[Cite as *Townsend v. Dollar Gen. Corp.*, 2010-Ohio-6523.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Tamecka Townsend	Court of Appeals No. E-09-067
Appellee	Trial Court No. 2007 CV 0752
v.	
Dollar General Corporation	**DECISION AND JUDGMENT**
Appellant	Decided: December 30, 2010

* * * * *

John K. Rinehardt, for appellee.

Brian D. Sullivan and Justin D. Harris, for appellant.

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HANDWORK, J.

{¶ 1} Defendant-appellant, Dollar General Corp., appeals a judgment entered by the Erie County Court of Common Pleas in favor of plaintiff-appellee, Tamecka Townsend. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} On August 23, 2007, Townsend filed a complaint against Dollar General for injuries she allegedly sustained as the result of a fall that occurred on Dollar General's premises on August 26, 2005. Dollar General filed an answer denying the substantive allegations contained in the complaint and raising various affirmative defenses.

{¶ 3} The matter proceeded to trial, beginning on June 22, 2009, and ending on June 24, 2009.

{¶ 4} At trial, evidence of the following facts was adduced. At approximately 6:00 on the evening of August 26, 2005, Townsend arrived at the Dollar General store to purchase school supplies and other items. Upon entering the store, she noticed clutter throughout the establishment, including debris and merchandise on the aisle floors.

{¶ 5} As she made her way through the store to collect the school supplies, Townsend stepped on what she thought was a flat piece of paper. In fact, the paper was covering a small porcelain doll leg. Townsend testified that she purposely stepped on the paper in an effort to avoid stepping on other clutter that was littering the aisle. When Townsend stepped on the paper, she also stepped on the doll leg that was underneath the paper, causing her to slip and fall to the floor.

{¶ 6} After counsel for Townsend concluded his case-in-chief, Dollar General moved for a directed verdict. This motion was denied.

{¶ 7} The jury returned a verdict finding in favor of Townsend and provided answers to the five jury interrogatories. Those interrogatories, and the jury's answers, are as follows:

{¶ 8} 1. "Do you find that the hazard that caused Tamecka Townsend to fall was open and obvious, and that no attendant circumstances existed?" The jury answered, "No."

{¶ 9} 2. "Do you find that the Defendant Dollar General failed to maintain its store premises in reasonably safe condition?" The jury answered, "Yes."

{¶ 10} 3. "Do you find that the Plaintiff failed to exercise reasonable care for her own safety?" The jury answered, "Yes."

{¶ 11} 4. "Assign a percentage of negligence to each party." The jury assigned 40% of the negligence to Townsend, and 60% to Dollar General.

{¶ 12} 5. "Indicate below the amounts of damages, if any, were [sic] proximately caused by the fall." The jury assigned a total verdict for Townsend in the amount of $819,000. Of that amount, $350,895.92 was awarded for future medical expenses.

{¶ 13} On July 2, 2009, the trial court confirmed the jury verdict and entered judgment in favor of Townsend, reducing the total damages by 40 percent as indicated by the jury's findings on the issue of comparative negligence and awarding to Townsend a total of $491,400.

{¶ 14} On July 15, 2009, Dollar General filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Said motion was denied.

{¶ 15} Dollar General timely appealed the judgment in this case, raising the following assignments of error:

{¶ 16} 1. "WHETHER THE TRIAL COURT ERRED IN DENYING DOLLAR GENERAL'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT WHEN THE CONDITION OF THE STORE WAS OPEN AND OBVIOUS."

{¶ 17} 2. "WHETHER THE TRIAL COURT ERRED IN PERMITTING THE JURY TO AWARD FUTURE MEDICAL EXPENSES ABSENT EXPERT TESTIMONY THAT PLAINTIFF WOULD CONTINUE TO INCUR FUTURE MEDICAL BILLS."

{¶ 18} 3. "WHETHER THE TRIAL COURT INCORRECTLY PRECLUDED DOLLAR GENERAL FROM INTRODUCING INTO EVIDENCE MS. TOWNSEND'S MY SPACE PAGES."

{¶ 19} 4. "WHETHER THE TRIAL COURT IMPROPERLY PERMITTED PLAINTIFF TO INTRODUCE INTO EVIDENCE DOLLAR GENERAL'S DISCOVERY RESPONSES."

{¶ 20} Dollar General argues in its first assignment of error that the trial court erred in denying its motion for directed verdict and judgment notwithstanding the verdict, because the condition of the store was "open and obvious."

{¶ 21} In the instant case, there is no dispute that, at the time of the accident, Townsend was a business invitee on Dollar General's premises. A landowner's duty of care to a business invitee is to exercise ordinary care to keep the premises in a reasonably safe condition so as to not expose the individual to any unnecessary or unreasonable risks of harm. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, citing *Campbell v. Hughes Provision Co.* (1950), 153 Ohio St. 9. A landowner does not, however, have a duty to warn an invitee of any dangers on the property which are open and obvious. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 5. As a result, the

open and obvious doctrine "acts as a complete bar to any negligence claims." Id. The rationale underlying the 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.* (Sep. 9, 1992), 64 Ohio St.3d 642, 644.

{¶ 22} "A hazard is open and obvious when in plain view and readily discoverable upon ordinary inspection." *Stewart v. AMF Bowling Center, Inc.*, 3d Dist. No. 5-10-16, 2010-Ohio-5671, ¶ 15. "'[E]ven an obstruction that sits low to the ground in an area frequented by customers may be open and obvious as a matter of law, so long as it is not concealed.'" *Mohn v. Wal-Mart Stores, Inc.*, 3d Dist No. 6-08-12, 2008-Ohio-6184, ¶ 14, quoting *Johnson v. Golden Corral*, 4th Dist No. 99CA2643.

{¶ 23} On the other hand, attendant circumstances may exist that distract an individual from exercising the degree of care an ordinary person would have exercised to avoid the danger and, thus, "may create a genuine issue of material fact as to whether a hazard is open and obvious." *Aycock v. Sandy Valley Church of God*, 5th Dist. No. AP 09 0054, 2008-Ohio-105, ¶ 26.

{¶ 24} What constitutes an attendant circumstance has been explained as follows:

{¶ 25} "[It is a] factor that contributes to the fall and is beyond the control of the injured party. * * * The phrase refers to all facts relating to the event, such as time, place, surroundings or background and the conditions normally existing that would

unreasonably increase the normal risk of a harmful result of the event. * * * However, '[b]oth circumstances contributing to and those reducing the risk of the defect must be considered.'" *Williams v. Lowe's of Bellefontaine*, 3d Dist. No. 8-06-25, 2007-Ohio-2045, ¶ 18, quoting *Benton v. Cracker Barrel Old Country Store, Inc.*, 10th Dist. No. 02AP1211, 2003-Ohio-2890, ¶ 17, quoting *Sack v. Skyline Chili, Inc.*, 12th Dist. No. CA2002-09-101, 2003-Ohio-2226, ¶ 20.

{¶ 26} Although the existence of a duty is a question of law for a court to decide, whether a particular hazard is open and obvious requires an extremely fact-specific inquiry and may, as in the instant case, involve a genuine issue of material fact for the trier of fact to resolve. *Henry v. Dollar Gen. Store*, 2d Dist. No. 2002-CA-47, 2003-Ohio-206, ¶ 10 and 16.

{¶ 27} In conducting our analysis, we begin by examining jury interrogatory number one, which asks, "Do you find that the hazard that caused Tamecka Townsend to fall was open and obvious, and that no attendant circumstances existed?" In answering, "No," to this clearly ambiguous interrogatory, we find that the jury was unable to communicate the precise nature of its findings. For example, the jury may have determined, completely consistent with its verdict in favor of Townsend, that the hazard was not open and obvious. On the other hand, the jury may, equally consistently, have found that the hazard was open and obvious, but that there existed attendant circumstances.

{¶ 28} Either way, we find that the jury's answer was sufficient to support judgment in favor of Townsend. See *Phillips v. Dayton Power and Light Co.* (1996), 111 Ohio App.3d 433, 441 (holding that it is proper to phrase an interrogatory disjunctively where there is no risk of a nonresponsive answer, such as where a "yes" answer to either question alone is enough to support a verdict based upon it).

{¶ 29} "The existence and the obviousness of a danger which allegedly exists on a premises is determined by a fact-specific inquiry and must be analyzed on a case-by-case basis." *Leonard v. Modene and Associates, Inc.*, WD-05-085, 2006-Ohio-5471, citing *Henry v. Dollar General Store*, 2d Dist. No. 2002-CA-47, 2003-Ohio-206 at ¶ 16; *Miller v. Beer Barrel Saloon* (May 24, 1991), 6th Dist. No. 90-OT-050.

{¶ 30} The evidence at trial, including both testimony and photographs, demonstrates that debris, made up of various merchandise and some small toys and small objects, was clearly visible on the floor of the aisleway where appellee walked, slipped, and fell. Even were the jury to determine that appellee's fall was caused by an unseen, three inch porcelain doll leg under paper debris on which she stepped and fell, a jury question was presented on whether the observable debris in the aisleway was such that a business invitee would be expected to appreciate the risk of falling by stepping on debris, discover the piece of debris that caused the fall, and protect themselves against it. A finding that no open and obvious danger was presented under the circumstances is supported by competent credible evidence.

{¶ 31} A finding that there existed attendant circumstances is likewise supported by the evidence. That is, even if the jury found the condition that caused Townsend's fall to have been open and obvious, there was also sufficient evidence to suggest the existence of attendant circumstances, in the form of clutter and debris throughout the store that would have distracted a customer from exercising the degree of care an ordinary person would have exercised to avoid falling and would have unreasonably increased the risk of a customer falling. See *Aycock*, supra; *Williams*, supra.

{¶ 32} There being substantial, competent evidence to support Townsend's claims in this case, we find that the trial court did not err in denying Dollar General's motion for directed verdict and judgment notwithstanding the verdict. See *Kassmakis v. Dasani*, 6th Dist. No. L-04-1041, 2004-Ohio-6463, ¶ 9 (holding that where there is substantial, competent evidence to support the non-moving party, upon which evidence reasonable minds could reach different conclusions, the directed verdict must be denied); *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275 (holding that where there is substantial, competent evidence upon which reasonable minds could come to different conclusions regarding the essential elements of the claim, an appellate court must affirm the trial court's decision to deny a motion for judgment notwithstanding the verdict). Accordingly, Dollar General's first assignment of error is found not well-taken.

{¶ 33} Appellant argues in its second assignment of error that the trial court erred in permitting the jury to award future medical expenses absent expert testimony that plaintiff would continue to incur future medical bills. Specifically, Dollar General

alleges that Townsend failed to present sufficient expert testimony demonstrating to a reasonable degree of medical probability: (1) that she would require future medical treatment; and (2) that the amount requested for any future medical treatment was reasonable.

{¶ 34} Here, the question is whether the record contains probative evidence that, if believed, would support an award of future medical expenses in the amount of $350,895.92. See *Power v. Kirkpatrick* (July 20, 2000), 10th Dist. No. 99AP-1026.

{¶ 35} A jury is not permitted to speculate as to damages for future medical expenses. Id. As stated in *Powell v. Montgomery* (1971), 27 Ohio App.2d 112:

{¶ 36} "The mere fact alone that there may be some permanency to the injury is not enough. This court is committed to the proposition that the jury cannot be allowed to speculate or guess in making allowance for future medical expenses; there must be some data furnished the jury upon which it might reasonably estimate the amount to be allowed for this item." Id. at 120.

{¶ 37} Thus, in awarding prospective damages, juries are limited to those damages reasonably certain to follow from the claimed injury. *Jordan v. Elex, Inc.* (1992), 82 Ohio App.3d 222, 230; *Roberts v. Mut. Mfg. & Supply Co.* (1984), 16 Ohio App.3d 324, 325.

{¶ 38} In the instant case, Townsend's treating physician, Dr. William Bauer, testified to a reasonable degree of medical certainty that the symptoms and complaints that Townsend reported to him since the date of the August 26, 2005 fall are permanent

in nature. He further testified to a reasonable degree of medical certainty that, if surgery were not performed, Townsend's future medical expenses would properly be predicated on the visits that she had had over the past year, which visits included treatment every four to eight weeks for trigger point injections, as well as pain medication.

{¶ 39} Dr. Bauer also opined "to a reasonable degree of medical certainty" that the total medical bills were both reasonable and necessary, and directly and proximately caused by the subject fall.

{¶ 40} On redirect examination, counsel for Townsend handed Dr. Bauer copies of all of the medical bills, including the bills from Dr. Bauer's own office. Dr. Bauer testified that the bills reflected both the billed amount (amounting to approximately $58,000) and the amount actually paid (amounting to approximately $24,500; or, as otherwise stated, $6,000 to $7,000 per year). Dr. Bauer opined that the real value of the medical care and treatment is the amount that is billed, as opposed to the amount that is actually reimbursed. At the close of Townsend's case, counsel for Townsend offered into evidence both the actual medical bills and a summary of the medical bills reflecting the total amount accepted as payment in full. Both items were admitted without objection.

{¶ 41} The trial court repeatedly instructed the jury (both during Dr. Bauer's testimony and at the end of trial) that it was for them to determine the reasonable value of future medical treatment and for them to determine whether to apply the amount billed or the amount paid or some amount in between.

{¶ 42} Based on the foregoing, we find that there was sufficient competent evidence and data furnished to the jury upon which it would reasonably estimate the amount of future medical expenses to be $350,895.92. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 43} Appellant argues in its third assignment of error that the trial court improperly prevented Dollar General from introducing into evidence Townsend's My Space photos depicting her at various locations and attending various events. According to Dollar General, these photographs should have been admitted, inasmuch as they are relevant to the issue of the extent of Townsend's alleged disability.

{¶ 44} Specifically, counsel for Dollar General elicited testimony from Townsend establishing that the subject web page included photographs of Townsend at a variety of social events, such as her brother's wedding in 2007 and at various of her son's wrestling meets and, also, at locations such as the zoo.

{¶ 45} In considering this assignment of error, we are cognizant of the fact that defense counsel made almost no attempt to distinguish which pictures were taken before 2005 (when the accident occurred) and which were taken since. In addition, we find it significant that at no time during Townsend's testimony did Townsend testify that she was ever completely unable to attend social events. Instead, she testified that her injury had limited the number of events that she could attend and the experiences that she could have had.

{¶ 46} The decision to admit or exclude evidence lies within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. Thus, an appellate court reviews the trial court's decision regarding evidentiary matters under an abuse of discretion standard of review. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219.

{¶ 47} We find, under the circumstances of this case, where the value of the subject photographs was at best questionable, that the trial court did not abuse its discretion or commit prejudicial error in excluding the photographs as evidence. Appellant's third assignment of error is, therefore, found not well-taken.

{¶ 48} Finally, appellant, in its fourth assignment of error, argues that the trial court committed error in permitting Townsend to introduce into evidence Dollar General's answers to interrogatories, first because no proper foundation was laid, and second because nothing was offered to authenticate the subject discovery responses.

{¶ 49} In the disputed answers to interrogatories, Dollar General relevantly, and erroneously, stated that thirty minutes prior to Townsend's accident, Colleen Ditchman, a stocker at Dollar General, had been in the aisle where Townsend fell and that the aisle "had been noticed" to be clean and free from debris. At trial, however, the undisputed evidence established that, by the time the accident occurred on the date in question, Ditchman had clocked-out from her job and was no longer working in the store.

{¶ 50} Civ.R. 33(B) explicitly provides that a party's answers to interrogatories may be used at trial, to the extent permitted by the rules of evidence. It is undisputed in this case that the trial court had previously indicated that it was convinced of the authenticity of the subject discovery responses. Accordingly, we find that the trial court did not err in admitting the discovery responses as evidence.

{¶ 51} Moreover, as acknowledged by counsel for appellant, the facts that Townsend sought to establish by way of admission of the discovery responses had already been established through witness testimony at trial. We, therefore, find that, even if admission of the evidence was error, such error was harmless.

{¶ 52} Because the admission into evidence of Dollar General's discovery responses neither amounted to an abuse of discretion, nor resulted in prejudicial error to appellant, appellant's fourth assignment of error is found not well-taken.

{¶ 53} For the foregoing reasons, the judgment from which this appeal is taken is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Townsend v. Dollar Gen. Corp.
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Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Keila D. Cosme, J.
CONCUR.

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JUDGE