[Cite as *Stiles v. Marc Glassman, Inc.*, 2015-Ohio-1438.]

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

MILDRED STILES	C.A. No. 27512
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARC GLASSMAN, INC.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2013 12 5710

DECISION AND JOURNAL ENTRY

Dated: April 15, 2015

WHITMORE, Judge.

{¶1} Appellant, Mildred Stiles, appeals from the Summit County Court of Common Pleas' grant of summary judgment in favor of Appellee, Marc Glassman, Inc. ("Marc's"), in Ms. Stiles' negligence action. We affirm.

I

{¶2} This appeal arises out of Ms. Stiles' slip and fall that occurred at the Marc's Sagamore Hills store on August 17, 2012. Ms. Stiles shopped at this store weekly prior to the fall, and typically was familiar with the store layout. On the day of the fall, however, Ms. Stiles was unfamiliar with the store layout because of ongoing remodeling.

{¶3} Ms. Stiles slipped after picking up a watermelon and trying to put the watermelon in her cart. The watermelon had been in a cardboard box on top of a wooden skid. Ms. Stiles picked up the watermelon, and fell when she turned to place it in her cart.

{¶4} Ms. Stiles typically uses a cane to walk. She was not using the cane when she fell, but instead had placed it in her cart to free her hands in order to pick up the watermelon.

{¶5} Ms. Stiles claims that she fell on water on the floor near the wooden skid. She did not see the liquid before falling. She believes that water in fact caused her to slip because one side of her pants was wet after falling.

{¶6} Ms. Stiles admits that there was nothing obstructing her view of the floor where she fell. She testified in her deposition that she "probably" would have seen the liquid if she had been watching where she was walking. If Ms. Stiles had known the water was there, she would have avoided stepping in it.

{¶7} Ms. Stiles does not know if anyone at Marc's knew the liquid was on the floor before she fell. She also does not know how long the water was there before she fell. She does not know what caused the liquid to be on the floor.

{¶8} After Ms. Stiles' fall, another patron at Marc's went out to the car where Ms. Stiles' mother, Mildred Smith, was waiting for her daughter. The patron informed Ms. Smith that her daughter had fallen. Ms. Smith entered the store approximately 15 minutes after Ms. Stiles fell. She went to the area where Ms. Stiles was still on the ground. Ms. Smith saw water on the floor around the carton of watermelons.

{¶9} Ms. Stiles filed a personal injury action for negligence against Marc's on December 9, 2013. She alleged an injury to her left knee as a result of her left knee striking the edge of the wooden skid underneath the watermelon display. Ms. Stiles testified that she claimed medical expenses in the amount of $38,162.62. She testified that she had injections to her knee and physical therapy, and that her doctor said that she was going to need a knee

replacement. Ms. Stiles further testified in deposition that she had left knee pain and restrictions in her left knee.

{¶10} The trial court's scheduling order included dates to complete discovery, submit expert reports, and to file and respond to dispositive motions. Ms. Stiles never produced an expert report from her treating physician or anyone else.

{¶11} The trial court granted summary judgment in favor of Marc's on August 21, 2014. Ms. Stiles now appeals. She raises two assignments of error for our review.

II

Assignment of Error Number One

> THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON AN ISSUE DEFENDANT DID NOT DELINEATE IN ITS MOTION AND THAT PLAINTIFF WAS NOT AFFORDED AN OPPORTUNITY TO RESPOND.

{¶12} In her first assignment of error, Ms. Stiles argues that the trial court committed reversible error by awarding summary judgment on grounds not specified in Marc's motion for summary judgment. We disagree.

{¶13} This Court reviews an award of summary judgment *de novo*. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). To prevail on motion for summary judgment, the moving party must show that there is no genuine issue of material fact, that the moving party is entitled to judgment as a matter of law, and, when evidence is viewed in a light most favorable to the nonmoving party, reasonable minds can come to only one conclusion, and that conclusion is in favor of the moving party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).

{¶14} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of

a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Once this burden is satisfied, the burden shifts to the nonmoving party to offer specific facts to show a genuine issue for trial. *Id.* at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Brannon v. Executive Properties, Inc.*, 9th Dist. Summit No. 26298, 2012-Ohio-5483, ¶ 6; Civ.R. 56(E).

{¶15} Marc's asserted two grounds for summary judgment in the trial court. First, Marc's argued that it was not liable based on the "open and obvious" doctrine. Second, Marc's argued that Ms. Stiles failed to produce a medical expert report to establish causation.

{¶16} Ms. Stiles' sole contention in her first assignment of error is that the trial court did not address Marc's "open and obvious" defense, but instead erroneously "granted summary judgment on the wholly new basis that 'Plaintiff is merely speculating as to the cause of her fall.'" According to Ms. Stiles, she was deprived of the opportunity to address this "wholly new basis" for summary judgment because she instead responded to Marc's argument that the water that supposedly caused her fall constituted an open and obvious hazard.

{¶17} Ms. Stiles' reading of the trial court's order granting summary judgment is patently in error. The trial court did in fact grant summary judgment on the basis of the open and obvious doctrine, as well as two alternate grounds. A plain reading of the trial court's opinion reveals that the trial court granted summary judgment because: (1) "the liquid was not such an unreasonably hazardous condition that it would impose a duty of care upon Marc's as the premises owner"; (2) Plaintiff is merely speculating as to the cause of her fall, and Ohio law is well established that if a plaintiff cannot identify or explain the reason for her fall, a finding of

negligence is precluded; and (3) Plaintiff failed to produce and file an expert report as required by the court's scheduling order.

{¶18} Ms. Stiles apparently fails to understand that the trial court's first ground for awarding summary judgment, that "the liquid was not such an unreasonably hazardous condition that it would impose a duty of care upon Marc's as the premises owner" is merely a restatement of the "open and obvious" doctrine. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 5. The Supreme Court of Ohio has discussed the open and obvious doctrine as follows:

> The sole issue before this court concerns the viability of the open-and-obvious doctrine, which states that a premises-owner owes no duty to persons entering those premises regarding dangers that are open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 42 O.O.2d 96, 233 N.E.2d 589, paragraph one of the syllabus. 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." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644, 597 N.E.2d 504. 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. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 18 OBR 267, 480 N.E.2d 474; *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 12 O.O.3d 321, 390 N.E.2d 810. When applicable, however, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims.

As the *Armstrong* court noted, "The fact that a plaintiff was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff." *Id.* at ¶ 13.

{¶19} Thus, the open and obvious doctrine relates to the duty prong of a negligence claim. *Id.* Under the doctrine, a store owner does not have a duty to warn a business invitee of a particular hazard, because the hazard is obvious (rather than hidden or latent), and should be

apparent to the invitee without notification by the store owner. This is precisely the first ground on which the trial court granted summary judgment.

{¶20} Ms. Stiles admits that she responded to Marc's "open and obvious" defense in the trial court. Thus, she was not prejudiced because she was given a full opportunity to address this basis on which the trial court granted summary judgment. Even assuming that the trial court erred in also granting summary judgment on a ground that Marc's did not raise, the court's error is harmless.[1] Ms. Stiles could and did respond to one of the bases that Marc's argued in its summary judgment motion, and on which the trial court granted judgment as a matter of law. *See generally State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 92 (1994) (a reviewing court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof).

{¶21} On appeal, Ms. Stiles does not separately challenge the trial court's conclusion that the water that purportedly caused her fall was an open and obvious hazard. Accordingly, we will not reach the merits of this claim.

{¶22} Ms. Stiles' first assignment of error is overruled.

III

Assignment of Error Number Two

THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON THE BASIS THAT PLAINTIFF DID NOT FILE AN EXPERT REPORT.

{¶23} In her second assignment of error, Ms. Stiles argues that the trial court committed reversible error by granting summary judgment on the premise that, because Ms. Stiles did not

[1] The Supreme Court of Ohio has held that, "A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988), syllabus.

produce an expert report, she could not establish that her injuries were a direct and proximate result of Marc's negligence.

{¶24} We have declined to address the merits of the trial court's finding that the open and obvious nature of the hazard at issue bars a negligence claim, because Ms. Stiles did not challenge this finding. Accordingly, the trial court's ruling on this issue stands.

{¶25} Because Ms. Stiles' negligence claim is barred under the open and obvious doctrine, we need not reach the question of whether an expert report is required to prove the causation element of that claim.[2] Ms. Stiles' second assignment of error is overruled.

IV

{¶26} Ms. Stiles' two assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

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[2] Even if we were to reach the merits of Ms. Stiles' second assignment of error, there is no evidence of causation on the record before us. Ms. Stiles claims that, in her discovery responses, she identified her treating physician, Dr. Krahe, as a person who would provide causation testimony. Ms. Stiles further claims that she submitted all of Dr. Krahe's medical records to Marc's. However, Ms. Stiles has not provided an affidavit to this effect, and none of the discovery papers or medical records mentioned have been placed on the appellate record. Further, it does not appear that "Dr. Krahe's 8/31/2012 medical note indicating causal [sic]" attached as Appendix Exhibit 1 to Ms. Stiles' appellate brief, was submitted to the trial court. Thus, it is not properly a part of the record on appeal. *See State v. Heard*, 9th Dist. Summit No. 26965, 2014-Ohio-371, ¶ 6 (noting that this Court cannot consider exhibits attached to appellate briefs that were not presented to the trial court).

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(C). 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.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
SCHAFER, J.
CONCUR.

APPEARANCES:

JESSICA M. BACON, and DALE S. ECONOMUS, Attorneys at Law, for Appellant.

JAMES HENSHAW, Attorney at Law, for Appellee.