[Cite as *Fletcher v. Wal-Mart Stores, Inc.*, 2017-Ohio-1215.]

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

BONNIE FLETCHER	C.A. No. 16CA010938
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
WAL-MART STORES, INC.	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 14CV184773

DECISION AND JOURNAL ENTRY

Dated: March 31, 2017

SCHAFER, Judge.

{¶1} Plaintiff-Appellant, Bonnie Fletcher, appeals the judgment of the Lorain County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee, Wal-Mart Stores East, LP ("Wal-Mart"). For the reasons set forth below, we affirm.

I.

{¶2} The facts of this case are not in dispute. On July 12, 2013, Ms. Fletcher sustained injuries after falling in the parking lot of a Wal-Mart store located in Elyria, Ohio. At the time of her fall, Ms. Fletcher was traversing through the parking lot, walking from her car and towards the store entrance. Ms. Fletcher was not looking down at the ground while walking, but instead was watching for traffic and other customers. As she proceeded through the parking lot, Fletcher stubbed her toe and tripped on a patch of cracked and crumbling concrete and fell to the ground. Ultimately, Ms. Fletcher was taken by ambulance to the hospital where she was treated for her injuries.

{¶3} On October 20, 2014, Ms. Fletcher filed a complaint in the Lorain County Court of Common Pleas asserting a negligence claim against Wal-Mart. Wal-Mart denied the allegations set forth in Fletcher's complaint and subsequently filed a third-party complaint against third-party defendant Moyer Industries, Inc. ("Moyer") seeking indemnification and/or contribution if Wal-Mart was ultimately found to be liable for Fletcher's injuries. Moyer denied the allegations asserted in Wal-Mart's third-party complaint. The matter then proceeded through the discovery process.

{¶4} On January 4, 2016, Wal-Mart filed a motion for summary judgment on Ms. Fletcher's negligence claim on the basis that the concrete area where Ms. Fletcher fell was open and obvious and not an unreasonably dangerous condition. Moyer also filed a motion for summary judgment arguing that since Wal-Mart is entitled to judgment as a matter of law, Wal-Mart's third-party complaint must be dismissed. On February 12, 2016, Fletcher filed briefs in opposition to Wal-Mart and Moyer's respective motions for summary judgment. Wal-Mart also filed an opposition brief in response to Moyer's summary judgment motion. On March 16, 2016, the trial court granted summary judgment in favor of Wal-Mart and Moyer. In so doing, the trial court concluded that the portion of the concrete parking lot where Ms. Fletcher tripped and fell was an open and obvious danger, thus obviating Wal-Mart's duty to warn Ms. Fletcher, an invitee, of hazardous conditions on its premises and barring her negligence claim.

{¶5} Ms. Fletcher filed this timely appeal and raises one assignment of error for this Court's review.

II.

Assignment of Error

The trial court erred in granting Appellees' motions for summary judgment as there are genuine issues of material fact.

{¶6} In her sole assignment of error, Ms. Fletcher argues that the trial court erred by granting summary judgment in favor of Appellees. We disagree.

A. Standard of Review

{¶7} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

{¶8} Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

B. The Open and Obvious Doctrine

{¶9} To obtain relief in a negligence action, the plaintiff "must establish the existence of a duty, a breach of that duty, and an injury proximately resulting from the breach of duty."

Mondi v. Stan Hywet Hall & Gardens, Inc., 9th Dist. Summit No. 25059, 2010–Ohio–2740, ¶ 11. In premises liability cases, "[i]t is the duty of the owner of the premises to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition." *Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68 (1986). However, "[a] shopkeeper is not * * * an insurer of the customer's safety," *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 203 (1985), and when "a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises," *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003–Ohio–2573, syllabus; *see also Andamasaris v. Annunciation Greek Orthodox Church*, 9th Dist. Summit No. 22191, 2005–Ohio–475, ¶ 14 ("An owner is under no duty to protect its customers from dangers * * * otherwise so obvious and apparent that a customer should reasonably be expected to discover them and protect herself from them."). As a result, the presence of an open and obvious danger "acts as a complete bar to any negligence claims." *Armstrong* at ¶ 5. The reasoning for such a complete bar "is that the open and obvious nature of the hazard itself serves as a warning [and the owner] may reasonably expect that persons entering the premises will discover [the hazard] and take appropriate measures to protect themselves." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644 (1992).

{¶10} "Open and obvious dangers are not hidden, are not concealed from view, and are discoverable upon ordinary inspection." *Zambo v. Tom–Car Foods*, 9th Dist. Lorain No. 09CA009619, 2010–Ohio–474, ¶ 8. To decide whether a hazard is open and obvious, we must resolve "'the determinative issue [of] whether the [hazardous] condition is observable.'" *Baker v. Bob Evans Farms, Inc.*, 9th Dist. Wayne No. 13CA0023, 2014–Ohio–2850, ¶ 11, quoting *Kirksey v. Summit Cty. Parking Deck*, 9th Dist. Summit No. 22755, 2005–Ohio–6742, ¶ 11. Our inquiry on this point is an objective one and the fact that a plaintiff was unaware of the hazard is

not dispositive. *Goode v. Mt. Gillion Baptist Church*, 8th Dist. Cuyahoga No. 87876, 2006–Ohio–6936, ¶ 25. Additionally, to resolve this issue, we "must look to the totality of the circumstances, considering 'both the nature of the dangerous condition and any attendant circumstances that may have existed at the time of the injury.'" *Baker* at ¶ 11, quoting *Gehm v. Tri–Cty., Inc.*, 9th Dist. Lorain No. 09CA009693, 2010–Ohio–1080, ¶ 8; *see also Gardner v. Kinstlinger*, 9th Dist. Summit No. 26374, 2012–Ohio–5486, ¶ 11 (noting that "[t]he existence of attendant circumstances does not create an exception to the open and obvious doctrine" but are rather "considered as part of the totality of the circumstances in determining whether a genuine issue of material fact exists regarding whether a reasonable person would have discovered the hazard."). Although the courts have not developed a "precise definition of attendant circumstances," *Jenks v. Barberton*, 9th Dist. Summit No. 22300, 2005–Ohio–995, ¶ 16, the phrase encompasses "'all facts relating to a situation such as time, place, surroundings, and other conditions that would unreasonably increase the typical risk of a harmful result of an event.'" *Marock v. Barberton Liedertafel*, 9th Dist. Summit No. 23111, 2006–Ohio–5423, ¶ 13, quoting *Hudspath v. The Cafaro Co.*, 11th Dist. Ashtabula No. 2004–A–0073, 2005–Ohio–6911, ¶ 19. With these principles in mind, we turn to the nature of the hazard presented by the concrete parking lot in this matter.

C. Analysis & Conclusion

{¶11} In support of its motion for summary judgment, Wal-Mart relied upon the deposition of Ms. Fletcher in arguing that the patch of concrete at issue in this matter constituted an open and obvious condition. Specifically, Wal-Mart points to Ms. Fletcher's deposition testimony wherein she admits that the patch of concrete was out in the open. Although Ms. Fletcher testified that she did not see the patch of concrete prior to tripping over it, she did admit

that it was observable and she would have seen it had she looked down while walking. Ms. Fletcher also testified that she noticed the patch of concrete clearly upon returning to the Wal-Mart store and inspecting the parking lot after sustaining her injuries.

{¶12} Additionally, Wal-Mart's motion for summary judgment asserted that no attendant circumstances were present at the time that Ms. Fletcher fell and sustained her injuries. In arguing this point, Wal-Mart again points to portions of Ms. Fletcher's deposition testimony wherein Ms. Fletcher states that the 35 inch by 21 inch patch of concrete at issue in this matter was not blocked or hidden from view. Ms. Fletcher also admitted that the patch of concrete was painted yellow and blue, which obviously stood out from the surrounding concrete area. Lastly, Ms. Fletcher testified that the weather was clear on the day in question and that there were no other people or moving vehicles around her at the time of her fall. Based on the foregoing evidence, we determine that Wal-Mart satisfied its initial *Dresher* burden in proving that no genuine issue of material fact remained to be litigated regarding whether the patch of concrete constituted an open and obvious condition.

{¶13} With Wal-Mart having met its initial burden, the burden then shifted to Ms. Fletcher as the non-moving party to provide specific facts which would demonstrate the existence of a "genuine triable issue" to be litigated at trial. *Tompkins*, 75 Ohio St.3d at 449. We note, however, that Ms. Fletcher's brief in opposition to Wal-Mart's motion for summary judgment does not contain any citations to the record. Rather, Ms. Fletcher's opposition brief argues that the patch of concrete in this matter was not an open and obvious danger as a matter law. In making this argument, Ms. Fletcher cites to numerous cases which have held that a condition is not open and obvious merely because it may have been visible. *See, e.g., Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680-681 (1998) ("This court

has held that '[a] pedestrian using a public sidewalk is under a duty to use care reasonably proportioned to the danger likely to be encountered but is not, as a matter of law, required to look constantly downward * * *."), quoting *Grossnickle v. Germantown*, 3 Ohio St.2d 96 (1965).

{¶14} After considering the totality of the circumstances involved in this case, we determine that the trial court did not err by concluding that the portion of the concrete parking lot where Ms. Fletcher tripped and fell was an open and obvious condition. The evidentiary materials cited within Wal-Mart's motion for summary judgment demonstrated that the concrete area in question was not hidden or concealed from view and was discoverable upon ordinary inspection. Although Ms. Fletcher is correct that, as a pedestrian, she was not required to constantly be looking downward in an effort to avoid potential danger, we agree with the trial court that a reasonable person would have been able to discover the hazard posed by the broken slab of concrete. This is especially true considering the fact that the slab of concrete was painted yellow and blue, which clearly distinguished it from the surrounding area. It is also undisputed that the weather conditions on the day in question were not abnormal and that no other customer or motorist either blocked Ms. Fletcher's view of the concrete slab or otherwise distracted Ms. Fletcher immediately preceding her fall. As Ms. Fletcher's opposition brief to Wal-Mart's motion for summary judgment does not point to contrary evidence within the record to rebut these facts, we determine that Ms. Fletcher has failed to satisfy her reciprocal burden on summary judgment. Accordingly, because the concrete slab at issue in this matter constituted an open and obvious condition, Wal-Mart owed no duty to warn Ms. Fletcher of its presence. As such, Ms. Fletcher's negligence claim fails as a matter of law and the trial court did not err by granting summary judgment in favor of Wal-Mart.

{¶15} Ms. Fletcher's assignment of error is overruled.

III.

{¶16} Having overruled Fletcher's sole assignment of error, we affirm the judgment of the Lorain County Court of Common Pleas.

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 Lorain, 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.

JULIE A. SCHAFER
FOR THE COURT

CARR, P.J.
HENSAL, J.
CONCURS.

APPEARANCES:

MARK I. VERKHLIN and JEFFREY H. FRIEDMAN, Attorneys at Law, for Appellant.

JESSICA L. SANDERSON and PEGGY FOLEY JONES, Attorneys at Law, for Appellee.

ERIC J. WILLIAMS, Attorney at Law, for Appellee.