[Cite as *Alfonso v. Marc Glassman, Inc.*, 2009-Ohio-5149.]

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

SUSAN ALFONSO	C. A. No. 24604
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARC GLASSMAN, INC.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2007-12-8967

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

Per Curiam.

{¶1} Plaintiff-Appellant Susan Alfonso appeals the judgment of the Summit County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee Marc Glassman, Inc. ("Marc's"). For reasons set forth below, we affirm.

I.

{¶2} On January 18, 2006, Alfonso went to the Fairlawn Marc's store. Upon entering the store, Alfonso tripped and fell on what Alfonso believes was a hump in the carpet. Alfonso sustained significant injuries from the fall. Alfonso filed a complaint in the Summit County Court of Common Pleas alleging (1) that Marc's was negligent in allowing the carpet runner at the entrance to develop a hump, in failing to correct it, and that such negligence caused Alfonso's fall and resultant injuries; (2) that Marc's was negligent in its training and supervision of its employees; and (3) that Marc's was liable via respondeat superior liability. Marc's filed an answer denying the allegations.

{¶3} Subsequently, Marc's filed a motion for summary judgment arguing that Alfonso could not prove that Marc's had any knowledge of the hazard and that Alfonso's recovery was precluded under the open and obvious doctrine. As supporting evidence, Marc's attached portions of Alfonso's and the Marc's manager's depositions. Alfonso filed a brief in opposition, to which Marc's replied. The trial court ruled in favor of Marc's concluding that the hump in the carpet was open and obvious and thus, that Marc's had no duty to warn Alfonso of the hazard. Alfonso has appealed raising two assignments of error.

II.

ASSIGNMENT OF ERROR I.

> "The Trial Court erred when it granted Appellee Marc Glassman, Inc.'s Motion for Summary Judgment, as there are genuine issues of material fact regarding whether the open and obvious doctrine is applicable to Mrs. Alfonso's January 1[8], 200[6] fall at the Fairlawn store."

ASSIGNMENT OF ERROR II.

> "The Trial Court erred when it granted Appellee Marc Glassman, Inc's Motion for Summary Judgment, as there are genuine issues of material fact regarding whether the hump that Mrs. Alfonso tripped over was open and obvious on January 18, 2006 under the *Armstrong* decision."

{¶4} As both assignments of error concern whether the trial court properly awarded summary judgment, they will be addressed together.

{¶5} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. "Pursuant to Civ.R. 56(C), summary judgment is appropriately rendered when '(1) [n]o 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.'" *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶6} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Dresher*, 75 Ohio St.3d at 293.

{¶7} "To prevail in a negligence action, the plaintiff must show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting from the breach." *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, at ¶21. "A shopkeeper 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., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶5. In this case, there is no dispute that Alfonso was a business invitee of Marc's at the time of the incident. Further, the parties do not dispute in their briefs that Alfonso tripped over a hump in the carpet.

{¶8} However, "[w]here a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." Id. at ¶14. "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.'" Id. at ¶5, quoting *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644. Marc's successfully argued in the trial court that the hump in the carpet was open and obvious, thus barring Alfonso's recovery.

{¶9} Nonetheless, the open and obvious doctrine only applies to static conditions. *Simmons v. Am. Pacific Enterprises, LLC*, 164 Ohio App.3d 763, 2005-Ohio-6957, at ¶23.

Alfonso has argued that there is a genuine issue concerning whether the condition was dynamic or static. We disagree.

{¶10} We have stated that:

> "'[p]remises 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.' 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.'" (Internal citations omitted and emphasis added.) *Winthrow v. Marc Glassman, Inc.*, 9th Dist. No. 23308, 2006-Ohio-6748, at ¶11, quoting *Simmons* at ¶20.

{¶11} Alfonso's claims clearly allege premises liability. Her basic contention is that Marc's failed to safely maintain its store by allowing the carpet to develop a hump and failed to warn Alfonso about the hump in the carpet. This is the essence of a negligence complaint involving a static condition. See *Winthrow* at ¶11. Thus, the trial court did not err in applying the open and obvious doctrine. Alfonso's argument to the contrary is without merit.

{¶12} If Marc's has established that the hump in the carpet was indeed open and obvious, the trial court's award of summary judgment was appropriate as Marc's would owe Alfonso no duty. *Armstrong* at ¶14. "Without establishing a duty, a plaintiff cannot proceed with a negligence action, and any evidence offered by the plaintiff to support a finding of the remaining three elements of negligence will not be considered." *Clark v. Burman*, 9th Dist. No. 06CA008867, 2006-Ohio-5052, at ¶9.

{¶13} We conclude that the trial court did not err. We have stated that "[t]he determinative issue is whether the condition is observable. Consequently, the 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. Ohio courts have found that no duty existed in

cases where the plaintiff did not notice the condition until after he or she fell, but could have seen the condition if he or she had looked." (Internal citations omitted.) *Kirksey v. Summit Cty. Parking Garage*, 9th Dist. No. 22755, 2005-Ohio-6742, at ¶11.

{¶14} Alfonso described the incident as follows:

"A: I was coming into the store to go to the pharmacy, and as I was coming in, I – something tripped me on the carpet. I felt a bump, something, and I couldn't – I tried so hard to get my – you know, not to fall, because I felt that I was just tripped, and I did everything I could, and I just flew, flew.

"* * *

"Q: And before you fell, did you see the carpet that you were walking past or over?

"A: I walk straight in. I don't walk looking down. I don't want to get hurt. I want to walk looking where I'm going.

"Q: Okay. So you did not see the carpet as you were walking in?

"A: Well, I saw a carpet laying there, but as I walked in, it was the buckle that threw me. I mean, it was buckled about this much.

"* * *

"Q: You didn't see the buckle in the carpet before you tripped, is that fair?

"A: No. I walked in and then the buckle tripped me.

"* * *

"Q: Where was [the buckle] in the carpet? Was it at the beginning of the carpet, in the middle, or at the end of the carpet, or do you know?

"A: It was after I took two or three steps.

"* * *

"Q: If you would have been looking down, do you think you would have seen the hump in the carpet?

"* * *

"A: I can't answer that.

"Q: Why?

"* * *

"A: I didn't look down because I was walking straight in.

"* * *

"Q: I understand. I understand. I'm trying to understand if you would have been walking in and been looking down – I'm not suggesting that you should have been.

"I want to understand. Was the buckle in the carpet significant enough that you would have seen it if –

"* * *

"A: I just called it that it happened to be bad luck. It was not my day. Had I, probably, but I didn't look down because I don't look down when I walk into a store. I look forward, straight where I'm going, ahead.

"* * *

"Q: Okay. Would there have been anything obstructing your view, something covering the hump in the carpet?

"A: No."

{¶15} Thus, Alfonso saw the carpet and fell somewhere near the middle of it. Alfonso stated that she was not looking down, and that if she had been, she probably would have seen the hump in the carpet. The fact that the hump in the carpet was appreciable is confirmed by the affidavit of the customer who entered the store right behind Alfonso and witnessed her fall.[1] Alfonso attached the affidavit to her brief in opposition in the trial court. The customer stated that "[t]he cause of [Alfonso's] fall, from what I saw, was a hump in the rug where it got

[1] We note that the affidavit does not state that it was based on the customer's personal knowledge. We have stated that "[u]nauthenticated documents and affidavits not based on personal knowledge have no evidentiary value and should not be considered by the court in deciding whether summary judgment is appropriate. Nonetheless, this Court has held that unless the opposing party objects to the admissibility of improper evidence, the trial court may, but

bunched up." Further, Alfonso was a regular customer of Marc's; prior to her fall she visited Marc's at least three times a week. She was knowledgeable about the layout of the store and acknowledged that it was common for stores to put carpets down in the wintery weather. It would seem highly unlikely that the day of Alfonso's fall was the first time she encountered carpets in the entrance way, given both her numerous previous visits to the store and the testimony that the carpets were in place anytime the weather was inclement. While there is no evidence in the record concerning the lighting in the store, the incident occurred during early to mid-afternoon and the record indicates the carpet itself was visible.

{¶16} We therefore conclude that the hump in the carpet was open and obvious as a matter of law and that Marc's therefore had no duty to warn Alfonso about it. *Armstrong* at ¶14.

{¶17} In the case at bar, the dissent asserts that the trial court, and in the instance of a de novo review, this Court, has the responsibility to review the record for any potential dispute of fact, that would arguably support liability under a factual scenario (here, possible water on the floor, or tripping over her own feet) not raised in the pleadings or argued in the trial court on motion for summary judgment. This Court has held to the contrary:

> "We have explained that if the moving party does not raise an issue in its motion for summary judgment, then it is improper for the trial court to grant the motion on that basis. *Wilson v. Smith*, 9th Dist. No. 22193, 2005-Ohio-337, at ¶15. '[I]f a party files a motion based on some, but not all, issues in a case, the trial court should restrict its ruling to those matters raised. It is reversible error to award summary judgment on grounds not specified in the motion for summary judgment.' (Internal citations omitted.) *Caplinger v. New Carlisle*, 2d Dist. No. 2007CA0072, 2008-Ohio-1585, at ¶26. The trial court may not rely on law or fact that is not presented in the moving party's motion. Id. at ¶28." *Lindsey v. Summit Cty. Children's Services Bd.*, 9th Dist. No. 24352, 2009-Ohio-2457, at ¶10.

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need not consider the evidence." (Internal quotations and citations omitted.) *Cheriki v. Black River Industries, Inc.*, 9th Dist. No. 07CA009230, 2008-Ohio-2602, at ¶6.

We have further recognized that "[i]n reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same test a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Tucker v. Kanzios*, 9th Dist. No. 08CA009429, 2009-Ohio-2788, at ¶17. Logically, therefore, this Court is similarly prohibited from considering matters which were not raised in the motion for summary judgment and we may neither affirm nor reverse based upon such matters.

{¶18} The dissent relies on *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, to create an argument as to a dispute of material fact where no argument exists between the parties. While *Murphy* imposes a duty on the trial court to thoroughly review all evidentiary materials submitted in support of, or in opposition to, a motion for summary judgment, that requirement must necessary be tempered by the prohibition against considering issues outside the scope of the motion, and certainly any issues beyond the scope of the complaint. Here, Alfonso has pleaded in her complaint that a hump in the carpet caused her fall. Though Marc's generally denies such an allegation in its answer, it does not dispute the allegation when moving for summary judgment on the complaint. Rather, Marc's accepts as true for the purpose of summary judgment only that, even if Alfonso tripped on a hump in the carpet when entering its store, she is barred from any recovery under the open and obvious doctrine.

{¶19} Despite the parties' apparent agreement that Alfonso fell on the hump in the carpet, the dissent asserts that the trial court erred by failing to scour the evidence before it to determine if, under its independent review, *any* argument can be made to support a finding that genuine issues of material fact remain – though both parties agree, for the purpose of summary

judgment, that the hump did in fact cause Alfonso's fall. Based on this Court's precedent, such review by the trial court would constitute reversible error.

{¶20} Having concluded that Marc's owed Alfonso no duty, summary judgment was properly awarded to Marc's. See *Clark* at ¶9. Accordingly, Alfonso's first and second assignments of error are not well taken.

III.

{¶21} In light of the above, Alfonso's assignments of error are overruled.

Judgment affirmed.

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 Appellant.

DONNA J. CARR
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

BELFANCE, J.
DISSENTS, SAYING:

{¶22} I respectfully dissent, as I do not believe that it was proper for the trial court to award summary judgment to Marc's. Alfonso, in her first assignment of error, broadly contends that the trial court erred, "as there are genuine issues of material fact regarding whether the open and obvious doctrine is applicable * * * ." In my view, Alfonso is correct in her assignment of error. A pivotal fact in this case is the cause of Alfonso's fall. Here, even a cursory review of the evidence properly before the trial court reveals a clear genuine issue of material fact concerning that very fact. But, because the parties have not specifically disputed the fact that Alfonso tripped over a hump in the carpet in their briefs, the majority has determined that any evidence within the record negating that fact was not properly before us. I believe, however, that the majority's analysis ignores a trial court's duty to review all the evidence properly before it as stated in *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358: "Civ.R. 56(C) places a clear duty on a trial court to examine all appropriate materials filed by the parties before it when ruling on a motion for summary judgment."

{¶23} In *Murphy*, the trial court stated at the summary judgment hearing that it had not reviewed the parties' motions or briefs. Id. at syllabus. After only hearing the parties' arguments, the trial court granted summary judgment to the defendants. Id. The plaintiff appealed arguing that "the trial court erred in not considering any of the depositions or other materials filed by the parties regarding the motion for summary judgment, and that the case should be remanded to the trial court to rule on the motion after reading the materials." Id. "[T]he appellate court * * * overruled the assignment of error, holding that any error was non-

prejudicial to [the plaintiff] because an appellate court reviewing a grant of summary judgment gives no deference to the trial court's decision." Id. The Supreme Court of Ohio reversed, holding that "Civ.R. 56(C) places a mandatory duty on a trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. The failure of a trial court to comply with this requirement constitutes reversible error." Id.

{¶24} While the facts of the instant case are not as egregious as those of *Murphy*, I believe the same reasoning applies here. *Murphy* stands for the proposition that when a trial court reviews a motion for summary judgment, it must examine not only the parties' arguments, but also the properly submitted evidence in support of, or in opposition to, the motion. Here, Marc's submitted portions of Alfonso's and the manager's depositions. Alfonso responded with a brief in opposition and filed her deposition, the depositions of the manager and Dreama Siers, and the affidavit of a customer witness in support. Thus, the trial court was required to examine all of the above evidence in making its determination.

{¶25} A review of the record before the trial court reveals a clear issue of material fact, and so it appears that the trial court only considered the parties' arguments and not all the evidence properly before it. Further, our review, is not one of deference to the trial court, it is *de novo*, which requires this Court to examine all the materials properly before the trial court and come to our own conclusion as to whether summary judgment was appropriate.

{¶26} In this case, Alfonso stated in her deposition that she tripped on a hump in the carpet. Likewise, in Marc's motion for summary judgment, Marc's seems content to go along with the proposition that Alfonso fell on a hump in the carpet, despite its denial of that same fact in its answer to Alfonso's complaint. Furthermore, it does not appear from the record that the parties have ever stipulated to the cause of Alfonso's fall.

{¶27} In order to grant summary judgment in this case, the trial court would be required to make determinations concerning witness credibility; determinations that are to be made at trial and not during summary judgment. Alfonso's deposition testimony, as well as a customer's affidavit indicates that Alfonso tripped on a hump in the carpet. However, the deposition testimony of Dreama Siers, the cashier supervisor of Marc's, is quite different. Siers saw Alfonso fall and stated that Alfonso "tripped over her feet." Ms. Siers' testimony is also unclear as whether or not any form of floor covering was in place on the day of the fall. Siers stated that "[m]ost generally the carpets weren't down there unless there was water, like outside raining or snowing or anything like that. That's the only time we put the carpets down. Any other time it was just like a rug, a runner. That's all it was." Later in the deposition, the following exchange takes place:

> "Q: Okay. Did you see a hump or buckle in the carpet prior to her fall?
>
> "A: There was no carpet there.
>
> "Q: There was no carpet present whatsoever?
>
> "A: No. None whatsoever.
>
> "Q: Okay. How are you so sure of that?
>
> "A: I remember there not being no [sic] carpets that day. We normally have carpets up there if it's bad out. That day we didn't need them. I didn't pull them out."

Notwithstanding the previous somewhat ambiguous reference to a "rug" or "runner," it appears that Siers is certain that there was no carpet present in the entrance way on the day Alfonso fell. Furthermore, there is also an indication in the record that Alfonso may have in fact slipped on water and not a hump in the carpet. The following is also from Siers' deposition:

> "Q: Then explain to me how under additional comments you wrote 'the customer complained she slipped in water.'

> "A: That's what my manager told me. That's what Dave T. told me. He said she had slipped in water on the floor, so I wrote that down."

{¶28} Without knowing what caused Alfonso to fall, it cannot be determined as a matter of law whether Marc's was negligent and without knowing the cause of the fall, it is unclear what law would apply. For example, if it is determined that Alfonso tripped over her own feet, the open and obvious doctrine would be inapplicable, where as if Alfonso slipped in water the doctrine may or may not apply to potentially bar her recovery. Although the majority suggests that Marc's implicitly admits that Alfonso tripped on a rug, the record does not reflect that admission. Marc's did not amend its answer wherein it specifically denies that Alfonso tripped on a rug, nor did it file a stipulation conceding that Alfonso tripped on a rug. Marc's "admitting" for purposes for summary judgment that Alfonso tripped over a carpet does not negate the existence of a material dispute of fact present in the record.

{¶29} The majority also points to our precedent in *Wilson v. Smith*, 9th Dist. No. 22193, 2005-Ohio-337, as limiting the trial court's responsibilities in reviewing a motion for summary judgment and hence our review on appeal. However, *Wilson* focuses on what the *movant* has argued and stands for the proposition that a court must limit itself to those issues raised by the movant in the motion for summary judgment. Id. at ¶15. Clearly, it is improper for a trial court to sua sponte consider grounds for summary judgment other than those alleged by the movant. However, that is not what is at issue in this case. In this case, the issue is whether the trial court may ignore those materials properly before it in evaluating whether the movant has met its burden of demonstrating the absence of a dispute of material fact. *Wilson* does not hold that the trial court may ignore properly submitted materials in support of, or in opposition to, a motion for summary judgment—the very point that is underscored in *Murphy*.

{¶30} In this case, the record properly before the trial court on summary judgment reveals an obvious and material dispute of fact that must be resolved by the trier of fact which in turn impacts the law that will apply. What caused Alfonso to fall is necessarily determined by examining the credibility of the witnesses and ultimately deciding who to believe. The purpose of summary judgment is not to resolve credibility issues. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341. "Credibility issues typically arise in summary judgment proceedings when one litigant's statement conflicts with another litigant's statement over a fact to be proved. Since resolution of the factual dispute will depend, at least in part, upon the credibility of the parties or their witnesses, summary judgment in such a case is inappropriate." Id. "Unless it is factually determined that [Alfonso] tripped over the [hump in the carpet], it is not necessary to consider whether the [hump] represented an open and obvious hazard." *Cabakoff v. Turning Heads Hair Design*, 10th Dist. No. 08AP-644, 2009-Ohio-815, at ¶17 (Sadler, J., concurring). Consequently, I would reverse.

APPEARANCES:

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