store manager tell an employee that things should not be stacked like that.

The Lawsuit

{¶5} Plaintiffs-Appellants Cynthia and Danny Tan filed their original complaint against Defendant-Appellee Marc Glassman, Inc. ("Marc's") in the Stark County Court of Common Pleas, Case No. 2017CV00098. They voluntarily dismissed their complaint on April 17, 2017.

{¶6} The Tans re-filed their complaint on April 13, 2018 in Case No. 2018CV00785. The Tans claimed the negligence of Marc's resulted in Cynthia's injuries and loss of consortium. On January 10, 2019, Marc's filed a motion for summary judgment on the Tans' claims, submitting the deposition of Cynthia Tan in support of its motion. In their motion, Marc's argued the Tans could not establish Marc's was legally responsible for the table falling and the danger from the accent table was open and obvious. The Tans filed their response to the motion for summary judgment and a Civ.R. 56(F) motion for leave to supplement their memorandum in opposition.

{¶7} On February 13, 2019, the trial court found there was no genuine issue of material fact that Marc's was not in breach of its duty to a business invitee. The trial court further found the accent table display was an open and obvious hazard. It granted summary judgment in favor of Marc's. The trial court denied the Tans' Civ.R. 56(F) motion.

{¶8} It is from this judgment the Tans now appeal.

ASSIGNMENTS OF ERROR

{¶9} The Tans raise two Assignments of Error:

{¶10} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT UPON FINDING THAT PLAINTIFF HAS NOT PROVIDED ANY EVIDENCE THAT DEFENDANT OR ITS EMPLOYEES WERE RESPONSIBLE FOR THE TABLE FALLING.

{¶11} "II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF DEFENDANT UPON FINDING THAT THE HAZARD CREATED BY THE STACKED TABLES WAS OPEN AND OBVIOUS."

ANALYSIS

Standard of Review

{¶12} The Tans argue in their two Assignments of Error that the trial court erred when it granted the motion for summary judgment in favor of Marc's. We consider their Assignments of Error together because they raise the same issue of premises liability.

{¶13} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of 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. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that

> reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶14} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings but must set forth "specific facts" by the means listed in Civ.R. 56(C) showing that a "triable issue of fact" exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶15} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶16} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*., 30 Ohio St.3d 35, 506 N.E.2d 212 (1987).

Premises Liability

{¶17} In order to establish a claim for negligence, a plaintiff must show: (1) a duty on the part of defendant to protect the plaintiff from injury; (2) a breach of that duty; and (3) an injury proximately resulting from the breach. *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989). Generally, if a defendant points to evidence showing that the plaintiff cannot prove any one of the foregoing elements, and if the plaintiff fails to respond as Civ. R. 56 provides, the defendant is entitled to summary judgment. *Hansen v. Wal-Mart Stores, Inc*., 4th Dist. Ross No. 07CA2990, 2008-Ohio-2477, ¶ 9 citing *Deem v. Columbus Southern Power Co.,* 4th Dist. Meigs No. 07CA6, 2007–Ohio–4404, at ¶ 9, citing *Feichtner v. Cleveland*, 95 Ohio App.3d 388, 394, 642 N.E.2d 657 (8th Dist.1994), and *Keister v. Park Centre Lanes*, 3 Ohio App.3d 19, 443 N.E.2d 532 (5th Dist. 1981).

{¶18} In a premises liability case, the relationship between the owner or occupier of the premises and the injured party determines the duty owed. *Gladon v. Greater Cleveland Regional Transit Auth*., 75 Ohio St.3d 312, 315, 662 N.E.2d 287 (1996); *Shump v. First Continental–Robinwood Assocs*., 71 Ohio St.3d 414, 417, 644 N.E.2d 291 (1994). Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability. *Shump, supra; Boydston v. Norfolk S. Corp*., 73 Ohio App.3d 727, 733, 598 N.E.2d 171, 175 (4th Dist.1991).

{¶19} The parties do not dispute that Cynthia Tan was a business invitee on January 14, 2015, when she was at the Marc's store in Canton, Ohio. An invitee is defined as a person who rightfully enters and remains on the premises of another at the express or implied invitation of the owner and for a purpose beneficial to the owner. *Broka v.*

Cornell's IGA Foodliner Inc., 5th Dist. No. 12CA100, 2013-Ohio-2506, 2013 WL 3147687, ¶ 20 citing *Gladon, supra* at 315, 662 N.E.2d 287.

{¶20} The owner or occupier of the premises owes the invitee a duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that its invitees will not unreasonably or unnecessarily be exposed to danger. *Knight v. Hartville Hardware, Inc*., 5th Dist. Stark No. 2015CA00121, 2016-Ohio-1074, ¶ 16 citing *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). A premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers. *See Jackson v. Kings Island*, 58 Ohio St.2d 357, 358, 390 N.E.2d 810 (1979). However, a premises owner is not an insurer of its invitees' safety against all forms of accidents that may happen. *Paschal, supra* at 204, 480 N.E.2d 474. Invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. *See Brinkman v. Ross*, 68 Ohio St.3d 82, 84, 623 N.E.2d 1175 (1993); *Sidle v. Humphrey,* 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the syllabus. In other words, a premises owner owes no duty to persons entering the premises regarding dangers which are open and obvious. *Armstrong v. Best Buy Company, Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, paragraph 5 of the syllabus (Citation omitted.)

{¶21} When considering whether a condition is open and obvious, the court must consider the nature of the condition itself, not the plaintiff's conduct in encountering the condition. *Knight v. Hartville Hardware, Inc.,* 5th Dist. Stark No. 2015CA00121, 2016-Ohio-1074, ¶ 18 citing *Jacobsen v. Coon Restoration & Sealants, Inc*., 5th Dist. Stark No.2011–CA–00001, 2011–Ohio–3563, ¶ 18 citing *Armstrong, supra*. The dangerous

condition at issue, however, does not actually have to be observed by the plaintiff to be an open and obvious condition under the law. *Kraft v. Johnny Biggs Mansfield, LLC*, 5th Dist. Richland No. 2012 CA 0068, 2012–Ohio–5502, ¶ 16 citing *Aycock v. Sandy Valley Church of God*, 5th Dist. Tuscarawas No.2006 AP 09 0054, 2008–Ohio–105. The determinative issue is whether the condition is observable. *Id*. The landowner's duty is not to be determined by questioning "whether the [condition] could have been made perfect or foolproof. The issue is whether the conditions that did exist were open and obvious to any person exercising reasonable care and watching where she was going." *Jackson v. Pike Cty. Bd. Of Commrs*., 4th Dist. Pike No. 10CA805, 2010–Ohio–4875, ¶ 18 quoting *Orens v. Ricardo's Restaurant*, 8th Dist. Cuyahoga No. 70403, 1996 WL 661024 (Nov. 14, 1996).

{¶22} Because Marc's owed a duty of reasonable care to the Tans, we must determine if there is a genuine factual question about whether Marc's breached that duty. While the existence of a duty presents a question of law, the existence of a breach is normally a factual question left to the jury. *Hansen v. Wal-Mart Stores, Inc*., 4th Dist. Ross No. 07CA2990, 2008-Ohio-2477, 2008 WL 2152000, ¶ 12 citing *Hanshaw v. River Valley Health Sys*., 152 Ohio App.3d 608, 2003–Ohio–2358, 789 N.E.2d 680, at ¶ 21, citing *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989); *Pacher v. Invisible Fence of Dayton*, 154 Ohio App.3d 744, 2003–Ohio–5333, 798 N.E.2d 1121 (2nd Dist.) at ¶ 41. However, where there is no genuine issue of fact for the jury to decide, a court may grant summary judgment if the moving party is otherwise entitled to judgment as a matter of law. *Hansen*, 2008-Ohio-2477 at ¶ 12; *See* Civ.R. 56(E). In order to demonstrate a breach of duty, the Tans must show one of the following: (1) Marc's, through its officers

or employees, was responsible for the hazard complained of, (2) Marc's or its agents had actual knowledge of the hazard and neglected to give adequate notice of its presence and remove it promptly, or (3) the danger existed for a sufficient length of time to reasonably justify the imposition of constructive notice. *Id*.

{¶23} In their first Assignment of Error, the Tans contend the trial court erred when it found reasonable minds could only conclude that Marc's was not legally responsible for the accent table falling on January 14, 2015. They argue there is a genuine issue of material fact whether Marc's was responsible for the hazardous condition or Marc's had actual knowledge of the hazard and failed to give adequate notice of its presence and remove it promptly.

{¶24} The trial court determined the Tans failed to provide any Civ.R. 56 evidence to demonstrate there was a genuine issue of material fact that Marc's was responsible for the table falling. The Tans concede there is no direct evidence showing why or how the table fell. The Tans contend there is circumstantial evidence that Marc's stacked one accent table on top of the other accent table, thereby creating the hazardous condition. The Tans rely on Cynthia's deposition testimony where she heard the Marc's store manager tell an employee as she took the accident report, "we couldn't stack things like that. She said things should not be stacked like that." (Depo. 25). The parties did not submit the deposition testimony of the Marc's store manager or the employee, nor do we have the accident report taken by the store manager.

{¶25} The Tans' evidence does not create a genuine issue of material fact about whether Marc's created the hazardous condition or whether it was aware or should have been aware that the display was unstable and dangerous. The Civ.R. 56 evidence

presented in this case shows Cynthia was injured on Marc's property but that fact standing alone does not create the inference that Marc's negligence caused the injury. "The mere happening of an accident gives rise to no presumption of negligence." *Parras v. Std. Oil Co*., 160 Ohio St. 315, 319, 116 N.E.2d 300 (1953). " 'Negligence is a fact that will not be presumed * * *.' " *McLain v. Equitable Life Assur. Co. of U.S*., 1st Dist. Hamilton No. C–950048, 1996 WL 107513, *6 (Mar. 13, 1996), quoting *Wesley v. The McAlpin Company*, 1st Dist. Hamilton No. C–930286, 1994 WL 201825, *2 (May 25, 1994). " 'An inference of negligence does not arise from mere guess, speculation, or wishful thinking, but rather can arise only upon proof of some fact from which such inference can reasonably be drawn.' " *Gibbs v. Speedway, LLC*, 2014-Ohio-3055, 15 N.E.3d 444, ¶ 19 (2nd Dist.), quoting *Parras* at paragraph two of the syllabus; *see also Parras* at 319, 116 N.E.2d 300 (saying that "in order for an inference to arise as to negligence of a party, there must be direct proof of a fact from which the inference can reasonably be drawn").

{¶26} There is no evidence that the accent tables were stacked in an unstable or dangerous manner. Cynthia did not testify the tables appeared damaged or were leaning or off-balance. She makes no contention that the display was at an unsafe height as there was no testimony as to the height of the stacked tables, other than two tables were stacked in the display. Cynthia testified she heard the Marc's store manager say, "things shouldn't be stacked like that," but the parties did not provide the accident report or the testimony of the Marc's store manager or employee.

{¶27} Taken together and drawing all reasonable inferences in favor of the Tans, there is no direct evidence of any negligence on the part of Marc's in constructing the display. There is likewise no evidence that Marc's displayed the accent tables in such a

manner likely to be hazardous. We find the trial court did not err in granting summary judgment in favor of Marc's on the issue of whether Marc's breached its duty of care. The Tans' first Assignment of Error is overruled.

{¶28} In their second Assignment of Error, the Tans argue the trial court erred in finding Marc's was entitled to summary judgment because if there was a hazard from the stacked tables, the danger was open and obvious.

{¶29} The trial court found in its judgment entry granting summary judgment in favor of Marc's that if the accent table display was in fact a hazard, the hazard was open and obvious. There was no genuine issue of material fact that Cynthia observed the tables stacked on top of each other. She touched the tables and remarked upon their heavy appearance. The trial court stated there was nothing hidden in the display's configuration and their stability or precariousness was easily ascertained.

{¶30} Upon our review of the case law as to the open and obvious doctrine and the Civ.R. 56 evidence presented in a light most favorable to the Tans, we find reasonable minds would agree the hazard from the accent table display was open and obvious. Cynthia had a clear view of the two tables stacked on top of each other. She remarked the tables looked heavy. There was no testimony as to the height of the stacked tables. Cynthia touched the tables and walked by them. We find there is no genuine issue of material fact that any hazard from the stacked tables was open and obvious to Cynthia. We therefore overrule the Tans' second Assignment of Error.

CONCLUSION

{¶31} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J., and

Gwin, P.J., concur.

Hoffman, J., dissenting.

Hoffman, J., dissenting

{¶32} I respectfully dissent from the majority opinion. I would sustain Appellant's first assignment of error.

{¶33} I find Appellant's deposition testimony she heard the Marc's store manager while taking the accident report tell another employee "things [the tables] shouldn't be stacked like that," when considered in the light most favorable to Appellant as required by Civ.R. 56, is sufficient to support a finding Appellee was responsible for creating the hazard complained of. In so doing, I fully recognize Appellant did not submit the deposition testimony of the store manager or the other employee, nor did Appellant submit the accident report. But, as noted by the majority, neither did Appellee.

{¶34} We are left with only Appellant's testimony about the store manager's statement. The statement is not hearsay. And, if believed, the statement would arguably constitute an admission of negligence in creating the hazard. Credibility is not an issue to be decided at summary judgment.

{¶35} Accordingly, I would sustain Appellant's first assignment of error.[1]

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HON. WILLIAM B. HOFFMAN

[1] Having concluded to sustain Appellant's first assignment of error, I find any analysis of Appellant's second assignment of error regarding the open and obvious doctrine unnecessary even though I do not disagree with the majority's analysis thereof.

Hoffman, J., dissenting

{¶36} I respectfully dissent from the majority opinion. I would sustain Appellant's first assignment of error.

{¶37} I find Appellant's deposition testimony she heard the Marc's store manager while taking the accident report tell another employee "things [the tables] shouldn't be stacked like that," when considered in the light most favorable to Appellant as required by Civ.R. 56, is sufficient to support a finding Appellee was responsible for creating the hazard complained of. In so doing, I fully recognize Appellant did not submit the deposition testimony of the store manager or the other employee, nor did Appellant submit the accident report. But, as noted by the majority, neither did Appellee.

{¶38} We are left with only Appellant's testimony about the store manager's statement. The statement is not hearsay. And, if believed, the statement would arguably constitute an admission of negligence in creating the hazard. Credibility is not an issue to be decided at summary judgment.

{¶39} Accordingly, I would sustain Appellant's first assignment of error.[2]

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HON. WILLIAM B. HOFFMAN

[2] Having concluded to sustain Appellant's first assignment of error, I find any analysis of Appellant's second assignment of error regarding the open and obvious doctrine unnecessary even though I do not disagree with the majority's analysis thereof.