[Cite as *Haller v. Meijer*, 2012-Ohio-670.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Nancy Haller et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-290
v.	:	(C.P.C. No. 08CVC-10-14374)
Meijer, Inc. et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 21, 2012

Law Office of David A. Bressman, and *David A. Bressman*, for appellants.

Weston Hurd LLP, *W. Charles Curley* and *J. Quinn Dorgan*, for appellee Meijer Stores Limited Partnership.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiffs-appellants, Nancy and Jerry Haller, appeal from a judgment of the Franklin County Court of Common Pleas granting summary judgment for defendant-appellee, Meijer, Inc. Because the record reflects that there are no genuine issues of material fact and Meijer is entitled to judgment as a matter of law, we affirm.

Facts and Procedural History

{¶2} The facts in this case are undisputed. On October 21, 2006, shortly before noon, Nancy Haller entered the Meijer store on Sawmill Road in Columbus, Ohio to buy shrimp. Upon entering the store, Haller wanted a shopping cart. Three or four other customers were standing near the entrance in front of Haller. Haller saw some available shopping carts behind and to the right of these other customers. Haller headed in the

direction of those available carts by going around this group of customers. As she proceeded around the group, she tripped on a "video cart barrier" and fell.

{¶3} A video cart barrier is part of a system that recharges special shopping carts that contain video screens for entertaining children. Deposition testimony and pictures attached as exhibits indicate that the video cart barrier is a gold-colored metal rail-like structure that is at least six inches high. Although nothing in the record establishes the total length of the barrier at issue, the pictures indicate that the barrier is more than four feet in length. The barrier helps keep the video carts parked on top of a black rubber electrified mat that charges the video carts. The barrier also protects the video carts, as well as ad stands and pop machines located next to the video carts, from being hit by regular shopping carts.

{¶4} Based upon this incident, Haller sued Meijer for negligence. Following some discovery, Meijer filed a motion for summary judgment, which the trial court granted.

{¶5} Appellant now appeals, assigning the following error:

> The trial court erred when it found that attendant circumstances did not create a genuine issue of material fact to be decided by a jury as to whether the hazard in this case was open and obvious.

Applicable Legal Standards

{¶6} We review the grant of summary judgment by a trial court de novo. *Cabakoff v. Turning Heads Hair Designs, Inc.*, 10th Dist. No. 08AP-644, 2009-Ohio-815, ¶3, citing *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. "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. We must affirm the trial court's judgment if any of the grounds raised by the movant in the trial court support the judgment. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶7} Summary judgment is appropriate only where: (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. A party seeking summary judgment "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." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107.

{¶8} To establish a cause of action for negligence, a plaintiff must show the existence of a duty, a breach of the duty, and an injury proximately caused by the breach. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602; *Strother v. Hutcheson* (1981), 67 Ohio St.2d 282, 285.

Open and Obvious Doctrine

{¶9} Here, the parties agree that Haller was a business invitee when she tripped and fell in Meijer's store. A business owner ordinarily owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶5; *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 203. However, the business owner's obligation is limited, and does not extend to the protection of invitees against dangers that are "open and obvious." *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. "The rationale underlying this 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.' " *Armstrong* at ¶5, quoting *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644. " '[T]he dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be an "open and obvious" condition under the law,' as the determinative issue is whether the condition is observable." *Cabakoff* at ¶6, quoting *Lydic v. Lowe's Cos., Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. See also *Cooper v. Meijer Stores, Ltd. Partnership*, 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶13. When applicable, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims. *Armstrong* at ¶5.

{¶10} An exception to the open and obvious doctrine applies when there are "attendant circumstances" surrounding the event that distract the invitee and reduce the degree of care an ordinary person would otherwise exercise. *Conrad v. Sears Roebuck and Co.*, 10th Dist. No. 04AP-479, 2005-Ohio-1626, ¶11, citing *Cummin v. Image Mart,*

Inc., 10th Dist. No. 03AP-1284, 2004-Ohio-2840. An attendant circumstance is any significant distraction that would divert the attention of a reasonable person in the same situation and thereby reduce the amount of care an ordinary person would exercise to avoid an otherwise open and obvious hazard. Id. at ¶11 and 21. In short, attendant circumstances are facts that significantly enhance the danger of the hazard. *Conrad* at ¶11; *Barrett v. Ent. Rent-A-Car Co.*, 10th Dist. No. 03AP-1118, 2004-Ohio-4646, ¶14. Furthermore, the attendant circumstance must be "an unusual circumstance of the property owner's making." *McConnell v. Margello*, 10th Dist. No. 06AP-1235, 2007-Ohio-4860, ¶17, citing *Lang v. Holly Hill Motel, Inc.*, 4th Dist. No. 06CA18, 2007-Ohio-3898.

{¶11} Although this court has reached differing conclusions about whether the open and obvious nature of a hazard and the existence of attendant circumstances is a question of law or a question of fact, this court uniformly recognizes that the existence and obviousness of an alleged danger requires a review of the underlying facts. *Freiburger v. Four Seasons Golf Ctr, L.L.C.*, 10th Dist. 06AP-765, 2007-Ohio-2871, ¶11; *Horner v. Jiffy Lube Internatl., Inc.*, 10th Dist. No. 01AP-1054, 2002-Ohio-2880, ¶19. If the record reveals no genuine issue of material fact as to whether the danger was free from obstruction and would be readily appreciated by an ordinary person under the circumstances, this court has found it appropriate to decide the hazard is open and obvious as a matter of law. *Freiburger* at ¶11, citing *Terakedis v. Lin Family Ltd. Partnership*, 10th Dist. No. 04AP-1172, 2005-Ohio-3985, ¶11-15.

{¶12} In her sole assignment of error, Haller contends that there are genuine issues of material fact regarding whether the tripping hazard posed by the video cart barrier was open and obvious because of "attendant circumstances." Essentially, Haller argues that the three or four other shoppers standing near the entrance of the store is an attendant circumstance that creates an issue of fact regarding whether the video cart barrier was open and obvious. We disagree.

{¶13} After reviewing the pictures of the video cart barrier, we can only conclude that it is readily visible, and therefore, an open and obvious hazard. The barrier is a gold-colored rail-like structure that is at least six inches high and more than four feet in length. It would be plainly visible to anyone who looked where they were walking.

{¶14} Haller testified during her deposition that the only thing that distracted her attention at the time of her fall was the presence of three or four other shoppers standing near the video cart barrier. These are the same three or four shoppers she walked around before she tripped. Haller also admitted that she was looking to the right where some regular shopping carts were located, and not where she was walking, at the time she tripped. It also appears that Haller took at least one step on the rubber mat before she tripped on the video cart barrier. We note that, given the configuration of the video cart system and Haller's path of travel, Haller would have had to take at least one step on the rubber mat before tripping over the video cart barrier. This change in surface should have caused Haller to exercise more, not less, care with respect to where she was walking. The attendant circumstance described by Haller is a normal condition encountered by customers in any large retail or grocery store. This circumstance is not the type of distraction that would cause a reasonable person to exercise less caution with respect to an open and obvious hazard. Nor does this circumstance significantly increase the danger posed by the hazard.

{¶15} Although Haller cites to several cases where courts have found that attendant circumstances created an issue of fact with respect to whether a hazard was open and obvious, the facts in those cases are markedly different from those presented here. For example, in *Horner*, the invitee was brought into an unfamiliar area of an auto service garage by an employee of the defendant who failed to point out the potential hazards. There were also visual obstructions and other conditions that greatly limited the plaintiff's opportunity to see and avoid the hazard (an oil pit). Likewise, in *Hudspath v. Caffaro Co.*, 11th Dist. No. 2004-A-73, 2005-Ohio-6911, there were multiple circumstances that greatly limited the plaintiff's ability to see the hazard (a collapsed wet floor sign). Again, in the case at bar, Haller confronted no unusual circumstances in the store and she had already walked around the only distraction she identified before she tripped on an open and obvious video cart barrier. We also note that the facts of this case are very similar to the facts confronting the court in *Armstrong*, where the Supreme Court of Ohio affirmed the trial court's grant of summary judgment in favor of the defendant when the plaintiff tripped over a shopping cart guardrail. Id. at ¶16.

{¶16} Because the video cart barrier was open and obvious, and the attendant-circumstances exception is inapplicable, Meijer owed no duty to protect or warn Haller of

the hazard posed by the video cart barrier. Therefore, we agree with the trial court that Meijer is entitled to summary judgment in its favor. For these reasons, we overrule Haller's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.