[Cite as *Alley v. Glassman, Inc.*, 2011-Ohio-6827.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ruth Alley,	:	
Plaintiff-Appellant,	:	
		No. 11AP-376
v.	:	(C.P.C. No. 10CVC-05-6740)
Marc Glassman, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 30, 2011

Blumenstiel, Evans & Falvo, LLC, and *Braden A. Blumenstiel*, for appellant.

Weston Hurd LLP, J. Quinn Dorgan and *David T. Patterson*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiff-appellant, Ruth Alley ("appellant"), appeals from the March 21, 2011 judgment of the Franklin County Court of Common Pleas, in which the court granted summary judgment in favor of defendants-appellees, Marc Glassman, Inc. et al ("Marc's" or "appellees"). For the following reasons, we affirm.

{¶2} On December 22, 2008, between the hours of 1:30 p.m. and 2:00 p.m., appellant decided to go to Marc's in order to pick up a few groceries. Appellant recalls arriving at Marc's, getting a cart, and picking up one or two cans of soup, a calendar, and a bag of potato chips. Appellant then headed to the back of the store to pick up a box of

organic spring greens lettuce. Appellant placed the soup, calendar, bag of potato chips, and box of organic spring greens lettuce in her cart. In order to purchase this particular kind of lettuce, appellant had been to Marc's "many times before," once a week or once every two weeks. (Alley depo., 41.) Customarily, on her trips to Marc's, appellant traversed the store in a U-shaped pattern, going from the front of the store, back to the produce counter, across to the meat counter, and then along the meat counter toward the front of the store. However, on December 22, 2008, instead of going from the produce counter to the meat counter, appellant changed her routine by going across one aisle, back toward the front of the store, in order to look at a display of oranges.

{¶3} While looking at the oranges, a big display of cauliflower caught appellant's eye. Appellant edged her cart up against the cauliflower display, making it parallel with the side of the display. Then, turning to face the display, appellant reached up for a head of cauliflower toward the back of the display. After getting the cauliflower, appellant placed it in her cart, along with the other items, and started walking toward the back of the store. In her deposition, appellant stated: "I started carefully down watching for these other people and their carts, and all of a sudden something grabbed my foot. I mean, I had been moving and all of a sudden my right leg couldn't go. I didn't know what had happened, and I just went kerboom down." (Alley depo., 46.) Further, appellant stated: "I didn't get to brace myself at all. I just went wham." (Alley depo., 47.) Appellant contends that an aluminum post at the corner of the display counter caught her right foot causing her to fall.

{¶4} Appellant described her injuries as follows: (1) a split in the middle of her forehead resulting in an inch-and-a-half long scar, (2) bruises to her right knee, as well as

other bruises, and (3) a broken second vertebra in her neck requiring surgery to place a three-inch screw in her neck. Further, appellant remained in the hospital for approximately five or six days and, upon her release, went to the Forum nursing home for a week of physical therapy. Appellant also indicated that, since her fall, she does not drive much anymore due to her neck injury, lives with her daughter, Sharon Lucas, and experiences dizziness while lying in bed or if she gets up too fast.

{¶5} On May 3, 2010, appellant filed a complaint for negligence, alleging that her fall, injuries, and resulting damages are a direct and proximate result of appellees,' or its agents,' recklessness, carelessness, and negligence as follows: (1) designing the store so that it contained the latent, hazardous guardrail; (2) installing the latent, hazardous guardrail; (3) failing to properly warn appellant of the dangerous condition; (4) failing to maintain the premises in a reasonably safe condition; and/or (5) failing to remove the latent, hazardous chrome guardrail. (See Complaint ¶20.) On June 4, 2010, appellees filed their answer to appellant's complaint, denying all allegations except those stated in paragraph two regarding appellees' corporate status in the state of Ohio. (See Answer ¶2.) On December 7, 2010, appellees filed a motion for summary judgment; on December 21, 2010, appellant filed a memorandum contra; and on January 7, 2011, appellees filed a reply.

{¶6} On March 21, 2011, the trial court granted summary judgment in favor of appellees, finding that it owed no duty to protect appellant under the open-and-obvious doctrine. (Decision and Entry, 7.)

{¶7} Appellant timely filed a notice of appeal on April 15, 2011, setting forth the following two assignments of error for our consideration:

> 1. THE TRIAL COURT ERRED BY FAILING TO ABIDE BY ITS OBLIGATION TO VIEW ALL EVIDENTIARY MATERIAL REGARDING THE GUARDRAIL IN A LIGHT MOST FAVORABLE TO APPELLANT RUTH (I.E., THE NON-MOVING PARTY), BUT INSTEAD MISINTERPRETED AND IMPERMISSIBLY VIEWED THE EVIDENCE IN A LIGHT MOST FAVORABLE TO APPELLEE MARCS, WHEN IT DEEMED THE GUARDRAIL TO BE "OPEN AND OBVIOUS."
>
> 2. THE TRIAL COURT ERRED IN RULING THERE WERE NO "ATTENDANT CIRCUMSTANCES" MANDATING THE DENIAL OF APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

{¶8} We review a grant of summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. 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* at 711.

{¶9} 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 nonmoving party, reasonable minds

can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, citing *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶10} Further, in *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163, 167-68, this court addressed the issue of whether it is proper for a trial court to weigh the credibility of evidence in resolving a motion for summary judgment. We stated:

> Credibility concerns normally arise in summary judgment proceedings when the affidavits or depositions of witnesses are in conflict concerning a fact to be proved. Under these situations, it is evident that resolution of the factual dispute will depend, at least in part, upon the credibility of the witnesses, and trial courts routinely deny summary judgment. However, credibility concerns can also be present where, on the face of evidentiary documentation supporting a motion for summary judgment, the moving party's evidence on a factual issue appears to be uncontroverted. This will be the case where, under the circumstances, credibility manifestly is critical to a determination that there is no genuine issue as to the existence of that fact.

{¶11} In order to prevail on a negligence claim, a plaintiff must show that: (1) defendant owed him a duty; (2) defendant breached that duty; and (3) the breach proximately caused his injuries. *Coffman v. Mansfield Corr. Inst.*, 10th Dist. No. 09AP-447, 2009-Ohio-5859, citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 295.

{¶12} A defendant's duty to a plaintiff depends on the parties' relationship at the time the incident occurred. *McCoy v. The Kroger Co.*, 10th Dist. No. 05AP-7, 2005-Ohio-6965, ¶7. In the present matter, the parties do not dispute that appellant is a business

invitee of Marc's. (See Complaint, ¶5; see also Motion for Summary Judgment, 5-7.) A business owner owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition, including an obligation to warn invitees of latent or hidden danger, so as not to unnecessarily and unreasonably expose its invitees to danger. *Sherlock v. Shelly Co.*, 10th Dist. No. 06AP-1303, 2007-Ohio-4522, ¶9, citing *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203; *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 52. A latent danger is " 'a danger which is hidden, concealed and not discoverable by ordinary inspection, that is, not appearing on the face of a thing and not discernible by examination.' " *McCoy* at ¶8, quoting *Potts v. Smith Constr. Co.* (1970), 23 Ohio App.2d 144, 148.

{¶13} Nevertheless, a business owner is not an insurer of a customer's safety. *Sherlock* at ¶9. Here, the trial court based its decision to grant appellees' motion for summary judgment upon the open-and-obvious doctrine. (See Mar. 21, 2011 Decision and Entry, 4-6.) The open-and-obvious doctrine eliminates a premises owner's duty to warn a business invitee of dangers on the premises either known to the invitee or so obvious and apparent to the invitee that he or she may reasonably be expected to discover them and protect against them. Id., citing *Simmons v. Am. Pacific Ent., L.L.C.*, 164 Ohio App.3d 763, 2005-Ohio-6957, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. The doctrine's rationale is that, because the open-and-obvious nature of the hazard itself serves as a warning, business owners may reasonably expect their invitees to discover the hazard and take appropriate measures to protect themselves against it. Id., citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42.

{¶14} Open-and-obvious dangers are those 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 does not need to observe the dangerous condition for it to be an "open-and-obvious" condition under the law; rather, the determinative issue is whether the condition is observable. *Sherlock* at ¶11, citing *Lydic*. Even in cases where the plaintiff did not actually notice the condition until after he or she fell, this court has found no duty where the plaintiff could have seen the condition if he or she had looked. Id., citing *Lydic*.

{¶15} It is well-settled that "[c]ertain clearly ascertainable hazards or defects may be deemed open and obvious as a matter of law for purposes of granting summary judgment." *McConnell v. Margello*, 10th Dist. No. 06AP-1235, 2007-Ohio-4860, ¶11. As such, "[t]his court has uniformly recognized that the existence and obviousness of an alleged danger requires a review of the underlying facts." Id., citing *Schmitt v. Duke Realty, LP*, 10th Dist. No. 04AP-251, 2005-Ohio-3985, ¶10. "However, unless the record reveals a genuine issue of material fact as to whether the danger was free from obstruction and readily appreciable by an ordinary person, it is appropriate to find that the hazard is open and obvious 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.

{¶16} In her first assignment of error, appellant contends that the trial court erred in granting summary judgment in favor of appellees because the trial court disregarded evidence and failed to construe it in a light most favorable to appellant, the nonmoving party. (See appellant's brief, 7.) Specifically, appellant contends that the trial court disregarded (1) the fact that appellees' own employees admitted that the guardrail

actually reflected the objects surrounding it, that the guardrail was "like a mirror," and that the guardrail reflected its surroundings so well that it "looks like you can see right through it," as well as (2) the actual color photographs of the guardrail itself, attached to appellant's brief as Exhibit 7, and (3) the numerous prior complaints Marc's received from other customers who ran into the guardrails. (See appellant's brief, 10.)

{¶17} In response, appellees argue that appellant makes an inferential leap that the guardrail is "virtually invisible" by cherry-picking and distorting the deposition testimony of Marc's employees, Craig Reed ("Reed"), Mike Hall ("Hall"), and Carrie McFarland ("McFarland"). (See appellees' brief, 5-6.) Further, appellees argue that the photographs in the record show that "[t]he guardrails are plainly visible against the floor, and in this way, they are similar to a wide variety of other open-and-obvious hazards." (See appellees' brief, 5.)

{¶18} In its decision to grant appellees' motion for summary judgment, the trial court stated that, unlike appellant's suggestion to the contrary, "[i]t is clear from the *deposition testimony and the photographs in evidence*," that this case differs from *Horner v. Jiffy Lube Internatl., Inc.*, 10th Dist. No. 01AP-1054, 2002-Ohio-2880, and *Thompson v. Do-An, Inc.*, 10th Dist. No. 99AP-1423, wherein this court declined to apply the open-and-obvious doctrine. (Emphasis added.) (Decision and Entry, 5.)

{¶19} Further, the trial court noted appellant's reliance upon the deposition testimony of Hall and Reed for the "proposition that the guard rail 'blended with the floor around it' so well that 'it looks like you can see right through it.' " (Decision and Entry at 5, quoting Memorandum Contra, 4.) Upon review of Hall and Reed's deposition testimony, the trial court concluded that appellant's reliance is misplaced and that Hall and Reed's

statements are taken out of context from their actual deposition testimony. (Decision and Entry, 5.) In support of its conclusion, the trial court stated:

> Hall and Reed's statements were clearly made in reference to the photographs in [appellant's] Exhibits A and B. Both Hall and Reed noted that the photographs were bad depictions of the condition as it exists in the store and that, *in the photographs*, the guardrails appeared to blend in with [the] floor and looked as though one could see through them.

(Emphasis sic.) (Decision and Entry at 5-6, citing Hall depo., 20 and Reed depo., 38-39.) Additionally, the trial court found that, regardless of the appearance of the guardrails in appellant's photographs, the guardrails were open-and-obvious conditions for which appellees did not owe a duty to appellant because "they have long been a ubiquitous fixture in the Henderson Road store, where [appellant] frequented and of which she should have had notice." (Decision and Entry, 6.)

{¶20} Finally, the trial court compared the present facts with those set forth in *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573. The trial court stated:

> This case is factually on point with *Armstrong*, where the plaintiff tripped over a guardrail at a Best Buy location. In both cases, the plaintiffs would have seen the obstruction had they been looking down. Plaintiff in *Armstrong* had been to that particular Best Buy multiple times before the incident; plaintiff herein admitted that she had been to the Marc's on Henderson Road far more than ten times before she was injured. In both cases, the guard rails were clearly visible to all business patrons. Just as the Supreme Court in *Armstrong* concluded there was no duty, this Court must also conclude that plaintiff was owed no duty in this case.

(Mar. 21, 2011 Decision and Entry, 6.) We note that, in *Armstrong* at ¶16, the Supreme Court of Ohio found that the rail upon which the appellant tripped was open and obvious

because the appellant admitted in his deposition that: (1) when he entered the store, nothing was obstructing his view prior to his fall; (2) had he been looking down, he would have seen the guardrail; and (3) he had visited the store two or three times prior to his fall. Further, in concluding that the guardrail was open and obvious, the Supreme Court in *Armstrong* stated that, "in viewing the photographs supplied by both parties, we find that as a matter of law, the rail in question was visible to all persons entering and exiting the store." Id.

{¶21} Here, having carefully reviewed the evidence contained in the record, we agree with the trial court that reasonable minds could only conclude that the chrome guardrail was open and obvious as a matter of law. First, upon reviewing the deposition testimony of Hall, McFarland, and Reed, in a light most favorable to appellant, we find that the trial court did not disregard this evidence and did not err in concluding that the chrome guardrail was open and obvious as a matter of law. Second, upon reviewing the photographs attached as exhibits to appellant's memorandum contra, and the photographs attached as exhibits to appellees' motion for summary judgment and reply, in a light most favorable to appellant, we find that the trial court did not disregard this evidence and did not err in concluding that the chrome guardrail was open and obvious as a matter of law. (See Memorandum Contra, Exhibit 5; see also Motion for Summary Judgment, Exhibits 1-7, and Reply, Exhibits A and B.) Third, in reviewing Reed's deposition testimony regarding prior complaints from customers regarding the chrome guardrails, we find that the trial court did not disregard this evidence and did not err in concluding that the chrome guardrail was open and obvious as a matter of law.

{¶22} First, we address appellant's argument that the trial court disregarded certain statements made by Hall, McFarland, and Reed, in concluding that the chrome guardrail was open and obvious. (See appellant's brief, 10-11.) In December of 2008, Hall worked as a grocery supervisor, McFarland worked in the closeout department, and Reed worked as the store manager. (Hall depo., 8; McFarland depo., 9-10; Reed depo., 13.) All three employees testified that they are familiar with the chrome guardrails. (Hall depo., 11; McFarland depo., 14-15; Reed depo., 16-17.) As stated above, appellant argues that the trial court disregarded Hall's and McFarland's admissions that the guardrail actually reflected the objects surrounding it, Hall's admission that the guardrail was "like a mirror," and Reed's admission that the guardrail reflected its surroundings so well that it "looks like you can see right through it." (See appellant's brief, 10; see also Hall depo., 12; McFarland depo., 20; and Reed depo., 38, 40.) In reviewing Hall, McFarland, and Reed's deposition transcripts in their entirety, we agree with the trial court that appellant took several statements regarding Marc's employees' assessments regarding the appearance of the chrome guardrail out of context.

{¶23} In support of her argument that the chrome guardrail is not open and obvious, appellant asserts that Hall admitted that the chrome guardrail actually reflected the objects surrounding it and that the guardrail was "like a mirror." (See appellant's brief, 10.) During his deposition, Hall viewed photographs of the chrome guardrails. Hall indicated that the photographs are "[n]ot a good color representation. They're very shiny. They stand out a lot more than that." (Hall depo., 11.) In addition, the following line of questioning reflects that Hall did not actually admit that this particular chrome guardrail is

"like a mirror," but that he responded to a question posed by appellant's counsel regarding the general reflective nature of chrome:

> Q. They're very shiny?
>
> A. Yes.
>
> Q. Chrome?
>
> A. Yes.
>
> Q. Chrome reflects.
>
> A. Uh-huh.
>
> Q. Like a mirror.
>
> A. Correct.
>
> Q. Reflects its surroundings, correct?
>
> A. I personally don't know exactly. I just know they're a lot shinier that that and they just stand out.

(Hall depo., 12.) Hall also prefaced his responses to appellant's questions regarding whether the chrome reflects the color of the floor by noting that he disagrees with the photographs and "that's not a good picture." (Hall depo., 19-20.) Then, in response to a question regarding whether a red-colored guardrail would be more visible than a chrome guardrail, Hall answered: "My opinion, a guardrail is a guardrail. It's there to stand out. It stands out." (Hall depo., 20.)

{¶24} Further, in support of her argument that the chrome guardrail is not open and obvious, appellant asserts that McFarland also admitted that the guardrail actually reflected the objects surrounding it. (See appellant's brief, 10.) During her deposition, McFarland viewed a photograph of the chrome guardrails and stated that: "[i]n the picture

here it stands out to me." (McFarland depo., 19.) McFarland also disagreed with the premise that the chrome guardrails in the photograph reflected the same color as the ground. (McFarland depo., 19.) Then, when posed with the following question: "[m]y understanding of how chrome works, it reflects its surroundings. If I look into a piece of chrome, it's going to reflect what's similar or what it's near. Is that your experience with these chrome guardrails in Marc's?" McFarland simply responded, "[y]es." (McFarland depo., 20.)

{¶25} Finally, in support of her argument that the chrome guardrail is not open and obvious, appellant asserts that Reed admitted that the guardrail reflected its surroundings so well that it "looks like you can see right through it." (See appellant's brief, 10-11.) During his deposition, Reed viewed the same photographs shown to Hall and McFarland and testified as follows:

> Q. Now, just looking at Photographs A and C, I just want to see, it appears to me that if I were to choose a color to describe the chrome guardrail I would say it's kind of an off white. Would you say that it's kind of a similar color as the ground?
>
> A. No, I disagree. But that's just—
>
> Q. How would you describe the two colors, then?
>
> A. I mean, you have the floor, which I think is a white, and then you have the silver thing on the side. I see the contrast.
>
> Q. I understand what you're saying. Are you saying that the chrome is not reflecting any image of the floor in either of these two pictures? Is that your testimony, it's not reflecting any portion of the floor in these two photographs?
>
> A. The picture makes it tough to—I mean, it makes it tough to make a good decision from what it's seeing on this. I don't

> think it's showing—shining off the floor itself. It looks like you can see right through it.
>
> Q. You're looking at C, and it looks like almost you can see right through the guardrail in that picture.
>
> A. I think the picture how it was taken is just terrible.

(Reed depo., 37-38.) In the above-cited testimony, Reed clearly attempted to explain that he disagreed with the premise that the chrome guardrail is a similar color as the ground and stated that there is a contrast between the white floor and the silver guardrail. Reed's statement that "[i]t looks like you can see right through it" does not indicate that Reed believed that the chrome guardrail is invisible but simply that Reed believed that the quality of the photograph did not accurately represent the true appearance of the chrome guardrail.

{¶26} Also, important here is the fact that, in her deposition, appellant did not testify that the chrome guardrails were invisible or that she *could not see* them. Nor did appellant testify that the guardrails reflected off the ground like mirrors. Appellant simply described the guardrail as "aluminum colored that blends in the with the floor." (Alley depo., 49.) In fact, appellant admitted that she saw the guardrail after her fall. However, at the time she fell, appellant *did not see* the chrome guardrail. (Alley depo., 47.) Appellant explained:

> I found out later that there are these aluminum-colored uprights that sort of stick out from the end of the display case that are basically the same color as the floor; but when you've got a cart with things in it and a lot of people with their carts, I never saw this upright thing. *And I'm not sure why it's there, but I'll grant it's there. I saw it afterward.* But when you were pushing the cart with things in the basket, I certainly never saw—[.]

(Emphasis added.) (Alley depo., 47.) Further, appellant explained that, subsequent to her fall, she went back to Marc's and determined that it was the guardrail that caused her to fall. (Alley depo., 52.) In response to whether she ever saw the chrome guardrail at Marc's prior to her fall, appellant admitted: "[t]o be very honest, no. Because when I go to the grocery, I'm not looking for aluminum posts. I'm concentrating on what I want to buy and what's on display." (Alley depo., 56.) Appellant also stated: "I mean, I don't doubt that it was there. I just never saw it. * * * I'm not arguing that. I just never paid attention to it." (Alley depo., 56, 58.) As further evidence that the appearance of the guardrail did not contribute to appellant's fall, Reed testified that, during a conversation with appellant, subsequent to her fall, appellant admitted that "[she] was not paying attention grabbing for the item." (Reed depo., 45-47.) When asked if she remembered saying this to Reed, appellant stated, "[w]ell, I don't' remember saying that; and I don't think I would have said it *except for the fact that I wasn't paying attention to obstructions in front of me*." (Emphasis added.) (Alley depo., 62.)

{¶27} Therefore, even in viewing the deposition testimony of appellant, Hall, McFarland, and Reed in a light most favorable to appellant, we find that the chrome guardrail is open and obvious as a matter of law.

{¶28} Second, we address appellant's argument that the trial court disregarded her photographs in concluding that the guardrail is open and obvious. (See appellant's brief, 11.) For the reasons below, we find that the record does not support appellant's theory. Appellant contends that the trial court's statement, "regardless of the appearance of the guardrails in [appellant's] photographs," suggests that the trial court simply disregarded this evidence in concluding that the guardrail is open and obvious. (See

appellant's brief, 11.) However, the trial court's decision specifically states that it reviewed the photographs in evidence and, in spite of doing so, determined the guardrail to be open and obvious. (See Decision and Entry, 5.) Further, during her deposition, appellant viewed seven black-and-white photographs provided by appellant's counsel in response to discovery and indicated that she "thinks" they represent the way she remembers the store and that she "paid a whole lot more attention to the things that were on the counters." (Alley depo., 61.) However, in her deposition, appellant did not testify that the color photographs attached to her brief as Exhibit 7, which she now contends the trial court disregarded in its conclusion that the guardrail is open and obvious, accurately depict the appearance of the guardrail.

{¶29} Upon viewing all of the photographs in the record provided by both parties, we find that the photographs show the contrast between the white speckled floor and the shiny silver chrome guardrail and also show the visibility of the guardrail from all angles against the produce stands. In addition, the photographs indicate that the chrome guardrails stand at each corner of the produce stands throughout the store and that the chrome guardrail upon which appellant tripped is not an isolated structure at that particular produce stand. (See Motion for Summary Judgment, Exhibit 1, 5; see also Reply, Exhibit A.)

{¶30} Therefore, even in viewing the photographs in a light most favorable to appellant, we find that the chrome guardrail is open and obvious as a matter of law.

{¶31} Third, we address appellant's argument that the trial court disregarded evidence of numerous prior complaints by other customers who ran into the guardrails.

(See appellant's brief, 10.) Reed's deposition testimony provides the only evidence in the record regarding prior complaints. Reed testified:

> Q. Okay. Has anyone ever complained about those chrome guardrails?
>
> A. We've had some people complain, truthfully. Everyone claims [sic] about everything.
>
> Q. Okay. Do you know specifically the name of anyone who complained?
>
> A. No, I do not.
>
> Q. What were the nature of the complaints about these guardrails?
>
> A. That the carts couldn't get through, it would hit the cart.
>
> Q. People were hitting the guardrails with their carts?
>
> A. Correct.
>
> Q. Anyone ever complain that they just couldn't see them, those guardrails, and, therefore, their carts were hitting them?
>
> A. Not to me, no.
>
> * * *
>
> Q. Okay. Do you know when people were complaining that their carts were hitting these, do you know if they were complaining because it juts out and it's not parallel with the side of the produce stand?
>
> A. Just when—what they're saying, they hit it as they come around it. I mean, instead of hitting this, it's a lot harder to hit a metal thing that a bumper thing. They hit the thing and it shakes the cart.
>
> * * *

> Q. Okay. Do you have any estimate as to how many people have filed complaints over the time you've been with Marc's on that issue?
>
> A. No, I don't have an estimate.
>
> * * *
>
> Q. You don’t' know how many complaints were filed on that?
>
> * * *
>
> A. There's nothing been filed at all.
>
> Q. But there have been verbal complaints made directly to you?
>
> A. Correct.

(Reed depo., 54, 56-58.)

{¶32} Appellant wrongly contends that Reed's testimony proves that "many other customers could not see the guardrail." (See appellant's brief, 10.) Reed clearly states that these complaints stemmed from carts not being able to get through the space and that no one complained that they could not see the guardrails. In addition, Reed indicated that 10,000 customers pass by the guardrails every week and that, during his employment at any Marc's store, no one has tripped and fallen over this guardrail. (Reed depo., 41, 58.) We note that appellant does not refute Reed's testimony regarding cart's running into the chrome guardrails, nor does she refute Reed's testimony that, during his employment, no one has tripped and fallen over this guardrail.

{¶33} Therefore, even in viewing Reed's testimony in a light most favorable to appellant, we find that the chrome guardrail is open and obvious as a matter of law.

{¶34} As stated above, "Ohio law establishes a duty upon the pedestrian to discover and protect himself from an open and obvious hazard." *Lydic* at ¶16. Further, "[a] pedestrian's failure to avoid an obstruction because he or she did not look down is no excuse." Id. Here, appellant admitted that, in her numerous trips to Marc's, she never paid attention to the chrome guardrail, even though Hall, McFarland, and Reed describe it as "shiny" and "standing out."

{¶35} Based upon the above-cited deposition testimony of appellant, Hall, McFarland, and Reed, as well as the photographs provided by both parties, we believe that, even when viewed in a light most favorable to appellant, it is clear that the evidence supports the trial court's conclusion that the chrome guardrail was an open-and-obvious condition. Therefore, we find that the trial court did not err in finding that the chrome guardrail was an open-and-obvious condition for which appellees did not owe appellant a duty. (See Decision and Entry, 6.)

{¶36} Appellant's first assignment of error is overruled.

{¶37} We now turn to appellant's argument regarding attendant circumstances. "Attendant circumstances act as an exception to the open-and-obvious doctrine." *Cooper v. Meijer Stores Ltd. Partnership*, 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶15. "Even when a plaintiff admits not seeing an obstacle because he or she never looked down, a jury question may arise if attendant circumstances distracted him or her." Id. at ¶14.

{¶38} In her second assignment of error, appellant contends that the trial court erred in ruling that the display items, Christmas decorations, and a multitude of Christmas shoppers at Marc's did not constitute attendant circumstances. (See appellant's brief, 13.) Appellant also argues throughout her brief that her cart was full with groceries. Attendant

circumstances must "divert the attention of the pedestrian, significantly enhance the danger of the defect and contribute to the fall." *Conrad v. Sears, Roebuck & Co*., 10th Dist. No. 04AP-479, 2005-Ohio-1626, ¶21. Therefore, in order to be considered an exception to the open-and-obvious doctrine, "an attendant circumstance must be 'so abnormal that it unreasonably increased the normal risk of a harmful result or reduced the degree of care an ordinary person would exercise.' " *Mayle v. Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶20, quoting *Cummin v. Image Mart, Inc.*, 10th Dist. No. 03AP-1284, 2004-Ohio-2840, ¶10.

{¶39} In her general discussion regarding attendant circumstances, appellant cites to this court's decision in *Horner*, as well as a number of nonbinding cases from other appellate districts. In *Horner* at ¶7, 24, we found that the appellant may have been distracted by attendant circumstances when she fell into an oil pit at Jiffy Lube, "an unfamiliar environment full of distractions without any warnings as to particular dangers she would protect against." We note that the facts in *Horner* are distinguishable from the present matter because, in *Horner*, the appellant had never been inside the garage area and, thus, did not have any knowledge of the oil pits. Id. at ¶20-21. However, in the case at hand, appellant admitted that, prior to falling, she was familiar with Marc's because she had visited the store on several previous occasions. Appellant's deposition testimony revealed the following:

> Q. Okay. Before the day that you fell, had you been in the Marc's store before?
>
> A. Yes.
>
> Q. How often did you go to Marc's?

> A. Once a week maybe. Once every two weeks.
>
> Q. Was it the place that you normally did your grocery shopping?
>
> A. No. But I always—I mean, I stopped there and picked up the boxes of lettuce, because that's the only place I knew that had it.
>
> Q. Okay. So you went generally someplace else for your main grocery shopping, but you would go to Marc's to see what was on special and for the lettuce?
>
> A. Yes.
>
> Q. So you were familiar with the store.
>
> A. Yes. I had been there many times before.

(Alley depo., 40-41.)

{¶40} We now focus our discussion on appellant's arguments regarding specific conditions that she claims to be attendant circumstances. First, we address appellant's argument that the (1) numerous display items and (2) Christmas decorations erected by Marc's for the purpose of attracting shoppers' attention constitute attendant circumstances. (See appellant's brief, 13.) We look to our decision in *McConnell* for guidance with this matter. In *McConnell*, this court referenced the First District Court of Appeal's decision, *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, in its discussion regarding attendant circumstances. In *McGuire* at 498, the appellant argued that her attention was distracted from the floor, upon which she tripped and fell, by the women's clothing and jewelry departments adjacent to the walkway. However, the First District "cautioned against construing the attendant circumstances exception so broadly that it would apply to all displays customarily encountered in a retail store." *McConnell* at

¶18; see also *McGuire* at 500. As such, the First District "found that attendant circumstances apply only where the plaintiff offers evidence of particular circumstances rendering a particular display or area of display foreseeably unsafe." Id.

{¶41} In *McConnell*, we applied the First District's reasoning, finding no genuine issue of material fact regarding the existence of attendant circumstances sufficient to avoid the application of the open-and-obvious doctrine. Id. at ¶19. In doing so, we rejected the appellant's argument that placing items for sale at and above eye level to attract customers' attention reduced the degree of care that the appellant was reqired to use. We reached this conclusion because, in *McConnell*, the appellant failed to identify a specific display created by the appellees that distracted her from observing the step. Id. Further, the appellant "merely [contended] that she was looking at a picture on the wall instead of looking where her feet were going." Id. Therefore, we held that "[t]he mere presence of merchandise displayed in a retail store does not rise to the level of unusual or abnormal circumstances that unreasonably increased the risk of a harmful result." Id.

{¶42} Here, similar to *McGuire* and *McConnell*, appellant fails to present any evidence of a specific display or decoration that actually diverted her attention from seeing the chrome guardrail. In addition, appellant does not present any evidence of an unusual or abnormal circumstance in the produce department that contributed to her fall. We note that both Hall and Reed testified that Marc's decorates the store for Christmas. (Hall depo., 18; Reed depo., 31.) However, Hall clarified that "[u]sually there's no decorations up in produce," (Hall depo., 18), and Reed could not recall specifically if there were decorations in that area. (Reed depo. 34-35.) In addition, McFarland testified that,

on December 22, 2008, there were no Christmas decorations in the produce department. (McFarland depo., 17, 18.)

{¶43} Further, in her deposition, appellant stated that, on other trips to Marc's, she never saw the chrome guardrail because she is "not looking for aluminum posts," she is "concentrating on what [she] wants to buy and what's on display." (Alley depo., 56.) It is difficult for this court to resolve how appellant can, on one hand, argue that the display items and Christmas decorations diverted her attention from seeing the chrome guardrail, and, on the other hand, admit to having *never seen the chrome guardrail on any other trips to Marc's* when the conditions present on the afternoon of December 22, 2008, arguably, were not present on other days. We also note that, in her deposition, appellant did not testify that she was distracted by a display or Christmas decoration at the time that she fell.

{¶44} Second, we address the issue of attendant circumstances with regard to (1) the purported crowd of Christmas shoppers in the produce section at Marc's on December 22, 2008, and (2) appellant's shopping cart full of groceries. In doing so, we distinguish the Eleventh District Court of Appeal's decision in *Hudspath v. Caffaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911.

{¶45} In *Hudspath* at ¶2, the appellant was shopping at the Ashtabula mall on November 24, 2000, the "busiest shopping day of the year." The appellant was holding her purse and two shopping bags, cradled close to her body, permitting her to see the crowd well but not allowing her to see what was immediately below her feet. Id. at ¶4. As the appellant "entered the mall traffic, she stepped on [a] collapsed 'wet floor' sign and fell injuring her shoulder." Id. The Eleventh District held that the attendant circumstances of

the appellant's slip and fall created a material issue of fact as to whether the appellee breached its duty of care because the appellant was "cradling several packages in a shopping mall while attempting to negotiate a dense crowd of mall shoppers on the day after Thanksgiving." Id. at ¶22. As such, the appellant "would not necessarily discover a collapsed 'wet floor' sign as she exited a store." Id. at ¶22.

{¶46} Again, we note that the facts in *Hudspath* are distinguishable from those in the present matter. In *Hudspath*, the appellant exited a store in the mall and walked into a dense crowd of people on the day after Thanksgiving. Here, appellant does not allege that there was a dense crowd of people in the produce section of Marc's in the middle of the afternoon on December 22, 2008. Rather, appellant testified that "this is two days before Christmas; and the store's crowded." (Alley depo., 45.) In addition, appellant explained "I turned as the cart is already tied up against this counter and I started walking; but there are people coming across this way, the way I usually am going. And I'm watching them and trying to maneuver." (Alley depo., 48.) Finally, appellant stated that "[t]hen all the other people that were shopping, you know, were around me." (Alley depo., 50.) However, Hall testified that the store is "fairly busy all year-round," that afternoons are usually not as busy, and that summer is generally the busiest time of year. (Hall depo., 15.) McFarland, who witnessed appellant's fall, also testified that there was only one other customer around appellant at the time of her fall. (McFarland depo., 17, 18.) Consistent with McFarland's testimony, in response to whether she passed any customers as she was making her turn, appellant answered, "[n]o."

{¶47} Also, with regard to appellant's argument regarding having a cart full of groceries, appellant testified that, during the course of her shopping trip, she placed one

or two cans of soup, a calendar, a bag of potato chips, a box of lettuce, and a head of cauliflower into the basket of her cart. (Alley depo., 38-39, 44, 46.) Appellant claimed that when she put the cauliflower in her cart with the potato chips, soup, calendar, and lettuce, the basket was getting full. (Alley depo., 48.) We note that, in her deposition testimony, appellant did not specifically state that the items in the cart blocked her view of the produce stand. However, in the affidavit affixed to her memorandum contra, appellant stated that "[b]ecause of the purchases in my cart, my view of the corner of the produce stand was completely obstructed." (See Alley Affidavit, ¶7, attached to Memorandum Contra.) In *McDowell v. Target Corp.*, 10th Dist. No. 04AP-408, 2004-Ohio-7196, ¶12, quoting *Kollmorgan v. Raghavan* (May 5, 2000), 7th Dist. No. 98 CA 123, quoting *Pace v. GAF Corp*. (Dec. 18, 1991), 7th Dist. No. 90-J-49, we stated that, "[i]n addressing inconsistencies between statements in affidavits in support of memoranda contra summary judgment and statements in depositions * * * courts have indicated that, where an affidavit is inconsistent with the affiant's prior deposition testimony, ' "and the affidavit neither suggests affiant was confused at the deposition nor offers a reason for the contradictions in her prior testimony, the affidavit does not create a genuine issue of fact which would preclude summary judgment." ' " Here, appellant's affidavit does not suggest that she was confused during her deposition, nor does it address any inconsistencies between her statements in the affidavit and her prior deposition testimony. (See generally Alley Affidavit attached to Memorandum Contra.) Further, unlike the appellant in *Hudspath* who was cradling several shopping bags against her body which blocked her view of the ground, appellant was pushing a shopping cart with four to five items in the basket. With regard to this issue, Hall testified that, even with a three to three and one-

half foot tall cart full of groceries, you could still see a two-foot tall guardrail because "you're taller than a shopping cart and you can see the angle in front of you over the groceries." (Hall depo., 21-22.)

{¶48} Therefore, based upon the foregoing and even in viewing the evidence in a light most favorable to appellant, the trial court did not err in finding that "[t]here is nothing novel about the conditions that existed at Marc's in the produce aisle on the day plaintiff was injured. Thus, attendant circumstances did not exist to bar the application of the open and obvious doctrine." (See Decision and Entry, 7.)

{¶49} Appellant's second assignment of error is therefore overruled.

{¶50} For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and TYACK, JJ., concur.

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