[Cite as *Ropp v. K-Mart Corp.*, 2002-Ohio-701.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

John Ropp, Wendy Ropp,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 01AP-597
K-Mart Corporation et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 27, 2001

Daniel J. Fletcher, for appellants.

Reminger & Reminger Co., L.P.A., and *Gregory D. Brunton*, for appellee K-Mart Corporation.

APPEAL from the Franklin County Court of Common Pleas.

BOWMAN, J.

Plaintiffs-appellants, John Ropp ("Ropp") and his mother, Wendy Ropp, appeal from the decision of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, K-Mart Corporation ("K-Mart").

On May 29, 1998, Ropp, then a minor, was shopping at a K-Mart store at 3780 Park Mill Run Drive in Columbus. Ropp bent down to look at merchandise in a waist-high glass showcase in the electronics department. When Ropp stood up and turned to his left, he bumped a fire extinguisher with his shoulder. The fire extinguisher fell off its mounting and landed on Ropp's foot. The impact cut Ropp's foot and broke his toe.

In granting K-Mart's motion for summary judgment, the trial court reasoned that K-Mart owed no duty of care to Ropp because the fire extinguisher was an open and obvious hazard.

On appeal, appellants assign the following error:

> THE TRIAL COURT ERRED IN DECIDING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT. THE COURT RULING IN FAVOR OF THE DEFENDANT ON SUMMARY JUDGMENT WAS BASED ON THE COURT'S INCORRECT CONCLUSION THAT THE FIRE EXTINGUISHER CAUSING PLAINTIFF'S INJURY WAS AN OPEN AND OBVIOUS DANGER TO A BUSINESS INVITEE IN THE POSITION OF PLAINTIFF.

For the reasons that follow, we affirm the judgment of the trial court.

Appellate review of summary judgment motions is *de novo*. *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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. *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183.

When a motion for summary judgment has been supported by proper evidence, a non-moving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing that there is a genuine triable issue. Civ.R. 56(E); *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52. To establish the existence of a genuine issue of material fact, the non-moving party must do more than simply resist the allegations in the motion. Rather, that party must affirmatively set forth facts which entitle him to relief. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111. If the non-moving party "does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E).

It is well-settled that a shopkeeper owes its patrons, as business invitees, a duty to exercise ordinary or reasonable care in maintaining their 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. However, the owner is not an insurer of the invitee's safety. *Id*. Under the "open and obvious" doctrine, an owner owes no duty to protect business invitees from hazards which are so obvious and apparent that the invitee is reasonably expected to discover and protect against them himself. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. "The rationale behind the doctrine is that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers

and take appropriate measures to protect themselves." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644.

We agree with the trial court that reasonable minds could only conclude that the fire extinguisher was an open and obvious hazard. Photographs authenticated by Wendy Ropp demonstrate that the fire extinguisher was mounted in plain view at a height of approximately four to five feet off the ground. A sign immediately above the fire extinguisher rendered it even more conspicuous.

Ropp admits that the fire extinguisher was mounted in plain view, readily discoverable upon ordinary inspection. He contends, however, that K-Mart should be liable because it hung the fire extinguisher "in such a way that the precarious and hazardous condition of the fire extinguisher was invisible." Appellants argue that they offered evidence that the fire extinguisher may have fallen from its mounting in the past, raising an issue of fact as to whether the fire extinguisher was sufficiently secured on its mounting. Ropp argues that K-Mart was negligent because it failed to take additional measures to secure the fire extinguisher so that it would not fall when Ropp bumped into it.

We disagree. "[T]he open and obvious doctrine is determinative of the threshold issue of the plaintiffs' *prima facie* case, the existence of the defendants' duty." *Kirk v. Scioto Downs* (Feb. 22, 2001), Franklin App. No. 00AP-1087, unreported.

Appellant argues that this court should follow the reasoning in *Schindler v. Gale's Superior Supermarket, Inc.* (2001), 142 Ohio App.3d 146, to hold that the open and obvious doctrine relates to proximate cause and, thus, a jury should determine the comparative negligence between the parties. In *Bowen v. Wal-Mart, Inc.* (Oct. 2, 2001),

Franklin App. No. 01AP-375, unreported (Memorandum Decision), this court, in reliance on *Bennett v. Stanley* (2001), 92 Ohio St.3d 35, held that the open and obvious doctrine relates to duty, not proximate cause.

We conclude that the danger posed by the fire extinguisher, including the risk that it could dislodge from its mounting and fall if bumped, was open and obvious and, consequently, K-Mart had no duty to warn of or prevent this hazard. The facts offered by Ropp are not material, as they merely pertain to the nature of the open and obvious hazard.

Accordingly, we overrule appellants' assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and DESHLER, J., concur.