[Cite as *Linker v. Xpress Fuel Mart,* 2018-Ohio-5404.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

PAT LINKER,

Plaintiff-Appellant,

v.

XPRESS FUEL MART, INC., et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 17 MA 0172

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2016-CV-3401

BEFORE:
Cheryl L. Waite, Gene Donofrio, Kathleen Bartlett, Judges.

JUDGMENT:
Affirmed in part; Reversed in part; Remanded.

Atty. Gregg A. Rossi, Rossi & Rossi, 26 Market Street, 8th Floor, Huntington Bank Building, P.O. Box 6045, Youngstown, Ohio 44501, for Plaintiff-Appellant.

Atty. John W. Becker and
Atty. John M. Heffernan, Harpst Ross Becker Co., LLC, 1559 Corporate Woods Parkway, Suite 250, Uniontown, Ohio 44685 address, for Defendants-Appellees.

Dated: December 20, 2018

WAITE, J.

{¶1} Appellant, Pat Linker, appeals a November 1, 2017 decision of the Mahoning County Common Pleas Court granting Appellee, Xpress Fuel Mart, Inc., summary judgment on Appellant's negligence claim. Appellant sustained injuries after he slipped and fell in Appellant's store on December 24, 2014. Appellant contends that genuine issues of material fact exist as to whether the hazardous condition that caused his injury was open and obvious. Appellant also contends the trial court erred in overruling his motion for reconsideration. While the trial court was without jurisdiction to rule on the motion for reconsideration once Appellant filed his notice of appeal with this Court, a genuine issue of material fact exists regarding the proximate cause of Appellant's fall and subsequent injuries which precludes summary judgment in this matter. The judgment of the trial court is reversed and the matter is remanded for further proceedings according to law and consistent with this Court's Opinion.

Factual and Procedural History

{¶2} On December 24, 2014 Appellant, who was 69 years old, went into Appellee's store to use the restroom and get food. He entered the store, turned left, walked past the cashier, and turned right down an aisle toward the restroom. After using the restroom, he followed the same path, but fell near the store entrance. (Linker Depo., pp. 33, 36, 46.) Appellant stated that he did not see any water or puddle on the floor when he entered and that he did not notice any foreign substance on the floor or smell any cleaning solution. (Linker Depo., pp. 38-39.) Appellant also stated that he parked in front of the store and walked through light snow to the store's front door. (Linker Depo., p. 46.)

{¶3} Appellee's employee, Amanda Mayle ("Mayle"), testified at her deposition that she was the only employee working that night. Mayle testified that she mopped the floor that night with an industrial cleaner because it was dirty and "a little bit wet." (Mayle Depo., p. 21.) She testified that the floor was "drying" by the time Appellant entered the store. (Mayle Depo., p. 38.)

{¶4} Appellant filed a lawsuit alleging negligence against Appellee in count one. Count two of the complaint related to payment of medical expenses pursuant to the insurance policy issued to Appellant by Defendant Grinnell Mutual Reinsurance Company, and was eventually dismissed with prejudice following a settlement between Appellant and Grinnell. On September 27, 2017, Appellee filed a partial motion for summary judgment on the allegations in count one. Appellee asserted in its motion that it did not create an unreasonably dangerous and latent condition that caused Appellant's fall, and that Appellee owed no duty to Appellant because moisture from snow and slush that had been tracked into the store constituted an open and obvious condition. Appellant argued in opposition that the wet condition of the floor was caused by Mayle's mopping and was not tracked in from the outdoors.

{¶5} On November 1, 2017, the trial court issued a judgment entry granting Appellee's motion for partial summary judgment. On November 13, 2017, Appellant filed a motion for reconsideration with the trial court. On December 1, 2017, Appellant voluntarily dismissed count two of the complaint with prejudice and on that same date filed a notice of appeal with this Court. On December 20, 2017, the trial court issued a judgment entry denying Appellant's motion for reconsideration. Appellant raises two assignments of error on appeal.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN GRANTING APPELLEES' PARTIAL MOTION FOR SUMMARY JUDGMENT AS, CONSTRUING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO APPELLANT, REASONABLE MINDS COULD REACH DIFFERENT CONCLUSIONS AND, THEREFORE, SUMMARY JUDGMENT WAS INAPPROPRIATE.

{¶6} This appeal is from a trial court judgment resolving a motion for summary judgment. An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶7} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280,

296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶8} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

{¶9} In order to validly raise a negligence claim in Ohio a plaintiff is required to show that defendant owed a duty to plaintiff, breached that duty, and that plaintiff sustained an injury that directly and proximately resulted from the breach of duty. *Menifee v. Ohio Welding Prods. Inc.,* 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). The question of whether a duty exists in a negligence action is a question of law. *Laughlin v. Auto Zone Stores, Inc.,* 7th Dist. No. 08 MA 10, 2008-Ohio-4967, ¶ 11. As this matter involves a premises, when determining whether a duty exists in the context of premises liability that question depends, in part, on the reason plaintiff has entered the property. In this case, Appellee operated a store and it is apparent that Appellant was a business invitee, as an invitee is an individual who enters the premises of another for some purpose beneficial to the owner or occupier. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 662 N.E.2d 287 (1996). Hence, as an owner or

occupier Appellee must exercise ordinary care and protect the invitee by maintaining the premises in a safe condition. *Light v. Ohio University*, 28 Ohio St.3d 66, 68, 503 N.E.2d 611 (1986).

{¶10} When a danger is open and obvious the owner owes no duty to persons entering the premises. *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the syllabus. The danger is said to be open and obvious in nature because it serves as a warning in and of itself. No additional duty is imposed on a premises owner because they can "reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *Simmers v. Bentley Constr. Co.,* 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992).

{¶11} Inclement weather has long been recognized to create an open and obvious hazard under Ohio law, shielding premises owners from liability for certain accidents occurring as a result:

> It is not the duty of persons in control of such buildings to keep a large force of moppers to mop up the rain as fast as it falls or blows in, or is carried in by wet feet or clothing or umbrellas, for several very good reasons, all so obvious that it is wholly unnecessary to mention them here in detail.

S.S. Kresge Co. v. Fader, 116 Ohio St. 718, 724, 158 N.E. 174 (1927).

{¶12} The duty of ordinary care imposed in premises liability requires merchants to warn business invitees only of latent or concealed defects of which the owner had, or should have had, knowledge. *McGee v. Lowe's Home Centers,* 7th Dist. No. 06 JE 26,

2007-Ohio-4981, ¶ 15 citing *Parsons v. Lawsons Co.,* 57 Ohio App.3d 49, 50, 566 N.E.2d 698 (5th Dist.1989). Further, the defect must constitute an "unreasonably dangerous" condition. *Baldauf v. Kent State Univ.,* 49 Ohio App.3d 46, 48-49, 550 N.E.2d 517 (10th Dist.1988). When the condition is open and obvious, the merchant has no duty and it acts as a complete bar to a subsequent negligence claim. *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 80, 2003-Ohio-2573, 788 N.E.2d 1088. In order to impose liability on an owner, possibility and speculation is not evidence. An invitee must present actual evidence tending to show some negligent act or omission. *Allstate Ins. Co. v. Sears,* 7th Dist. No. 06 BE 10, 2007-Ohio-4977, ¶ 75 citing *The J.C. Penney Co., Inc. v. Robison,* 128 Ohio St. 626, 193 N.E. 401 (1934), paragraph four of the syllabus.

{¶13} Appellant contends the open and obvious doctrine does not apply because he did not fall as a result of snow being tracked into the store. Instead, his fall was caused by the wetness left on the floor by Mayle when she mopped. Appellant supports his contention with evidence that Appellee required its employees to mop every night and to spot mop if needed, and that wet floor signs were required to be placed on the floor. (Mayle Depo., p. 41.) Appellant provided store video showing the incident, which the trial court viewed. Appellant stressed that it is apparent from this video there were no signs posted to alert him about the wet floor.

{¶14} Appellee, however, argues Appellant's claim is barred by the open and obvious doctrine because Appellant failed to establish that Appellee created an unreasonably dangerous, latent condition which was the proximate cause of Appellant's fall. Further, Appellee claims that snow or moisture from outdoors had been tracked

into the store. Appellant testified that he did not see any water or puddle when he entered the store and that there was no cleaner on the floor where he slipped. (Linker Depo., p. 39.)

{¶15} Appellee relies on the *Laughlin* case in this matter. In *Laughlin*, the appellant was a 79 year old man who entered an Auto Zone store and fell at the entrance on a wet tile floor. He acknowledged that he had walked through a wet parking lot because it was raining outside, and that the floor was wet although he did not see water on the floor until he fell. Laughlin testified that he thought the water was tracked into the store by various patrons' shoes, including his own. In his negligence claim Laughlin argued that he fell because of a combination of events: rain water on the floor, six coats of wax on the tile floor, the entrance rug was missing, and the store lacked any warning cones. Laughlin argued that a rug and warning signs were normally present at the entrance of the store and that because both were missing, this caused an unreasonably dangerous condition. We held that summary judgment was proper where Laughlin failed to present any evidence that the water on the waxed floor created an unreasonably dangerous condition despite the missing rug or cones. Further, the wet floor was admittedly an open and obvious condition and Auto Zone had no duty to warn Laughlin.

{¶16} Appellant contends that the floor was wet due to Mayle's mopping and that this created an unreasonably dangerous, latent condition that caused his fall. There is no direct evidence to that effect, and this record overall contains very little actual evidence. The parties do differ on key facts: whether there was snow, slush or inclement weather from the outdoors that had been tracked into the store that day or

whether the action of Appellee in mopping the store caused the floor to be wet and slippery, precipitating Appellant's fall. No witness testimony is dispositive. Appellant testified during his deposition when questioned if it had been snowing, "[n]o, not that I can recall" and "I don't know. I'll say no." (Linker Depo., pp. 34, 47.) Mayle testified that she mopped the floor "because it was dirty" and that there was a little slush tracked in from outside. (Mayle Depo., p. 21.)

{¶17} Mayle's testimony about her actions contains equivocations. Mayle testified that she had mopped the floor "possibly" within fifteen minutes of Appellant's fall and she thought any wetness "could have been from the slush coming outside on the shoes." (Mayle Depo., p. 38.) She testified that the floor was "drying" after being mopped. Appellant testified that he did not see signs posted warning about a wet floor and that after he fell he noticed his sleeve was wet. (Linker Depo., p. 40.) There are no warning signs visible on the videotape submitted into evidence. Appellant also testified it had not been snowing, although not without his own equivocation, intimating that any moisture on the floor could not have been tracked in from the outdoors.

{¶18} In the motion for summary judgment, Appellee raised the open and obvious doctrine to refute Appellant's negligence claim. Appellee contends moisture was tracked in from the outdoors. Appellant maintained that Mayle's mopping and Appellee's negligence in failing to provide proper warning led to his fall. The record contains conflicting testimony about the cause of Appellant's fall; testimony that supports both positions. Because of this dispute in material fact, this matter was not appropriately disposed of in summary judgment.

{¶19} The trial court erred in granting summary judgment to Appellee when a genuine issue of material fact exists regarding causation and Appellee's negligence. Thus, Appellant's first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION/MOTION FOR RELIEF FROM JUDGMENT.

{¶20} In his second assignment of error, Appellant contends the trial court erred in denying his motion for reconsideration. As earlier stated, the trial court issued its final, appealable order granting summary judgment on November 1, 2017. Appellant filed a motion for reconsideration with the trial court on November 13, 2017. While such a motion is a nullity in the trial court (*Ritchie v. Mahoning Cty.*, 2017-Ohio-1213, 80 N.E.3d 560 (7th Dist.); *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 381, 423 N.E.2d 1105 (1981)) the trial court apparently ruled on that motion. Appellant filed his notice of appeal on December 1, 2017. The parties agree the trial court denied Appellant's motion to reconsider on December 21, 2017, although that judgment is not properly part of this appellate record since it was issued subsequent to the filing of the notice of appeal.

{¶21} "An appeal is perfected upon the filing of a written notice of appeal. R.C. 2505.04. Once a case has been appealed, the trial court loses jurisdiction except to take action in aid of the appeal." *In re S.J.,* 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 9 citing *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas,* 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978); App.R. 3(A). Thus, the trial court

retains jurisdiction over any issues not inconsistent with the appellate court's jurisdiction. *Id.*

{¶22} Appellant filed a motion for reconsideration pursuant to Civ.R. 60(B) with the trial court in this matter, attempting to submit additional evidence regarding the weather conditions on the day of the incident in question. This additional evidence could, and should, have been presented before final judgment was rendered. Moreover, "the power of a [trial] court to alter its judgment must be consistent with the [Ohio Rules of Civil Procedure]." *EMC Mortgage Co., Inc. v. Atkinson*, 9th Dist. No. 25067, 2011-Ohio-59, ¶ 3.

{¶23} Under Civ.R. 60(B), the trial court may relieve a party from final judgment for: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) judgment has been satisfied; or (5) any other reason justifying relief from judgment. Civ.R. 60(B). In its interpretation of Civ.R. 60(B), the Ohio Supreme Court has held that:

> To prevail on a motion brought under [the rule], the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time.

GTE Automatic Elec. Inc. v. ARC Indus. Inc., 47 Ohio St.2d 146 (1976), paragraph two of the syllabus.

{¶24} The evidence presented in Appellant's motion for reconsideration regarding weather data was simply additional evidence that could, and should, have been introduced before final judgment. No hearing was held on Appellant's motion. The judgment entry dated December 20, 2017 reflects only that the motion was denied. There is no indication that the trial court considered the *GTE* factors when denying the motion. However, the trial court did not have "inherent equitable power" to modify the final judgment. *EMC* at ¶ 6. Hence, the trial court did not err in overruling Appellant's motion. Appellant's second assignment of error is without merit and is overruled.

{¶25} Based on the foregoing, Appellant's first assignment of error has merit and his second assignment is without merit. The judgment of the trial court is affirmed in part and reversed in part. This matter is remanded to the trial court for further proceedings according to law and consistent with this Court's Opinion.

Donofrio, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and his second is overruled. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed in part. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.