[Cite as *Zitron v. Sweep-A-Lot,* 2010-Ohio-2733.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Margot Zitron,	:	
Plaintiff-Appellant,	:	
Medigold Insurance,	:	
Involuntary Plaintiff-Appellee,	:	No. 09AP-1110 (C.P.C. No. 08CVC-08-11732)
v.	:	(ACCELERATED CALENDAR)
Sweep-A-Lot and Kroger Company,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 15, 2010

Joseph S. Streb Co. LPA, and *Joseph S. Streb*, for appellant.

Gallagher, Gams, Pryor, Tallan & Littrell, LLP, Andrew Kielkoph, and *Patricia A. Boyer*, for appellee Sweep-A-Lot.

The Cook Law Group, LLC, and *Todd A. Cook*, for appellee Kroger Company.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Margot Zitron ("Zitron"), appeals the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendants-appellees, Kroger Company ("Kroger") and Sweep-A-Lot (collectively, "defendants"), on Zitron's negligence claims arising out of a trip-and-fall accident. For the following reasons, we affirm.

{¶2} On June 14, 2007, Zitron purchased a small plant at the Kroger Marketplace store on Hamilton Road in Gahanna, Ohio, and exited through the store's south entrance, carrying her purse and the plant. Zitron crossed the sidewalk and stepped from the curb onto the parking lot, whereupon she tripped on a hose and fell, sustaining injuries.

{¶3} The hose upon which Zitron tripped was one of two hoses being used by Tyler Little ("Little"), an employee of Sweep-A-Lot, an independent contractor, to clean the sidewalks in front of the Kroger Marketplace. In his work, Little drove a truck with a trailer that held a pressure washer and water tank. One hose, the "equipment hose," was 100 feet long and connected the pressure washer on the trailer to a surface cleaner or wand used by Little to clean the sidewalk. A second hose, the "supply hose," connected the water tank on the trailer to a water supply, in this case an outside spigot located south of the south entrance to the Kroger Marketplace. The equipment hose moved as Little used the surface cleaner and wand, but the supply hose was laid down and not moved.

{¶4} Zitron filed a complaint in the Franklin County Court of Common Pleas on August 14, 2008, alleging negligence by both defendants. On October 7, 2009, the trial

court issued a decision granting summary judgment in favor of both defendants. The court concluded that Kroger was entitled to summary judgment because the hazard posed by the Sweep-A-Lot hose was open and obvious, therefore negating any duty for Kroger to warn Zitron of the hazard. It further concluded that Sweep-A-Lot did not breach its duty of ordinary care to Zitron. The trial court entered final judgment in favor of the defendants on November 23, 2009.

{¶5} Zitron filed a timely notice of appeal and presently raises the following assignments of error:

> I. THE TRIAL COURT ERRED IN ADOPTING AS FACT A STATEMENT OF OPPOSING COUNSEL.
>
> II. THE TRIAL COURT ERRED IN FAILING TO FOLLOW OHIO SUPREME COURT CASE LAW AND BASIC STATUTORY LAW.
>
> III. THE TRIAL COURT ERRED IN REFUSING TO ALLOW [ZITRON] TO USE AN ERRATA SHEET REGARDING HER DEPOSITION.
>
> IV. THE TRIAL COURT ERRED IN REFUSING TO ALLOW [ZITRON] TO USE AN AFFIDAVIT TO SET FORTH HER STATEMENT OF FACTS.
>
> V. THE TRIAL COURT ERRED IN FINDING MOVEABLE HOSES STATIC AND IN FAILING TO CONSIDER THE KROGER [SURVEILLANCE] TAPE.

{¶6} Although Zitron does not generally assign as error the trial court's entry of summary judgment, her specific assignments of error stem from the trial court's decision granting summary judgment. Therefore, for context, we briefly review the standards governing summary judgment. Pursuant to Civ.R. 56(C), summary judgment "shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶7} By her first assignment of error, Zitron contends that, in its October 7, 2009 decision, the trial court erroneously adopted as fact an unsupported statement by Sweep-A-Lot's attorney. Specifically, Zitron contests the trial court's statement that "it was not the hose that [Little] was using to wash the building that [Zitron] tripped on. It was rather the hose going from the spigot to the water tank." Despite Zitron's argument that the record contains no evidence of which hose she tripped over, undisputed deposition testimony supports the trial court's statement.

{¶8} Little testified that he arrived at the Kroger Marketplace at approximately 8:00 a.m. on the day in question and began cleaning the sidewalks from the south end of the store. By the time he learned of Zitron's fall, Little had worked his way north of the north entrance and around the corner of the building. At that time, his truck was parked near the north entrance but positioned so that the supply hose could reach the spigot south of the south entrance. Basia Nowak ("Nowak"), a witness who exited the Kroger Marketplace from the south entrance at the same time as Zitron, confirmed that the Sweep-A-Lot truck was "on the other end of Kroger," closer to the north entrance, and testified that the hose upon which Zitron tripped was running to the truck. (Nowak Depo. 29.) Zitron, herself, testified that the hose extended beyond sight in both directions. Based on the undisputed locations of Little, the truck, and the spigot, the hose crossing Zitron's path was the supply hose stretching from the Sweep-A-Lot truck, across the south entrance, to the spigot. Viewing the evidence in the light most favorable to Zitron, the court could only have concluded that Zitron tripped and fell over the supply hose. Therefore, the trial court did not adopt an unsupported representation by counsel when it stated that Zitron tripped over the supply hose, and we overrule Zitron's first assignment of error.

{¶9} Zitron's second and fifth assignments of error touch on the applicability of the open-and-obvious doctrine in this case and on the effect of the trial court's conclusion that the hose was open and obvious.

{¶10} To establish actionable negligence, a plaintiff must show the existence of a duty, breach of that duty, and injury proximately resulting from the breach. *Cooper v.*

Meijer Stores Ltd. Partnership, 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶8, citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. The open-and-obvious doctrine relates to the threshold issue of duty. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶13. A shopkeeper ordinarily owes a business invitee, like Zitron here, a duty of ordinary care in maintaining the premises in a reasonably safe condition, which includes an obligation to warn invitees of latent or hidden dangers. Id. at ¶5, citing *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. The open-and-obvious doctrine, however, eliminates a shopkeeper's duty to warn a business invitee of static dangers either known to the invitee or so obvious and apparent that the invitee may reasonably be expected to discover them and protect against them. *Simmons v. Am. Pacific Ent., LLC*, 164 Ohio App.3d 763, 2005-Ohio-6957, ¶21, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. The rationale is that an open and obvious danger serves as its own warning. *Simmons* at ¶21.

{¶11} An open and obvious danger is one not hidden, concealed from view or undiscoverable upon ordinary inspection. *Lydic v. Lowe's Cos., Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. A person need not actually observe a dangerous condition for it to be open and obvious; the determinative issue is whether the condition is observable. Id. The crucial inquiry is whether an invitee exercising ordinary care would have seen and been able to guard against the condition. *Ruz-Zurita v. Wu's Dynasty*, *Inc.*, 10th Dist. No. 07AP-616, 2008-Ohio-300, ¶7. Thus, even in cases where the plaintiff did not see the condition until after falling, this court has found no duty if the plaintiff could have seen the condition had he or she looked. Id. "A pedestrian's failure

to avoid an obstruction because he or she did not look down is no excuse." *Lydic* at ¶16, citing *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224.

{¶12} The existence and obviousness of an alleged dangerous condition requires a review of the underlying facts. *Ruz-Zurita* at ¶8. If, however, the record reveals no genuine issue of material fact as to whether the danger was free from obstruction so that an ordinary person could readily appreciate it, the open and obvious nature of the hazard may appropriately be determined as a matter of law. Id., citing *Freiburger v. Four Seasons Golf Ctr., L.L.C.*, 10th Dist. No. 06AP-765, 2007-Ohio-2871, ¶11.

{¶13} In her fifth assignment of error, Zitron contends that the open-and-obvious doctrine is inapplicable because the hose upon which she fell was not a static condition.[1] Zitron relies on *Simmons*, where this court distinguished premises tort claims alleging negligence based on static or passive conditions from those alleging negligence based on an act or omission by the defendant. The court grounded its distinction on "the two separate and distinct duties an occupier owes its business invitees." Id. at ¶20. Whereas "static conditions relate to the owner's duty to maintain its premises in a reasonably safe condition, including an obligation to warn its invitees of latent or hidden dangers, * * * active negligence relates to the owner's duty not to injure its invitees by negligent activities conducted on the premises." Id. The open-and-obvious doctrine applies only to static conditions. Id. at ¶9, 23. In *Simmons*, the

[1] Although her fifth assignment of error also states that the trial court failed to consider a Kroger surveillance tape, Zitron makes no argument in support of that assertion, and the record does not indicate

negligence claim was not premised solely on a failure to warn of a pre-existing, static

that the trial court excluded or otherwise failed to consider the tape. Accordingly, we have no basis upon which to review Zitron's assertion.

hazard, and the evidence demonstrated that the defendant's employee actively created the hazard shortly before the plaintiff's injury. Accordingly, we concluded that the record presented an issue of fact as to whether the employee's action constituted an act of negligence to which the open-and-obvious doctrine would not apply.

{¶14} Zitron argues that the hose was moving as Little cleaned and was, therefore, not a static condition that could be observed prior to her fall. In *Wolfe v. Bison Baseball, Inc.*, 10th Dist. No. 09AP-905, 2010-Ohio-1390, ¶14, we recently refused to apply the open-and-obvious doctrine to moving objects, like a flying baseball, stating, "[t]he difference between the danger in this case, and those [involving static conditions], is that a baseball is a moving object [and] its precise location or potential to cause harm cannot be observed prior to its point of impact." Zitron's argument here, however, is again based on her contention that she may have tripped over the equipment hose that moved as Little cleaned. As stated above, the trial court could only have concluded that the hose upon which Zitron tripped was the supply hose. Little testified that, unlike the equipment hose that moves as he cleans, the supply hose does not move once it is laid down, and the record contains no contrary evidence. As the trial court aptly recognized, the record contains no evidence that the hose upon which Zitron tripped was moving at the time of her fall. Therefore, we discern no error in the trial court's characterization of the hose as a static condition, subject to the open-and-obvious doctrine, and we overrule Zitron's fifth assignment of error.

{¶15} By her second assignment of error, Zitron contends that the trial court erroneously applied the open-and-obvious doctrine in favor of Sweep-A-Lot, in

contravention of a Supreme Court of Ohio holding that the doctrine does not apply to a claim against an independent contractor. "An independent contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which exonerates an owner or occupier of land from the duty to warn those entering the property concerning open and obvious dangers on the property." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 1992-Ohio-42, syllabus. Although the trial court attributed it to *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, the trial court acknowledged the *Simmers* holding in substance. Moreover, despite criticizing the Supreme Court's holding as "counterintuitive and against all logic," the trial court rejected Sweep-A-Lot's argument in support of summary judgment based on the open-and-obvious doctrine, stating: "Unlike Kroger, [Sweep-A-Lot] cannot relieve itself of [its] duty [of ordinary care] by way of the open and obvious doctrine." That conclusion is consistent with *Simmers*.

{¶16} Zitron goes on to argue that the court's consideration of the open and obvious nature of the hazard in its analysis of Zitron's claim against Sweep-A-Lot under the ordinary rules of negligence was merely a veiled application of the open-and-obvious doctrine and, itself, a blatant disregard of the *Simmers* holding. We disagree. First, Zitron mischaracterizes the trial court's holding, stating that the court determined that "no duty is owed by an independent contractor wielding hoses around busy shopping center sidewalks to little old lady store patrons carrying purchased items." The trial court made no such determination and, to the contrary, expressly concluded that the open-and-obvious doctrine did not relieve Sweep-A-Lot of its duty of care. The

court nevertheless considered the open and obvious nature of the hose in its consideration of whether Sweep-A-Lot breached its duty of care to Zitron. Sweep-A-Lot argued that Zitron could not prove that it breached its duty of ordinary care because the hose was in plain sight, was easily observable to a reasonably prudent person who could be expected to protect himself or herself, and did not create a foreseeable risk of unreasonable harm.

{¶17} In *Simmers*, the Supreme Court acknowledged that, while the open-and-obvious doctrine does not relieve an independent contractor of a duty, the open and obvious nature of a hazard remains relevant for other purposes. The court stated, "[s]ince [the independent contractor] had no property interest in the premises, we must look to the law of negligence to determine [the independent contractor's] duty of care, and then consider the significance of the factual finding that the [hazard] was open and obvious." Id. at 645. In fact, the court noted that a condition may "itself [be] sufficiently discernible to constitute an adequate warning of the danger," precluding a finding of a breach. Id. at 646. *Simmers*, thus, does not foreclose the trial court's consideration of the open and obvious nature of the hose in its analysis of whether Sweep-A-Lot breached its duty of ordinary care to Zitron.

{¶18} Under the facts stipulated in *Simmers*, a question of fact remained as to whether the hazard posed by a large hole in a railway bridge used by pedestrians was sufficiently discernable to satisfy the duty of care owed by the contractor who created the admittedly dangerous condition. The court did not, however, suggest that, in appropriate circumstances and on the proper record, summary judgment would never

be warranted on the question of whether an obvious hazard itself may preclude a finding of breach of duty. Furthermore, although Zitron asserts that the trial court ignored the Supreme Court's holding that the open-and-obvious doctrine does not relieve an independent contractor of a duty, neither Zitron's assignment of error nor Zitron's argument on appeal specifically states that the trial court erred in its conclusion that Sweep-A-Lot did not breach its duty of care to Zitron.

{¶19} Zitron also argues, under her second assignment of error, that the trial court ignored the law of comparative negligence. Having found no negligence on the part of either defendant, however, issues of comparative negligence are immaterial. See *Nageotte v. Cafaro Co.,* 160 Ohio App.3d 702, 2005-Ohio-2098, ¶29 (stating that, where the defendant owes no duty, there can be no negligence to compare); *Gatien v. Schumacher* (Aug. 15, 1994), 5th Dist. No. 94 CA 0065 (absent a showing of a breach of duty, the comparative negligence statute is inapplicable). For these reasons, we overrule Zitron's second assignment of error.

{¶20} Zitron's remaining assignments of error concern the evidence before the trial court for purposes of summary judgment. By her third assignment of error, Zitron claims the trial court erred by rejecting an errata sheet filed to correct certain testimony from her deposition, and, by her fourth assignment of error, she claims the trial court erred by refusing to consider her post-deposition affidavit. The trial court refused the errata sheet, stating that an errata sheet is intended to correct transcription errors, not to materially change deposition testimony. The court also disregarded statements in

Zitron's affidavit that contradicted her previous deposition testimony. Zitron maintains that the trial court prejudicially erred in both regards.

{¶21} Pursuant to Civ.R. 30(E), "[a]ny changes in form or substance [to deposition testimony] that the witness desires to make shall be entered upon the deposition by the officer [before whom the deposition was taken] with a statement of the reasons given by the witness for making them." Defendants concede that Civ.R. 30(E) authorizes substantive changes to a witness' deposition testimony, but they nevertheless argue that the trial court appropriately rejected the errata sheet because Zitron did not strictly comply with the requirements of that rule. They also argue that the requested changes are ultimately irrelevant to the trial court's decision and, therefore, that any error in their exclusion was harmless.

{¶22} "A party seeking to invoke the privilege accorded by Civ.R. 30(E) must comply with the instructions that the rule gives for making additions and/or changes in deposition testimony." *Bishop v. Ohio Bur. of Workers' Comp.*, 146 Ohio App.3d 772, 2001-Ohio-4274, ¶56. In *Bishop* at ¶59, we quoted with approval *Holland v. Cedar Creek Mining, Inc.* (S.D.W.Va.2001), 198 F.R.D. 651, 653, wherein the court stated: " 'The witness is * * * plainly bound by the rule to state specific reasons for each change. * * * This court, like most courts, will insist on strict adherence to the technical requirements of Rule 30(e).' " Zitron's errata sheet requests 29 separate corrections or changes to her deposition testimony, but she states reasons for only eight.[2] The trial court was entitled to reject at least those changes for which Zitron did not indicate a

[2] Four others simply correct misspellings in the transcription.

reason based on non-compliance with the requirements of Civ.R. 30(E). We also agree with the defendants that, even if the trial court erred by rejecting Zitron's errata sheet in its entirety, any error in that regard was harmless because the proposed alterations would have had no effect on the trial court's decision.

{¶23} The factual underpinning of the trial court's decision was its finding that the hose was open and obvious. In making that finding, the court noted Zitron's testimony that, when she saw it after her fall, the hose was approximately 18 inches from the curb, as well as testimony that the hose was distinguishable in color from the parking lot. Zitron also testified that, when she saw the hose, it was not tucked under the curb, and there was nothing laying over the hose to obscure it. Similarly, Nowak testified that the hose was "not right at the curb," but was further out and readily observable. (Nowak Depo. 48.) The court acknowledged that Zitron did not see the hose prior to her fall, but also cited her deposition testimony that nothing obstructed her view of the sidewalk or parking lot as she exited the store. Zitron has not alleged any attendant circumstances that would have diverted her attention at the time of the fall, and she admitted that she was able to focus as she was walking toward her car.

{¶24} None of the proposed changes on the errata sheet would create a genuine issue of fact as to whether the hose was an open and obvious hazard. At her deposition, Zitron was asked: "Is there anything that would have obstructed you from seeing something that was * * * on the ground in front of you?" and she replied "[n]o." (Zitron Depo. 59.) On the errata sheet, Zitron attempted to change her response to read: "I was holding a potted plant in my hand." Prior to the response she sought to

change via the errata sheet, Zitron had not only already testified that she was carrying the plant, measuring approximately six inches in height, but also that there was nothing to obstruct her view of either the sidewalk or the parking lot as she exited the store. Zitron made no attempt to alter this contradictory, earlier testimony that her view was unobstructed. Zitron's only explanation for the requested change to her subsequent statement is that it is consistent with her testimony that she was carrying a plant. She does not explain, however, how the plant obstructed her view of the sidewalk or parking lot, in light of her previous, contradictory testimony.

{¶25} This court has previously rejected an attempt to avoid the open-and-obvious doctrine where a plaintiff claimed he could not see an otherwise observable hazard because he was carrying a large item in front of him. See *Lydic* at ¶13-15. In *Lydic*, a plaintiff tripped and fell over a piece of wood while shopping at a Lowe's store. At the time of his fall, the plaintiff was carrying a 50-pound bag of cedar chips, which obscured his view ahead and below. Nevertheless, we agreed with the trial court that reasonable minds could only conclude that the otherwise unobscured piece of wood on the store floor was open and obvious, and we affirmed the entry of summary judgment in favor of the defendant based on the open-and-obvious doctrine. Accordingly, Zitron's proposed change to her deposition testimony to suggest that her view may have been obscured by the small plant in her hand would not create a factual dispute as to whether the hose was open and obvious where all of the evidence suggests that the hose was observable and not hidden from view.

{¶26} Zitron also attempted, without explanation, to change her response to counsel's question: "Would you agree * * * that a reasonable person, an ordinary person looking down would have seen the hose as they're walking in the parking lot that day?" (Zitron Depo. 120.) Originally, Zitron responded "I don't know," but she attempted to change her response to "not under the circumstances." Zitron's agreement or disagreement about whether a reasonable person would have seen the hose does not affect the trial court's determination, based on the record evidence, that reasonable minds could only conclude that the hose was open and obvious. Upon review, we conclude that, even had the trial court considered this proposed change to Zitron's deposition testimony, it would not have created a genuine issue of material fact as to the open and obvious nature of the hose, in light of the evidence in the record demonstrating that the hose was observable and that Zitron's view of the parking lot and sidewalk were unobstructed. Thus, even if the trial court erred by rejecting Zitron's errata sheet, any error in that regard was harmless. For these reasons, we overrule Zitron's third assignment of error.

{¶27} Lastly, we turn our attention to Zitron's affidavit in opposition to the defendants' motions for summary judgment. The Supreme Court of Ohio has held that "an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶28. When a party opposing summary judgment presents an affidavit inconsistent with the affiant's prior deposition testimony, the trial court must

consider whether the affidavit contradicts or merely supplements prior testimony. Id. at ¶29. "A nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created." Id. Because Zitron offered no explanation for any contradiction between her affidavit and her deposition testimony, the trial court was entitled to disregard contradictory statements in her affidavit. The trial court did not reject Zitron's affidavit in its entirety, but simply stated that it would disregard any statement that contradicted her prior deposition testimony, as authorized by *Byrd*.

{¶28} Zitron argues that her affidavit explains and amplifies, but does not contradict, her deposition testimony with respect to the location of the hose. Zitron contends that the trial court ignored her affidavit statement that she did not see the hose until after she fell, even though she maintains that that statement is consistent with her deposition testimony. We agree that Zitron consistently testified in her deposition that she did not see the hose until after she fell, and the trial court specifically acknowledged that fact in its decision. Because the question of whether a condition is open and obvious utilizes an objective standard, however, the court stated that whether Zitron actually saw the hose is not determinative of whether it was open and obvious. See *Lumley v. Marc Glassman, Inc.*, 11th Dist. No. 2007-P-0082, 2009-Ohio-540, ¶24; *Williams v. Lowe's Home Ctrs., Inc.*, 6th Dist. No. L-06-1267, 2007-Ohio-2392, ¶18, citing *Lydic*. The court appropriately noted Zitron's deposition testimony that the hose was approximately 18 inches from the curb when she saw it. Although Zitron's affidavit states that the curb obscured her view of the hose, that statement contradicts, without

explanation, her deposition testimony that the hose was not tucked up under the curb, that there was no shadow from the curb obscuring the hose, and that she had no knowledge of the hose's position before her fall. Accordingly, the trial court was entitled to disregard her contradictory affidavit statement. Because Zitron identifies no statement in her affidavit that the trial court improperly ignored, we overrule Zitron's fourth assignment of error.

{¶29} Having overruled each of Zitron's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.