[Cite as *Winthrow v. Marc Glassman, Inc.*, 2006-Ohio-6748.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

LORI WINTHROW	C. A. No. 23308
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARC GLASSMAN, INC.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2005 07 4222

DECISION AND JOURNAL ENTRY

Dated: December 20, 2006

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶1} Plaintiff-Appellant Lora Withrow[1] has appealed from the judgment of the Summit County Court of Common Pleas which granted summary judgment on her negligence claim in favor of Defendant-Appellee Marc Glassman, Inc. This Court affirms in part and reverses in part.

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[1] We note that the caption from the lower court's journal entry misspelled Appellant's name. For consistency, we have maintained that caption.

I

{¶2} The facts herein are largely undisputed. On July 26, 2003, Appellant and her husband were shopping at a Marc's grocery owned and operated by Appellee. Appellant observed a large outdoor planter on the top shelf in the garden section. Unable to retrieve the planter herself, Appellant requested help from a Marc's employee. Sue Adelman, the Marc's store manager, attempted to retrieve the planter for Appellant. The parties, however, dispute whether Adelman used a ladder to reach the item or simply reached up while standing on the ground. Regardless of such a fact, Adelman admitted to mishandling the planter and dropping it. The planter struck Appellant as a result of Adelman dropping it, causing injuries to chest, neck, and shoulder.

{¶3} On July 26, 2005, Appellant filed suit against Appellee, alleging that Appellee had breached its duty to her as a business invitee and was liable under the theory of respondeat superior. Appellee moved for summary judgment on Appellant's claims, alleging that each was defeated by the application of the open and obvious doctrine. The trial court agreed and granted Appellee's motion for summary judgment on June 30, 2006. Appellant has timely appealed from the trial court's judgment, raising two assignments of error for review.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED WHEN IT ENTERED SUMMARY JUDGMENT IN FAVOR OF MARCS SINCE GENUINE ISSUES OF MATERIAL FACT REMAIN WITH REGARD TO WHETHER MS. WITHROP'S (sic) INJURIES WERE CAUSED BY MARC'S NEGLIGENCE AND WHETHER MARCS CREATED AND/OR MAINTAINED A HAZARDOUS CONDITION WITHIN ITS RETAIL ESTABLISHMENT."

{¶4} In her first assignment of error, Appellant has asserted that the trial court erred in granting summary judgment in favor of Appellee. Specifically, Appellant has argued that the open and obvious doctrine does not apply to the facts of her negligence claim. We agree.

{¶5} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12. Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains 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, 327.

{¶6} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of a genuine issue of material fact as to some essential element of the non-moving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. To support the motion, such evidence must be present in the record and of the type listed in Civ.R. 56(C). Id.

{¶7} Once the moving party's burden has been satisfied, the non-moving party must meet its burden as set forth in Civ.R. 56(E). Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material to demonstrate a genuine dispute over the material facts. Id. See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶8} 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."

{¶9} To recover on a negligence claim, a plaintiff must prove that (1) the defendant owed her a duty (2) that duty was breached by the defendant, and (3) the breach of that duty proximately caused the plaintiff's injury. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565. Although a premises owner has a duty to exercise ordinary care in maintaining the premises, the open and obvious

doctrine, when applicable, obviates the duty to warn and acts as a complete bar to any negligence claims. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶5. The open and obvious doctrine relates to the threshold issue of duty and provides that the owner of a premises owes no duty to those people entering the premises regarding dangers that are open and obvious. Id. at ¶ 5, 13. The rationale behind this doctrine is that the open and obvious nature of the hazard itself serves as a warning. Id. at ¶5. "Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." Id., quoting *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644; *Schmitt v. Duke Realty, LP*, 10th Dist. No. 04AP-251, 2005-Ohio-4245, at ¶9. "The determination of the existence and obviousness of a danger alleged to exist on a premises requires a review of the facts of a particular case." *Miller v. Beer Barrel Saloon* (May 24, 1991), 6th Dist. No. 90-OT-050, at *3; *Schmitt*, supra.

{¶10} Appellant has asserted that the open and obvious doctrine is inapplicable to the facts at hand. We agree.

{¶11} Initially, we note that while not argued clearly by the parties, Appellant brought three distinct causes of action in the trial court: a premises liability claim; a general negligence claim; and a respondeat superior claim dependent upon the former two claims. "Premises tort claims where the alleged negligence arises from static or passive conditions, such as preexisting latent

defects, are legally distinct from claims averring active negligence by act or omission." *Simmons v. Am. Pac. Enterprises, LLC*, 164 Ohio App.3d 763, 2005-Ohio-6957, at ¶20. This distinction is important because the two claims correspond to separate duties. "[S]tatic conditions relate to the owner's duty to maintain its premises in a reasonably safe condition, including an obligation to warn its invitees of latent or hidden dangers, while *** active negligence relates to the owner's duty not to injure its invitees by negligent activities conducted on the premises." Id., citing *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51.

{¶12} In the instant matter, Appellant's claim based upon a hazardous condition maintained on Appellee's property is unsupported by the record. Appellant has never presented evidence that the premises themselves were hazardous. Rather, Appellant has asserted that Adelman's negligence caused her injuries. Accordingly, to the extent that the trial court found that no hazardous condition existed on the property which resulted in Appellant's injury, it did not err. The trial court, therefore, properly granted summary judgment on Appellant's hazardous condition/premises liability claim.

{¶13} Appellant has claimed throughout the proceedings that the negligent handling of the planter by Appellee's employee resulted in her injuries. In response, Appellee has argued that it was foreseeable that its employee would drop the planter on Appellant. Specifically, Appellee has asserted that Appellant was aware of the danger presented by the planter as evidenced by her request that

an employee retrieve it on her behalf. Effectively, Appellee has argued that the negligence of its employee was foreseeable and therefore an open and obvious danger. However, such a use of the open and obvious doctrine would foreclose relief in nearly every negligence claim.

{¶14} This Court cannot find that as a matter of law Appellant should have foreseen that Appellant's employee would actively perform her work duties in a negligent manner. Unlike cases applying the open and obvious doctrine, Adelman's negligence did not create a hazard on the premises. See, contra, *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49 (applying the open and obvious doctrine when an employee's negligent stacking of boxes had created a dangerous condition). Likewise, the remaining cases relied upon by Appellee stand for the same proposition: the open and obvious doctrine is applicable, despite negligence by the premises owner, when that negligence creates a hazardous condition on the premises. See *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642 (noting that the open and obvious doctrine may apply when an employee's negligence caused a large gap in a walkway, a hazardous condition, which later caused the plaintiff's injuries); *Frajt v. Goodwill Industries of Greater Cleveland* (1986), 33 Ohio App.3d 92 (applying the open and obvious doctrine despite employee's negligence in leaving elastic belts tangled because such a hazardous condition was open and obvious).

{¶15} Furthermore, to the extent that Appellee has argued that Appellant should not have stood so close to Adelman while she retrieved the planter, such an argument is one of comparative negligence. As such, it is not a proper issue for summary judgment.

{¶16} Adelman's negligence did not cause the condition of Appellee's property to become hazardous. Rather, her alleged negligence directly caused injury to Appellant. As noted above, Appellee had a duty not to injure Appellant, an invitee, through negligent activities conducted on the premises. *Perry*, 53 Ohio St.2d at 52; *Simmons* at ¶20. Viewing the evidence in a light most favorable to Appellant, she presented evidence which demonstrated that Appellee breached that duty. As Appellant's general negligence claim was entirely unrelated to the condition of the premises owned by Appellee, the trial court erred in applying the open and obvious doctrine to defeat that claim.

{¶17} Appellant's first assignment of error, therefore, has merit in part.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE THE EVIDENCE DEMONSTRATED THAT MS. WITHROP (sic) APPRECIATED THE DANGER OF THE OPEN AND OBVIOUS HAZARD AND TOOK APPROPRIATE MEASURES TO AVOID THE HAZARD."

{¶18} Based upon this Court's resolution of Appellant's first assignment of error, Appellant's second assignment of error is moot and we decline to address it. App.R. 12(A)(1)(c).

III

{¶19} Appellant's first assignment of error is sustained to the extent that the trial court found that she had not presented evidence of general negligence under a theory of respondeat superior. Appellant's first assignment of error is overruled to the extent that the trial court properly granted summary judgment on her claim that a hazardous condition caused her injuries. Appellant's second assignment of error is moot and we decline to address it. The judgment of the Summit County Court of Common Pleas is affirmed in part and reversed in part and the cause remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

BETH WHITMORE
FOR THE COURT

CARR, J.
REECE, J.
CONCUR

(Reece, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

JOHN BROOKS CAMERON, Attorney at Law, for Appellant.

NICHOLAS SWYRYDENKO and RICHARD DOBBINS, Attorneys at Law, for Appellee.