[Cite as *Snyder v. Kings Sleep Shop, L.L.C.*, 2014-Ohio-1003.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

Earl Snyder	Court of Appeals No. WM-13-006
Appellant	Trial Court No. 12 CI 104
v.	
Kings Sleep Shop, LLC	**DECISION AND JUDGMENT**
Appellee	Decided: March 7, 2014

* * * * *

Robert W. Bryce and Ryan S. Thompson, for appellant.

Brian A. Newberg, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals an order of the Williams County Court of Common Pleas granting summary judgment to a business owner in a premises liability negligence claim. Because we concur with the trial court that the hazard responsible for appellant's injury was open and obvious, we affirm.

{¶ 2} On November 6, 2010, appellant, Earl Snyder, his mother and a friend visited a furniture store in West Unity, Ohio. The store was operated by appellee, Kings Sleep Shop, LLC.

{¶ 3} Appellee's store occupies three adjoining buildings, divided only by common walls through which appellee has constructed open doorways. Patrons enter through a single door to the street then move through these doorways from building to building. Because the floor level of the three buildings is not the same, appellee has constructed ramps through the doorways.

{¶ 4} As appellant's party was shopping in the store, appellant's mother and his friend used one of the ramps to move from one building into another, descending approximately one foot. When appellant followed a few minutes later, he inadvertently placed his foot partially on the edge of the ramp causing him to fall. He was injured as a result of the fall.

{¶ 5} On June 12, 2012, appellant sued appellee alleging that his fall and resulting injuries were due to appellee's failure to remedy, or warn him of, an unreasonably dangerous condition on the premises. Appellee responded, denying liability.

{¶ 6} Following extensive discovery, appellee moved for summary judgment. Appellee argued that, if there was a dangerous condition on its property, it was open and obvious, absolving appellee of a duty to warn and negating premises liability.

{¶ 7} Appellant responded, pointing out that the ramp was carpeted with material of the same color, texture and age as the floor on the lower level. It had no handrail or

any other device marking a drop-off. Appellant also asserted that ramp was not constructed in conformity with the Ohio Building Code or the Americans with Disabilities Act Accessibility Guidelines. Moreover, the furniture in the store was specifically arranged to draw the attention of the shopper. This latter intentional attempt to divert a shopper's attention constituted attendant circumstances, appellant maintained, creating a genuine issue of material fact as to whether these circumstances negate the open and obvious doctrine.

{¶ 8} On these submissions, the court ruled. In a 19-page decision, the court concluded that appellee had no duty toward appellant because the ramp and any danger inherent in its use were open and obvious. The court also concluded that any code or guideline violation did not negate the open and obvious doctrine and the furniture displayed in the store did not create any attendant circumstance as a matter of law. On these conclusions, the court granted appellee's motion for summary judgment.

{¶ 9} From this judgment, appellant now brings this appeal. Appellant sets forth the following five assignments of error:

> I. The trial court committed reversible error when it held that the ramp was open and obvious as a matter of law.
>
> II. The trial court committed reversible error by making material factual findings not supported by the testimonial record or with the cited caselaw itself.

III. The trial court committed reversible error in ruling that the law imposes an obligation to constantly look down while walking.

IV. The trial court committed reversible error in holding that ADAG and OBC violations were "irrelevant."

V. The trial court committed reversible error in holding that no attendant circumstances were present.

I. Summary Judgment

{¶ 10} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 11} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526

N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

II. Premises Liability

{¶ 12} Premises liability is a form of negligence. In general, to establish actionable negligence, the plaintiff must show that the defendant owes a duty to him or her which has been breached proximately resulting in the plaintiff's injury. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). The duty that an owner or occupier of premises owes to one who is injured on those premises is governed by the relationship between the parties. *Light v. Ohio University*, 28 Ohio St.3d 66, 67, 502 N.E.2d 611 (1986). Persons who come onto premises by invitation, express or implied, for purposes beneficial to the owner or occupier are considered business invitees. *Id.* at 68.

{¶ 13} The duty of a premises owner to a business invitee is one of ordinary care in maintaining the premises in a reasonably safe condition and to warn an invitee of latent or hidden dangers. *Brown v. Helzberg Diamonds*, 168 Ohio App.3d 438, 2006-Ohio-4297, 860 N.E.2d 803, ¶ 13 (6th Dist.); *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). The owner of premises, however, is not an insurer of the customer's safety and is under no duty to protect business invitees from dangers "known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Id.* at 203-204, quoting *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the syllabus. The owner or occupier of premises may reasonably expect that invitees to the premises will discover such dangers and take appropriate measures to protect themselves. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 12.

III. Assigned Errors

A. Factual Findings

{¶ 14} We shall discuss appellant's second assignment of error first.

{¶ 15} The trial court begins its discussion of the evidence by stating that "The court finds as follows." What follows is a list of 22 undisputed facts derived from the depositions, affidavits and interrogatories submitted by the parties in support of, or in opposition to, summary judgment.

{¶ 16} Using the word "find" in this context is an imprecise use of language. In a legal setting, when a court "finds" something or makes "findings," the connotation is that the court is announcing a conclusion upon a disputed fact; "a decision upon a question of fact reached as the result of judicial examination * * * by a court." *Black's Law Dictionary* 631-632 (6th Ed.1990). Since summary judgment may only issue when there is "no genuine issue as to any material fact," Civ.R. 56(C), the need to "find" facts would be antithetical to the device.

{¶ 17} An examination of the material submitted in support and opposition to the summary judgment motion reveals that the facts the trial court enumerated, indeed, are undisputed. We conclude that the trial court's imprecise use of the word "find" was not prejudicial to appellant. Appellant's second assignment of error is not well-taken.

B. Open and Obvious

{¶ 18} Considering those undisputed facts, we note that the multiple pictures of the ramp at issue reveal a well-lighted, uncluttered area. Although the carpeting matches that of the ramp in the room into which appellant was going, the carpet in the room appellant was leaving is of a markedly different color and texture and outlines the ramp as it declines into the next room. There was deposition testimony from appellant's friend and appellant's 75-year-old mother that they had no difficulty navigating the ramp. The incline of the ramp was sufficient to be sensed by someone walking on it (appellant had crossed more than half the ramp when he fell). A normally observant person would note that the furniture in the next room was at a level noticeably below the room from which

appellant came. The owner of the store testified that the ramp had been in place since 2006 or 2007 and no other customer or invitee had ever fallen.

{¶ 19} On these facts, we can only concur with the conclusion of the trial court that any danger posed by this ramp was open and obvious to anyone exercising a reasonable awareness of his or her environment. Accordingly, appellant's first assignment of error is not well-taken.

C. Code Violations

{¶ 20} An exception to the open and obvious doctrine exists when a defendant fails to adhere to a statutory duty such that the violation constitutes negligence per se. *Lang*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 14. Such an exception does not apply to violations of administrative rules such as the building code or the accessibility guidelines. *Id.* at ¶ 20. Accordingly, appellant's fourth assignment of error is not well-taken.

D. Obligation to Look Down

{¶ 21} The trial court did not impose a duty to "constantly look down while walking." The court merely reiterated that a business invitee must be reasonably aware of his or her surroundings. Recovery for objectively observable conditions is barred. *Williams v. Lowe's Home Ctrs., Inc.*, 6th Dist. Lucas No. L-06-1267, 2007-Ohio-2392, ¶ 18. Here, the trial court concluded that that the hazard at issue was such that a reasonably aware customer would see had he been looking. Appellant's third assignment of error is not well-taken.

E. Attendant Circumstances

{¶ 22} Appellant maintains that the furniture displays in appellee's store constituted attendant circumstances so as to negate the open and obvious doctrine. Attendant circumstances may create a genuine issue of material fact as to whether a hazard is open and obvious. *McGuire v. Sears Roebuck & Co.*, 118 Ohio App.3d 494, 498, 693 N.E.2d 807 (1st Dist.1996).

> An attendant circumstance is a factor that contributes to the fall and is beyond the injured person's control. The phrase refers to all circumstances surrounding the event, such as time and place, the environment or background of the event, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event. An "attendant circumstance" has also been defined to include any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time. (Citations omitted.) *Jackson v. Pike Cty. Bd. of Commrs*. 4th Dist. Pike No. 0CA805, 2010-Ohio-4875, ¶ 21.

{¶ 23} According to appellant, the "vignettes" in which appellee displayed its furniture were designed to attract his attention. Since such displays achieved their intended purpose, appellant insists, they constitute attendant circumstances, giving rise to a question of fact as to whether the ramp hazard was open and obvious.

{¶ 24} Customers who are distracted by merchandising signs, goods and displays routinely encountered within a store for sales promotion are not excused from discovering open and obvious dangers. *Grossnickle v. Village of Germantown*, 3 Ohio St.3d 96, 103-104, 209 N.E.2d 442 (1965), *Ankney v. Seaway Foodtown*, 6th Dist. Wood No. WD-90-55, 1991 WL 26666 (Mar. 1, 1991), *Lovejoy v. Sears, Roebuck & Co.*, 6th Dist. Lucas No. L-98-1025, 1998 WL 351876 (June 19, 1998), *Black v. Discount Drug Mart, Inc.*, 6th Dist. Erie No. E-06-044, 2007-Ohio-2027, ¶ 17. Whether called a vignette or simply a display of furniture, there is nothing in the record to suggest that what appellant encountered was anything other than the type of display one would ordinarily expect to see in a furniture store. Accordingly, he is not absolved of his responsibility to be aware of his circumstances and avoid open and obvious hazards. Appellant's fifth assignment of error is not well-taken.

{¶ 25} On consideration, the judgment of the William County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE