[Cite as *McCammon v. Youngstown Sports Grille*, 2016-Ohio-8210.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JEAN McCAMMON	)	
	)	
PLAINTIFF-APPELLEE	)	
	)	CASE NO. 15 MA 0124
VS.	)	
	)	OPINION
YOUNGSTOWN SPORTS GRILLE, et al.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 14 CV 342
JUDGMENT:	Reversed and Remanded.
APPEARANCES: For Plaintiff-Appellee	Attorney Brian Kopp Attorney Justin Markota 6630 Seville Drive Canfield, Ohio 44406
For Defendant-Appellant	Attorney William Meola 4137 Boardman-Canfield Road Suite 101 Canfield, Ohio 44406

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 14, 2016

[Cite as *McCammon v. Youngstown Sports Grille*, 2016-Ohio-8210.]
DeGENARO, J.

{¶1} Plaintiff-Appellant Jean McCammon appeals the trial court's summary judgment to Defendants-Appellees Youngstown Sports Grille and Sean C. Pregibon in this personal injury suit. Upon review, McCammon's assignment of error is meritorious. There is a genuine issue of material fact about whether the Easter grass scattered throughout the restaurant by restaurant personnel as decoration was an open and obvious hazard. Accordingly, the judgment of the trial court is reversed and the matter remanded for further proceedings.

{¶2} On the afternoon of St. Patrick's Day, McCammon visited the Sports Grille, which was festively decorated for the holiday. The adornments included shredded green Easter basket grass placed on the tables, floor and light fixtures by the restaurant. McCammon and her daughter Kathy found a table where they listened to the live band and McCammon enjoyed a diet soda while the two of them awaited the arrival of McCammon's other daughter, Jeri. When Jeri joined them, the family ordered dinner. McCammon later recalled seeing the Easter grass on the tables and lights upon entering the restaurant and being aware of some of it falling on the floors before ordering her food. After finishing her meal, she went to the restroom then walked over to the band to request a song. As she was returning to her table, she fell. She stated at deposition: "The grass wrapped around my shoes and tripped me, tripped my toes. Sort of like maybe bound them together or the toes of the shoes got hooked into the grass." She described seeing "a loose jumble of this green Easter grass" about the size of "a small football" tangled around her closed-toed, diabetic shoes after the fall. McCammon claimed the fall caused her permanent injury.

{¶3} As a result of this incident, McCammon filed a complaint against the restaurant and its owner, Pregibon. Appellees filed an answer denying the allegations and asserting various affirmative defenses including contributory negligence, assumption of the risk, and the open and obvious doctrine. Discovery proceeded and the depositions of McCammon and Pregibon were taken and filed.

{¶4} Appellees filed a motion for summary judgment asserting McCammon's

claims were barred because the restaurant was not in a defective condition at the time of McCammon's fall, and they owed her no duty with respect to the condition she claimed caused her fall because that condition was open and obvious. Appellees cited McCammon's deposition testimony in support of their motion, in which she acknowledged she was aware of the widespread presence of the Easter grass as she was being ushered to her table, and specifically aware of its presence on the floor while she was at her table. She also testified that at the time she fell, she was not carrying her purse or anything else, she was watching where she was walking, was not distracted in any way, was not bumped by anyone, and there were no obstructions in her path, any wetness on the floor, or any lighting issues.

{¶5} McCammon opposed summary judgment arguing Appellees breached their duty to her through their negligent conduct which the open-and-obvious doctrine does not relieve. She attached color photos of the inside of the restaurant which were from another year's St. Patrick's Day celebration showing colorful streamers and signs hung from the ceiling and Easter basket grass strewn liberally around the premises. She also attached Pregibon's deposition, highlighting his testimony that a similar St. Patrick's Day celebration was held at the restaurant every year, and that the photographs are an accurate representation of how the Easter grass would have been scattered on the day McCammon fell.

{¶6} The magistrate granted Appellees' motion for summary judgment. McCammon filed objections, arguing the magistrate erred by ruling that the Easter grass was an open and obvious hazard as a matter of law and that McCammon did not take the proper amount of care while walking in order to avoid the hazard, and whether the hazard was avoidable due to its dynamic nature was a question of fact that should have been submitted to the jury. Appellees defended the objections. The trial court overruled McCammon's objections and granted summary judgment in favor of Appellees

{¶7} Appellant McCammon sets forth one assignment of error:

The trial court erred in granting Defendants' motion for summary

> judgment in that genuine issues of material fact exist as to whether the negligent acts of the Defendants created a dynamic condition and attendant circumstances which operate to preclude the application of the open-and-obvious doctrine.

{¶8} Generally, an abuse of discretion standard is applied in an appellate review of a trial court's adoption of a magistrate's decision. *Bank of America, N.A. v. Miller,* 7th Dist. No 13 MA 119, 2015-Ohio-2325, at ¶ 25. However, where, as here, the trial court adopted a magistrate's decision determining that summary judgment was appropriate the appellate court reviews the case *de novo*. *Long v. Noah's Lost Ark, Inc.*, 158 Ohio App.3d 206, 2004-Ohio-4155, 814 N.E.2d 555, at ¶ 17 (7th Dist.).

{¶9} A trial court's summary judgment is subject to de novo review. *Parenti v. Goodyear Tire & Rubber Co*., 66 Ohio App.3d 826, 829, 586 N.E.2d 1121 (9th Dist.1990). Summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the nonmovant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. Civ.R. 56.

{¶10} To establish a cause of action for negligence, a plaintiff must show the existence and breach of a duty which proximately caused plaintiff's injury. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2002-Ohio-2573, 788 N.E.2d 1088, ¶ 8. "The existence of a duty is a question of law." *Kish v. Scrocco*, 7th Dist. No. 11 MA 197, 2013-Ohio-899, ¶ 12, citing *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). An owner or occupier of a business owes its invitees a duty of ordinary care to maintain the premises in a "reasonably safe condition" so that its customers are not exposed to danger, *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 203, 480 N.E.2d 474 (1985), and has a duty to warn its invitees of latent or hidden dangers. *Armstrong* at ¶ 5. *See also McGee v. Lowe's Home Centers,* 7th Dist. No. 06JE26, 2007-Ohio-4981, ¶ 14.

{¶11} However, "[w]here the danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *McGee* at ¶ 15, citing

Armstrong. "An open and obvious danger is one that an invitee may reasonably be expected to discover; however, one does not necessarily have to see the hazard for it to be open and obvious." *McElhaney v. Marc Glassman, Inc.*, 174 Ohio App.3d 387, 2007-Ohio-7203, 882 N.E.2d 455, ¶ 37 (7th Dist.). The Ohio Supreme Court has held that Ohio "continue[s] to adhere to the open-and-obvious doctrine." *Armstrong* at ¶ 13. Discussing the *Armstrong* analysis of the open-and-obvious doctrine, this court has declared, "[O]nce a condition is found to be open and obvious, the inquiry into negligence on the part of the owner or operator of a business comes to an end." *Kraft v. Dolgencorp, Inc.*, 7th Dist. No. 06 MA 69, 2005-Ohio-4997, ¶ 16.

{¶12} However, as this court previously noted:

> "Although the Supreme Court has held that whether a duty [to an invitee] exists is a question of law for the court to decide, the issue of whether a hazardous condition is open and obvious may present a genuine issue of fact for a jury to review.
>
> Where only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. * * * However, where reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. *Carpenter v. Marc Glassman, Inc.* (1997), 124 Ohio App.3d 236, 240, 705 N.E.2d 1281; *Henry v. Dollar General Store,* Greene App. No.2002–CA–47, *2003–Ohio–206; Bumgarner v. Wal–Mart Stores, Inc.,* Miami App. No.2002–CA–11, 2002–Ohio–6856."

Boston v. A&B Sales, Inc., 7th Dist. No. 11 BE 2, 2011-Ohio-6427, at ¶ 33, quoting *Klauss v. Glassman*, 8th Dist. No. 84799, 2005-Ohio-1306 (some internal citations omitted).

{¶13} Here, reviewing the record in the light most favorable to McCammon,

there is a genuine issue of material fact that precludes summary judgment. There is evidence that restaurant employees scattered the Easter grass on the tables, light fixtures and the floor; thus the restaurant created the dangerous condition. The extent of the grass throughout the restaurant is a disputed issue, which we must leave for the jury to resolve.

{¶14} Accordingly, McCammon's sole assignment of error is meritorious, and the judgment of the trial court is reversed and the case remanded for further proceedings.

Donofrio, P. J., concurs.

Waite, J., concurs.