[Cite as *Bovetsky v. Marc Glassman, Inc.*, 2016-Ohio-7863.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOYCE BOVETSKY, ET AL.

Plaintiffs-Appellants

-vs-

MARC GLASSMAN, INC., ET AL.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2016CA00122

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2015CV02310

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 14, 2016

APPEARANCES:

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Hoffman, P.J.

{¶1} Plaintiffs-appellants Joyce Bovetsky, et al. appeal the May 12, 2016 Judgment Entry entered by the Stark County Court of Common Pleas, which granted summary judgment in favor of defendants-appellees Marc Glassman, Inc., et al.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 30, 2015[1], Appellants Joyce and Ronald Bovetsky visited Appellee Marc Glassman, Inc.'s ("Marc's") Belden Village retail establishment. Appellants parked their vehicle in the front parking lot to the left of the store entrance. Ronald Bovetsky immediately proceeded into the store. Joyce Bovetsky walked from their vehicle directly to the sidewalk where she stopped to look at a display of pumpkins which was located on the sidewalk. Joyce Bovetsky entered the sidewalk at a point which was level with the parking lot. She walked approximately 21 feet down the sidewalk to the display of pumpkins.

{¶3} Joyce Bovetsky removed three pumpkins from the display and placed them on the ground. She then took several steps backwards to assess the comparative size of the pumpkins. Joyce Bovetsky did not look behind her as she stepped back. As she was stepping backwards, one of her feet landed half on the sidewalk and half on the parking lot, causing her to fall. At the point of her fall, there was a four to four and one-half inch difference in height between the sidewalk and the parking lot. Joyce Bovetsky sustained injuries as a result of the fall.

[1]In its May 12, 2016 Judgment Entry, the trial court uses a date of September 20, 2015. However, the Complaint and other filings in the trial court as well as the parties' briefs to this Court use the September 30, 2015 date.

{¶4} On November 5, 2015, Appellants filed a complaint against Marc's and Appellee Deville Developments, LLC ("Deville"). Deville is the owner of the premises.

{¶5} On April 8, 2016, Appellee Marc's moved for summary judgment pursuant to the open and obvious doctrine. Appellants filed a memorandum in opposition on April 22, 2016. With leave of court, Deville filed a motion for summary judgment premised upon the same grounds asserted by Marc's. Via Judgment Entry filed May 12, 2016, the trial court granted summary judgment in favor of Appellees. The trial court found the elevated difference between the sidewalk and the parking lot was readily observable if Joyce Bovetsky had looked to see where she was walking. In addition, the trial court found the pumpkin display was not an attendant circumstances; therefore, did not create an exception to the open and obvious doctrine.

{¶6} It is from the April 8, 2016 Judgment Entry Appellants appeal, raising as their sole assignment of error:

{¶7} I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE REASONABLE MINDS COULD CONCLUDE THAT:

{¶8} A. THE DANGER WAS NOT OPEN AND OBVIOUS.

{¶9} B. THE "ATTENDANT CIRCUMSTANCES" EXCEPTION TO THE OPEN AND OBVIOUS DOCTRINE IS APPLICABLE HERE.

SUMMARY JUDGMENT STANDARD OF REVIEW

{¶10} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, this

Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

{¶11} Civ.R. 56 provides summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

{¶12} It is well established the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265. The standard for granting summary judgment is delineated in *Dresher v. Burt* (1996), 75 Ohio St.3d 280 at 293, 662 N.E.2d 264: " * * * a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving

party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 309 N.E.2d 924.

I.

{¶13} Typically, a business owner owes its invitees a duty of ordinary care in maintaining its premises in a reasonably safe condition and a duty to warn its invitees of hidden or latent dangers. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 203, 480 N.E.2d 474. However, a business owner has no duty to warn its invitees against known or open and obvious dangers, which invitees can reasonably be expected to discover and protect against. *Robinson v. Bates,* 112 Ohio St.3d 17, 24, 2006–Ohio–6362, 857 N.E.2d 1195; *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 2003–Ohio–2573, 788 N.E.2d 1088, ¶ 5.

{¶14} A danger is open and obvious if "the hazard is not hidden from view or concealed and is discoverable by ordinary inspection[.]" *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50, 566 N.E.2d 698. In slip-and-fall cases, courts have determined a person does not have to actually see the dangerous condition prior to the fall in order for the condition to be open and obvious, and courts have found no duty to warn existed where the condition could have been seen had a person looked. *Id.* 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.

{¶15} In her deposition, Joyce Botevsky testified as follows:

Q. Okay. So, so – but your testimony is you entered the sidewalk when it was flush with the parking lot.

A. Correct.

Q. – correct?

How many inches would you say that curb was higher than the parking lot where you fell?

A. Four, four and a half.

Q. Okay. Would you agree with me that's something pretty easy to see if you're looking at it?

A. Only if you're looking at it.

* * *

Q. And you would have walked all the way down that sidewalk as the sidewalk raised up off the parking lot, correct?

A. Correct.

Q. And at any time had you looked down you could have seen the difference, correct?

A. If I would have looked down, yes.

Deposition of Joyce A. Bovetsky at pp. 31- 32, 34-35.

{¶16} By her own testimony, Joyce Bovetsky established the elevated difference between the sidewalk and the parking lot was readily observable if she had looked. The issue is not whether Marc's could have taken additional precautions to warn of the elevation differential of the sidewalk, but whether a reasonable person under the circumstances would have observed the condition. See, e.g., *Knight v. Hartville Hardware, Inc.*, Stark App. No. 2015CA00121, 2016-Ohio-1074. Under these circumstances, we find reasonable minds could only conclude the height difference between the sidewalk and the parking lot was open and obvious.

{¶17} However, attendant circumstances can create an exception to the open and obvious doctrine and render summary judgment inappropriate. *Johnson v. Regal Cinemas, Inc.,* 8th Dist. Cuyahoga No. 93775, 2010-Ohio-1761, 2010 WL 1611010, ¶ 23. 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." *Haller v. Meijer, Inc.,* 10th Dist. Franklin No. 11AP–290, 2012–Ohio–670, ¶ 10.

{¶18} For this exception to apply, "[a]n attendant circumstance must divert the attention of the injured party, significantly enhance the danger of the defect, and contribute to the injury." *Forste v. Oakview Constr., Inc.,* 12th Dist. Warren No. CA2009–05–054, 2009–Ohio–5516, 2009 WL 3350450, ¶ 22; *Isaacs v. Meijer,* Inc., 12th Dist. Clermont No. CA2005–10–098, 2006–Ohio–1439, 2006 WL 766692, ¶ 16. Attendant circumstances may include such things as the time of day, lack of familiarity with the route taken, and lighting conditions. *Hart v. Dockside Townhomes, Ltd.,* 12th Dist. Butler No. CA2000–11–222, 2001 WL 649763, *2 (June 11, 2001). Further, an attendant

circumstance is a circumstance which contributes to the fall and is beyond the control of the injured party. *Backus v. Giant Eagle, Inc.* (1996), 115 Ohio App.3d 155, 158, 684 N.E.2d 1273.

{¶19} Appellants contend the pumpkin display located on the sidewalk outside of the store constitutes an attendant circumstance which created a genuine issue of material fact as to whether the danger was open and obvious, and, as such, rendered summary judgment inappropriate. Essentially, Appellants argue the pumpkin display was an attendant circumstance because Marc's situated the display outside of the store with the intent to draw its customers' attention to these items and entice them to buy the pumpkins, thereby increasing Marc's profits. Appellants conclude Joyce Bovetsky was distracted by the pumpkin display; therefore, the open and obvious doctrine does not apply.

{¶20} While we find reasonable minds could disagree (when considering the evidence in the light most favorable to Appellants) whether the pumpkin display constituted attendant circumstances, our analysis does not stop there. We must determine what, if any, effect her removing three pumpkins from the display and then taking several steps backwards, without turning around, has on whether the attendant circumstances exception to the open and obvious doctrine still applies. We find it does not in this case.

{¶21} The pumpkin display was not the proximate cause of Joyce Botevsky's fall. Her independent act of removing three pumpkins from the display placing them on the sidewalk and then stepping backward, without looking, to observe them broke the causal connection between any attendant circumstances the display may have provided and her

ultimate fall. There can be no dispute her actions were the proximate cause of the fall and were beyond the control of the premises owner.

{¶22} Based upon our review of the undisputed facts and the relevant law, we agree with the trial court the elevated difference between the sidewalk and the parking lot was open and obvious. Appellants' assignment of error is overruled.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur