[Cite as *Ray v. Wal-Mart Stores, Inc.*, 2009-Ohio-4542.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

MARIANNE RAY, et al.,	:	
Plaintiffs-Appellants,	:	Case No. 08CA41
vs.	:	
WAL-MART STORES, INC., et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

COUNSEL FOR APPELLANTS: John E. Triplett, Jr., and Daniel P. Corcoran, 424 Second Street, Marietta, Ohio 45750

COUNSEL FOR APPELLEES: D. Patrick Kasson, 65 East State Street, 4th Floor, Columbus, Ohio 43215

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-25-09

ABELE, J.

{¶ 1} This is an appeal from a Washington County Common Pleas Court summary judgment in favor of Wal-Mart Stores, Inc. and Wal-Mart Real Estate Trust, defendants below and appellees herein.

{¶ 2} Marianne Ray and John D. Ray, plaintiffs below and appellants herein, raise the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS-APPELLEES

BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT REGARDING LIABILITY."

SECOND ASSIGNMENT OF ERROR:

"THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS-APPELLEES PRIOR TO THE COMPLETION OF PLAINTIFFS'-APPELLANTS' DISCOVERY."

{¶ 3} On July 28, 2003, Marianne Ray tripped over a black produce crate that partially protruded into the shopping aisle from underneath a table displaying corn. She sustained personal injuries as a result of her fall.

{¶ 4} On August 13, 2007, appellants re-filed a negligence and loss of consortium complaint against appellees. They also asserted a spoilation and destruction of evidence claim and alleged that appellees failed to preserve video tape evidence of Ray's fall.

{¶ 5} On September 24, 2007, appellees filed a summary judgment motion and argued that the hazard was open and obvious, thus obviating it of a duty to warn. Appellees further contended that it did not (1) create the hazard, or (2) have actual or constructive knowledge of the hazard.

{¶ 6} Appellants did not file an immediate substantive memorandum in opposition to appellees' summary judgment motion. Instead, they filed a motion to strike the depositions that appellees attached to their summary judgment motion. Appellants claimed that depositions were not proper because they were submitted in the previously-filed case. Appellants also filed a motion under Civ.R. 56(F) to continue the non-oral hearing regarding appellees' summary judgment motion until appellants conducted further discovery.

{¶ 7} On November 1, 2007, appellants filed an opposition memorandum to appellees' summary judgment motion. They asserted that summary judgment was not proper because they have not had sufficient opportunity to conduct discovery.

{¶ 8} On February 6, 2008, appellants filed a "bench brief," which apparently was a substantive memorandum in opposition to appellees' summary judgment motion. Appellants argued that genuine issues of material fact remained regarding whether the produce crates constituted an open and obvious hazard.

{¶ 9} The parties submitted four depositions in support of their respective positions. Wal-Mart Assistant Manager Nancy White testified that she was present at the store on the date of Ray's fall and filled out an incident report. She viewed the scene shortly after the incident and noticed that Ray fell over two stacked black produce crates, which together were approximately thirty inches by twenty inches and eight to ten inches tall. She stated that the crates were not supposed to be "in the traffic part of the aisle."

{¶ 10} Mr. Ray stated that he visited Wal-Mart the day after his wife's fall. He noticed that the floors were light-colored– either white, beige, or gray. In response to the question, "Was there anything about the display which would obstruct a black object sticking out into the aisle from being visible," he stated: "If you were away from it, the answer to that would be no. If you were looking at it, you could have seen it. If you were close, you wouldn't see it." In response to the question, "If you were walking around the table looking down and there were a black object sticking out beyond the edge of the table and beyond the edge of the skirt, is there anything which would

obstruct and make that black object not visible," Mr. Ray stated, "No."

{¶ 11} Mrs. Ray stated that she did not see the produce crates before she fell, but she saw them after she fell, while sitting on the floor. She testified that the crates partially protruded from underneath a corner of the display of corn by less than twelve inches. She stated that she was not certain whether she would have seen them had she looked.

{¶ 12} After reviewing the evidentiary materials, the trial court granted appellees summary judgment. The court determined that the hazard was open and obvious and, thus, obviated appellees of a duty to warn Mrs. Ray of the danger. The court then entered a "decision and final judgment entry" that dismissed appellants' complaint. This appeal followed.

I

{¶ 13} In their first assignment of error, appellants assert that the trial court improperly determined that no genuine issues of fact remained regarding appellees' liability. Specifically, they argue that genuine issues of material fact remain as to whether: (1) appellees created the dangerous condition; (2) Mrs. Ray had a reasonable opportunity to inspect the hazard such that she should have discovered it and protected herself; (3) attendant circumstances existed to render the hazard latent and hence, not open and obvious; and (4) appellees had superior knowledge.

A

SUMMARY JUDGMENT STANDARD

{¶ 14} Initially, we note that appellate courts conduct a de novo review of trial

court summary judgment decisions. See, e.g., Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. See Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786. Thus, to determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

{¶ 15} Civ. R. 56(C) provides, in relevant part, as follows:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶ 16} Thus, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (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) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.0

{¶ 17} Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion, and to identify those portions of the record that demonstrate the absence of a material fact. Vahila, supra; Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The moving party cannot discharge its initial burden under the rule merely with a conclusory assertion that the nonmoving party has no evidence to prove its case. See Kulch v. Structural Fibers, Inc. (1997), 78 Ohio St.3d 134, 147, 677 N.E.2d 308; Dresher, supra. Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); Dresher, supra.

{¶ 18} "[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment." Pennsylvania Lumbermans Ins. Corp. v. Landmark Elec., Inc. (1996), 110 Ohio App.3d 732, 742, 675 N.E.2d 65. Once the moving party satisfies its burden, the nonmoving party bears a corresponding duty to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); Dresher, supra. A trial court may grant a properly supported summary judgment motion if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that there is a genuine issue for trial. Id.; Jackson v. Alert Fire & Safety Equip., Inc. (1991), 58

Ohio St.3d 48, 52, 567 N.E.2d 1027.

B

NEGLIGENCE

{¶ 19} A successful negligence action requires a plaintiff to establish that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. See, e.g., Texler v. D.O. Summers Cleaners (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 217; Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614; Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. If a defendant points to evidence to illustrate that the plaintiff will be unable to prove any one of the foregoing elements, and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to judgment as a matter of law. See Lang v. Holly Hill Motel, Inc., Jackson 06CA18, 2007-Ohio-3898, at ¶19, affirmed, — Ohio St.3d —, 2009-Ohio-2495, — N.E.2d —.

C

APPLICATION OF THE OPEN AND OBVIOUS DOCTRINE

{¶ 20} First, we address appellants' contention that four exceptions exist to the open and obvious doctrine. Appellants argue: "There are at least four situations in which a plaintiff may recover in a slip and fall case, regardless of whether the hazard may appear open and obvious when looking at it directly. These include: (1) where the Defendant creates the dangerous condition; (2) where the plaintiff does not have a reasonable opportunity to inspect the hazard such that she should have discovered it and protected herself against it; (3) where attendant circumstances distract an

individual from exercising the degree of care an ordinary person would have exercised to avoid the danger; and (4) where defendant has superior knowledge of the particular danger which caused the injury such that plaintiff may not reasonably be expected to protect herself from a risk she cannot fully appreciate." We do not entirely agree with appellants' recitation of the foregoing principles as applied to the open and obvious doctrine.

{¶ 21} We do not believe that appellants' assertion that the open and obvious doctrine does not apply when the defendant creates the dangerous condition is not a correct statement of the law. Whether the defendant created the dangerous condition is one of the circumstances that the Ohio Supreme Court set forth in Johnson v. Wagner Provision Co. (1943), 141 Ohio St. 584, 49 N.E.2d 925, as establishing that the defendant breached the duty of care.[1] It relates to the breach, not duty, element of a negligence cause of action. See Galo v. Carron Asphalt Paving, Inc., Lorain App. No. 08CA9374, 2008-Ohio-5001, at ¶16 (observing that Johnson primarily addressed whether the defendant breached the duty, not whether duty existed); see, also, Hansen

[1] The Johnson court held that to establish that a shopkeeper breached the duty of care, the plaintiff must show:

> "1. That the defendant through its officers or employees was responsible for the hazard complained of; or
> 2. That at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its presence or remove it promptly; or
> 3. That such danger had existed for a sufficient length of time reasonably to justify the inference that the failure to warn against it or remove it was attributable to a want of ordinary care."

Id. at 589.

v. Wal-Mart Stores, Inc., Ross App. No. 07CA2990, 2008-Ohio-2477; Bowling v. Walmart Stores, Inc., Lake App. No. 2007-l-112, 2008-Ohio-1129; Gouhin v. Giant Eagle, Franklin App. No. 07AP-548, 2008-Ohio-766; Sharp v. Anderson's, Inc., Franklin App. No. 06AP81, 2006-Ohio-4075; Hudspath v. The Cafaro Co., Ashtabula App. No. 2004-A-0073, 2005-Ohio-6911; Louderback v. McDonald's Restaurant, Scioto App. No. 04CA2981, 2005-Ohio-3926; Pruitt v. Hayes (Mar. 5, 1998), Lawrence App. No. 97CA14; Jepsen v. O'Mara Enterprises, Inc. (Aug. 9, 1995), Washington App. No. 94CA57. The open and obvious doctrine, in contrast, relates to the threshold question of whether the defendant possessed a duty. See, e.g., Armstrong v. Best Buy Co., Inc., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d. 1088, at ¶13; Frano v. Red Robin Internatl. Inc., Lake App. No. 2008-L-124, 2009-Ohio-685, at ¶19. The open and obvious doctrine focuses on the nature of the hazard, not on any party's particular conduct. Accordingly, whether a defendant created the dangerous condition becomes a relevant question only if a plaintiff demonstrates that the defendant owed the plaintiff a duty of care.

{¶ 22} We further believe that appellants' second assertion, that a plaintiff may recover despite the existence of an open and obvious danger when the plaintiff did not have a reasonable opportunity to inspect the hazard such that the plaintiff should have discovered it and taken appropriate precautions, likewise is an inaccurate statement of the law. The determination of whether a particular danger is open and obvious does not revolve around the plaintiff's peculiar sensibilities or whether the plaintiff actually observed the danger. See Armstrong, at ¶13; Lang at ¶25. Instead, the question is whether, under an objective standard, the danger would have been discernible to a

reasonable person. See Lang at ¶25. To the extent a reasonable person would not have discerned the danger, then by definition, that danger would not be open and obvious.

{¶ 23} We do agree with appellants' third assertion, that attendant circumstances may create a genuine issue of material fact as to whether a danger is open and obvious. See Lang at ¶24.

{¶ 24} Appellants further assert that the open and obvious doctrine does not apply when the defendant has superior knowledge of the particular danger. One of the cases appellants cite, Betts v. Windland (Nov. 4, 1991), Washington App. No. 90CA39, determined that genuine issues of material fact remained as to whether the danger at issue in that case was unreasonably dangerous or latent. Thus, the danger in Betts was not open and obvious. The other cases appellants cite address a landowner's liability for failing to remove natural accumulations of ice and snow. In those situations, the landowner is not liable unless "the owner had superior knowledge of the particular danger which caused the injury * * * because in such a case the invitee may not reasonably be expected to protect himself from a risk he cannot fully appreciate." LaCourse v. Fleitz (1986), 28 Ohio St.3d 209, 210, 503 N.E.2d 159, citing Debie v. Cochran Pharmacy-Berwick, Inc. (1967), 11 Ohio St.2d 38, 227 N.E.2d 603. Some courts have limited this rule to slip and fall cases involving natural accumulations of ice and snow. See Royce v. Yardmaster, Lake App. No. 2007-L-80, at ¶19; Cooper v. Valvoline Instant Oil Change, Franklin App. No. 07AP-392, 2007-Ohio-5930, at ¶17. Others have held that it enters a negligence analysis only if the danger is not open and obvious. See Kalemba-Sims v. Kent State Univ., Court of Claims No. 2004-10973,

2006-Ohio-5669, at ¶7; Hudspath v. Caffaro Co., Ashtabula App. No. 2004-A-73, 2005-Ohio-6911, at ¶27. We believe that the rule itself seems to imply that it applies only when the danger is not open and obvious. If the invitee does not fully appreciate the risk, then one would imagine that the invitee did not fully appreciate the risk because some aspect of the risk was not open and obvious, but instead, was hidden. Thus, we do not agree with appellants' characterization of this rule as an exception to the open and obvious doctrine.

{¶ 25} After our comments about foregoing matters, we now turn to the analysis of appellants' first assignment of error.

D

DUTY

{¶ 26} The existence of a defendant's duty is a threshold question in a negligence case. See Armstrong, at ¶13. In a premises liability case, the relationship between the owner or occupier of the premises and the injured party determines the duty owed. See, e.g., Gladon v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287; Shump v. First Continental-Robinwood Assocs. (1994), 71 Ohio St.3d 414, 417, 644 N.E.2d 291. In the case at bar, the parties do not dispute that Ray was a business invitee.

{¶ 27} A premises owner or occupier possesses the duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that its business invitees will not unreasonably or unnecessarily be exposed to danger. Paschal v. Rite Aid Pharmacy, Inc. (1985), 18 Ohio St.3d 203, 203, 480 N.E.2d 474. A premises owner or occupier is not, however, an insurer of its invitees' safety. See id. While the

premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers, see Jackson v. Kings Island (1979), 58 Ohio St.2d 357, 358, 390 N.E.2d 810, invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. See Brinkman v. Ross (1993), 68 Ohio St.3d 82, 84, 623 N.E.2d 1175; Sidle v. Humphrey (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus.

{¶ 28} Therefore, when a danger is open and obvious, a premises owner owes no duty of care to individuals lawfully on the premises. See Armstrong v. Best Buy Co., 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, at ¶5; Sidle v. Humphrey (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus. By focusing on duty, "the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it." Id. at ¶13. The underlying rationale 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." Armstrong, at ¶5. "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. Thus, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to recovery. Id. at ¶5.

{¶ 29} In the instant case, the dispute centers upon whether the partially protruding produce crates presented an open and obvious danger that relieved

appellees of a duty of due care, or whether the crates were a latent danger against which appellees should have taken appropriate precautions. In most situations, whether a danger is open and obvious presents a question of law. See Lang, supra, at ¶23; Hallowell v. Athens, Athens App. No. 03CA29, 2004-Ohio-4257, at ¶21; see, also, Nageotte v. Cafaro Co., Erie App. No. E-04-15, 2005-Ohio-2098. Under certain circumstances, however, disputed facts may exist regarding the openness and obviousness of a danger, thus rendering it a question of fact. As the court explained in Klauss v. Marc Glassman, Inc., Cuyahoga App. No. 84799, 2005-Ohio-1306, at ¶17-18:

> "Although the Supreme Court of Ohio has held that whether a duty exists is a question of law for the court to decide, the issue of whether a hazardous condition is open and obvious may present a genuine issue of fact for a jury to review.
>
> Where only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. Anderson v. Hedstrom Corp. (S.D.N.Y.1999), 76 F.Supp.2d 422, 441; Vella v. Hyatt Corp. (S.D. MI 2001), 166 F.Supp.2d 1193, 1198; see, also, Parsons v. Lawson Co. (1989), 57 Ohio App.3d 49, 566 N.E.2d 698.
>
> However, where reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. Carpenter v. Marc Glassman, Inc. (1997), 124 Ohio App.3d 236, 240, 705 N.E.2d 1281; Henry v. Dollar General Store, Greene App. No.2002-CA-47, 2003-Ohio-206; Bumgarner v. Wal-Mart Stores, Inc., Miami App. No.2002-CA-11, 2002-Ohio-6856."

See, also, Oliver v. Leaf and Vine, Miami App. No.2004CA35, 2005-Ohio-1910, at ¶31 ("'The determination of whether a hazard is latent or obvious depends upon the particular circumstances surrounding the hazard. In a given situation, factors may include lighting conditions, weather, time of day, traffic patterns, or activities engaged in at the time.'") (internal quotations omitted).

{¶ 30} "Attendant circumstances" may also create a genuine issue of material fact as to whether a hazard is open and obvious. See Lang, at ¶24; Cummin v. Image Mart, Inc., Franklin App. No. 03AP1284, 2004-Ohio-2840, at ¶8, citing McGuire v. Sears, Roebuck & Co. (1996), 118 Ohio App.3d 494, 498, 693 N.E.2d 807. An attendant circumstance is a factor that contributes to the fall and is beyond the injured person's control. See Backus v. Giant Eagle, Inc. (1996), 115 Ohio App.3d 155, 158, 684 N.E.2d 1273. "The phrase refers to all circumstances surrounding the event, such as time and place, the environment or background of the event, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event." Cummin, at ¶8, citing Cash v. Cincinnati (1981), 66 Ohio St.2d 319, 324, 421 N.E.2d 1275. An "attendant circumstance" has also been defined to include any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time." McGuire, 118 Ohio App.3d at 499.

{¶ 31} Attendant circumstances do not include the individual's activity at the moment of the fall, unless the individual's attention was diverted by an unusual circumstance of the property owner's making. See McGuire, 118 Ohio App.3d at 498. Moreover, an individual's particular sensibilities do not play a role in determining whether attendant circumstances make the individual unable to appreciate the open and obvious nature of the danger. As the court explained in Goode v. Mt. Gillion Baptist Church, Cuyahoga App. No. 87876, 2006-Ohio-6936, at ¶25: "The law uses an objective, not subjective, standard when determining whether a danger is open and obvious. The fact that appellant herself was unaware of the hazard is not dispositive of

the issue. It is the objective, reasonable person that must find that the danger is not obvious or apparent." Thus, we use an objective standard to determine whether the danger associated with the stairs was open and obvious. Furthermore, the question of whether a danger is open and obvious is highly fact-specific. Stanfield v. Amvets Post No. 88, Miami App. No. 06CA35, 2007-Ohio-1896, at ¶12; Henry v. Dollar General Store, Greene App. No. 2002-CA-47, 2006-Ohio-206, at ¶16.

{¶ 32} Whether a danger is open and obvious is a highly-litigated question in premises liability cases and numerous cases discuss the open and obvious doctrine. Many Ohio courts have held that objects and obstructions in store aisles are open and obvious hazards, regardless of whether a customer actually notices the hazard. See, e.g., Silbernagel v. Meijer Stores Ltd. Partnership, Butler App. No. 2006-02-40, 2006-Ohio-5658; Benton v. Cracker Barrel Old Country Store, Inc., Franklin App. No. 02AP-1211, 2003-Ohio-2890, ¶22 (boxes comprising part of store display that protruded into aisle constituted open and obvious hazard); Brooks v. Jo Ann Stores (Nov. 13, 2001), Butler App. No. CA2001-05-107 ("mess" of magazine insert cards scattered on store floor was open and obvious hazard); Prince v. Hills Dept. Store (July 25, 1997), Wood App. No. WD-96-069 (pile of packing peanuts in store aisle was open and obvious hazard); Austin v. Woolworth Dept. Stores (May 6, 1997), Franklin App. No. 96APE10-1430 (partially emptied pallet in store aisle was open and obvious hazard). Again, however, the cases are highly fact-specific.

{¶ 33} For example, in Silbernagel v. Meijer Stores Ltd. Partnership, Butler App. No. 2006-02-40, 2006-Ohio-5658, the plaintiff tripped over a one- to two-foot high black display frame while shopping at a store. The display frame was part of an

approximately six-feet long, six-feet wide, and four- to five-feet high "island" of displayed merchandise located in the middle of a main shopping aisle. The merchandise was stacked on pallets and bordered by display frames. The display frames consisted of black boards, approximately one to two feet high. The display "islands" were approximately five feet apart, allowing shoppers to cross the main aisle at various points.

{¶ 34} The plaintiff walked down the main aisle and then crossed the aisle between two of the display "islands." As he did, he tripped and fell over an empty display frame that had been pushed behind an adjacent display approximately 18 inches, obscuring it from his view. The appellate court determined that the empty display frame that caused the plaintiff's fall constituted an open and obvious hazard. The court explained:

> "The record does not show that the display frame was a hidden danger undiscoverable by ordinary inspection. The record shows that the display frame was approximately one to two feet high and black in color, contrasting with the lightly-colored floor of the aisle. Silbernagel did state in his deposition that the display frame had been pushed behind an adjacent display approximately 18 inches, and that the stacked merchandise in the adjacent display obscured his view of the display frame. Consistent with those statements, the display frame may not have been visible to Silbernagel as he walked up the aisle toward the checkout area. However, once Silbernagel turned to cross the main aisle, the display frame would have been a clearly visible hazard."

Id. at 12.

{¶ 35} In Black v. Discount Drug Mart, Inc., Erie App. No. E-06-44, 2007-Ohio-2027, the plaintiff tripped over a red bin filled with merchandise that was located near the corner of an illuminated display case. The plaintiff claimed that she did not see the bin. The appellate court determined that because the red bin that

contrasted with the light floor was "so large" (36 inches long by 24 inches wide by 18 inches tall), "reasonable minds could only conclude that it was open and obvious." Id. at 16.

{¶ 36} Other cases, however, have concluded that an object located in a store aisle or walkway was not an open and obvious danger. In Klauss v. Marc Glassman, Inc., Cuyahoga App. No. 84799, 2005-Ohio-1306, for example, the plaintiff tripped over a wooden pallet that was located in a store cross aisle behind a park bench. The pallet was part of a larger display that extended approximately four feet beyond the park bench. At the other end of the display stood a three-foot high stack of merchandise. The display area between the park bench and the three-foot high stack of merchandise was empty. When the plaintiff entered the cross aisle, he noticed the park bench and the stacked merchandise but did not notice the empty pallets located in between. He admitted, however, that if he had looked down, he might have seen them. After the trial court determined that the pallets were an open and obvious danger, the plaintiff appealed. The appellate court reversed the trial court's decision, explaining:

> "Considering the facts of this particular case, there is a genuine issue of whether the placement of the bench and display created an unreasonably dangerous condition. Although Klauss argues that the reconstruction photographs establish that the pallet was open and obvious, we find the evidence in the record reveals a factual dispute as to the appearance of the condition based upon the attendant circumstances. Marc's placed the pallet directly in the middle of a cross aisle and at the end of an open aisle on the other side. The view of the pallet was obscured by a bench on one side and a display of merchandise on the other. Shoppers at Marc's normally have carts or baskets, are shopping for goods, and are looking at displays. Under the facts of this case, we find that reasonable minds could differ as to whether the pallet was an open and obvious condition."

Id. at 21.

{¶ 37} In Henry v. Dollar Gen. Stores, Greene App. No. 2002-CA-47, 2003-Ohio-206, the plaintiff tripped over a cement block that propped open a door. The block extended at least eight inches into the left side of the doorway and a collection of brooms and mops in a trash can partially obstructed the right side of the doorway. An eye-level display of merchandise distracted the plaintiff as she attempted to exit through the doorway, and consequently, she did not see the cement block–although had she looked, she would have seen it. The court nonetheless determined that genuine issues of material fact remained regarding whether the cement block presented an open and obvious danger. The court explained:

> "The record reflects that Henry entered the Dollar General store, turned left around a corner, and exited though a different door. She encountered the cement block only two or three steps after turning the corner. In addition, a trash can full of mops and brooms had been placed next to the exit door, opposite the cement block, and the mops and brooms were 'sticking out' and partially blocking the doorway. The trial court also found, and the record suggests, that Henry may have been distracted by an eye-level merchandise display as she exited the store.
>
> Viewing the foregoing facts in a light most favorable to Henry, reasonable minds might conclude that Dollar General placed the block in a location where customers could be expected to turn or change direction, thereby limiting their opportunity to see the block and avoid it. Reasonable minds also might find that Dollar General caused customers to encounter the block while attempting to avoid the trash can full of mops and brooms on the opposite side of the doorway. Likewise, reasonable minds might conclude that Dollar General increased the risk of customers not seeing the cement block by placing merchandise nearby at eye level, thereby creating a distraction. Therefore, under the facts of the present case, we cannot say, as a matter of law, that the cement block constituted an open-and-obvious danger."

{¶ 38} In Bumgardner v. Wal-Mart Stores, Inc., Miami App. No. 2002-CA-11, 2002-Ohio-6856, the plaintiff tripped over a four-feet wide, six-feet long, and six-inches high pallet located behind a broad red line and adjacent to a shopping cart corral. Two

feet of the pallet were empty, with the remaining area displaying merchandise stacked at varying heights. The plaintiff tripped over the pallet as she walked behind her husband and looked at other merchandise displays. She did not see the pallet until after her fall. The trial court determined that the pallet presented an open and obvious danger, but the appellate court disagreed. The court explained:

> "Viewing the evidence in a light most favorable to Bumgardner, we find that reasonable minds may disagree whether the pallet was an unreasonable danger and whether it was open and obvious. From the photographs submitted in evidence, and relied upon by the trial court, it appears that the pallet was located at the end of, but at the back side of, a row of shelves that were stocked with merchandise. It also appears that a reasonable person could find that the pallet was located in an area where a customer would be expected to turn or change direction. A reasonable person could also differ in determining whether the position of the portion of the pallet not covered with cartons of soft drinks was obscured by the row of shelves to which it was adjacent, and whether it constituted an unreasonable tripping hazard."

Id. at 26.

{¶ 39} In Carpenter v. Marc Glassman, Inc. (1997), 124 Ohio App.3d 236, 705 N.E.2d 1281, the plaintiff tripped over a four-foot by six-foot by three-foot high empty pallet that was located at the end of a store aisle. A merchandise display rack blocked the plaintiff's view of the empty pallet. The court of appeals concluded that genuine issues of material fact remained as to whether the pallet constituted an open and obvious danger and explained: "Here, construing the evidence in this case most strongly in favor of Carpenter, reasonable minds could differ as to whether the display platform was open and obvious, and whether Carpenter knew of its danger, or may reasonably have been expected to discover it and protect against it, given that her view had been blocked by a movable display rack filled with merchandise, and her attention

had been distracted by goods on display." Id. at 240.

{¶ 40} In Mills v. Drug Mart, Inc., (Dec. 16, 1993), Cuyahoga App. No. 64358, the court determined that genuine issues of material fact remained regarding whether the hazard was open and obvious when the evidence showed that: (1) the defendant placed a wire mesh beach ball display in the exit aisle; (2) the wire mesh beach ball display measured approximately three feet high and two feet square; (3) the wire mesh beach ball display possessed a lower lip or extension which was located approximately 2 inches off of the ground and extended six inches into the exit aisle way; (4) the lip of the wire mesh beach ball display and the floor were identical in color; (5) the appellee allowed shopping carts to collect in the middle of the exit aisle thus forcing customers to weave around and through the abandoned shopping carts; (6) the abandoned shopping carts forced customers leaving the appellee's place of business to pass extremely close to the wire mesh beach ball display; and (7) appellant-Gaylard Mills, while attempting to negotiate the abandoned carts, tripped and fell near the wire mesh beach ball display.

{¶ 41} In the case sub judice, we believe that the facts more closely align with those cases that concluded genuine issues of material fact remained regarding the open and obvious nature of the danger. Here, Ray denied seeing the crates before her fall. After her fall, she noticed that they seemed to stick out from underneath a produce display by less than one foot. She also stated that had she looked, she is not certain she would have seen them. This is not a case, therefore, where the hazard was undisputably discernible. Rather, a genuine issue of material fact exists as to whether the crates were hidden from view and thus, constituted a latent danger requiring appellees to exercise a duty of due care. Thus, based upon the specific facts involved in the case sub judice, we believe that genuine issues of material fact remain regarding the openness and obviousness of the hazard such that summary judgment is

not appropriate. We are unable to state, as a matter of law, that the produce crates partially protruding from under a display table presented an open and obvious danger. Consequently, we agree with appellants that at this juncture the trial court improperly granted appellees summary judgment.[2]

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[2] Once the plaintiff establishes that the defendant owed a duty of ordinary care, the next question is whether the defendant breached that duty. To establish that a premises owner breached the duty of ordinary care in a slip-and-fall case, the plaintiff must demonstrate that: (1) the shopkeeper created the hazard; or (2) the shopkeeper had actual knowledge of the hazard and failed to give adequate notice of its existence or to remove it promptly; or (3) the hazard existed for a sufficient length of time to justify the inference that the failure to warn against it or remove it was attributable to a lack of ordinary care. See, e.g., Ashbaugh v. Family Dollar Stores (Jan. 20, 2000), Highland App. No. 99CA11, citing Johnson v. Wagner Provision Co. (1943), 141 Ohio St. 584, 589, 49 N.E.2d 925. If the shopkeeper created the hazardous condition, then we presume that the shopkeeper had knowledge or notice of the condition of at issue. See Crane v. Lakewood Hosp. (1995), 103 Ohio App.3d 129, 136, 658 N.E.2d 1088, citing Presley v. Norwood (1973), 36 Ohio St.2d 29, 31, 303 N.E.2d 81 ("[w]hen the owner or occupier of the premises creates the hazardous condition, plaintiff is not required to show specifically that defendant had knowledge or notice. Knowledge or notice of the owner or occupier is required to be shown in slip-and-fall cases only where the alleged hazardous condition is created by someone other than the owner.").

Furthermore, an inference of negligence does not arise simply because an invitee falls while on the shopkeeper's premises. See Hodge v. K-Mart Corp. (Jan. 18, 1995), Pike App. No. 93CA528, citing Parras v. Standard Oil Co. (1953), 160 Ohio St. 315, 116 N.E.2d 300. An inference of negligence does not arise from mere guess, speculation, or wishful thinking, but rather can arise only upon proof of some fact from which such inference can reasonably be drawn. Parras, paragraph two of the syllabus. Therefore, "it is incumbent on the plaintiff to show how and why any injury occurred-to develop facts from which it can be determined by a jury that the Defendant failed to exercise due care and that such failure was a proximate cause of the injury." Hodge, quoting Boles v. Montgomery Ward (1950), 153 Ohio St. 381, 3892, 92 N.E.2d 9; see, also, Stamper v. Middletown Hosp. Assn. (1989), 65 Ohio App.3d 65, 67-68, 582 N.E.2d 1040.

In the case at bar, the parties do not raise any arguments on appeal regarding whether summary judgment would be appropriate due to the lack of a genuine issue of material fact concerning appellees' breach of the duty of care. Furthermore, the trial court did not address this element. Consequently, we will not address it for the first time on appeal. See Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138.

{¶ 42} Accordingly, based upon the foregoing reasons, we sustain appellants' first assignment of error, reverse the trial court's judgment and remand the matter for further proceedings consistent with this opinion.[3] Additionally, our resolution of appellants' first assignment of error renders the second assignment of error moot and we need not address it. See App.R. 12(A)(1)(c).

JUDGMENT REVERSED AND CAUSE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

[3] We observe that the trial court dismissed appellants' complaint, ostensibly including their spoilation/destruction of evidence claim, even though neither party raised that claim during the summary judgment proceedings. While sua sponte dismissal of a complaint without notice is generally inappropriate, it is proper where the complaint is frivolous or the claimant obviously cannot prevail on the facts alleged in the complaint. See State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn. (1995), 72 Ohio St.3d 106, 108, 647 N.E.2d 799; State ex rel. Peeples v. Anderson (1995), 73 Ohio St.3d 559, 560, 653 N.E.2d 371. Furthermore, it is well-settled that a trial court "may not sua sponte grant summary judgment premised on issues not raised by the parties." Ranallo v. First Energy Corp., Lake App. No.2005-L-187, 2006-Ohio-6105, ¶26, quoting Eller v. Continental Invest. Partnership, 151 Ohio App.3d 729, 2003-Ohio-894, at ¶16. In instances when trial courts have granted summary judgment when neither party moved for it, courts have reversed the trial courts' sua sponte disposal of the case. See Besser v. Griffey (1993), 88 Ohio App.3d 379, 382-83, 623 N.E.2d 1326, and Minix v. Collier (March 31, 1998), Scioto App. No. 97CA2523; see, also, HomEq Servicing Corp. v. Schwamberger, Scioto App. No. 07CA3146, 2008-Ohio-2478, at ¶14, affirmed, — Ohio St.3d —, 2009-Ohio-2607, — N.E.2d —. Neither party has raised this issue on appeal, however, and we therefore decline to consider it as a basis for reversal. Due to our reversal of the trial court's summary judgment, appellants may nonetheless proceed with this claim on remand.

Harsha, J., concurring in judgment only:

{¶ 43} I believe we should consider "open and obvious" to be part of the legal question of duty so that courts decide it as a matter of law. I realize many appellate courts, including ours, have deferred to the jury on this issue, but I do not think resolution of a factual aspect changes the overall character of the issue. I am not aware of any Supreme Court case that has actually deferred to the jury. To the contrary, *Mussivand v. David (*1989), 45 Ohio St.3d 314,318, *Wheeling and Lake Erie RR Co. v. Harvey* (1907), 77 Ohio St.3d 235, 240 and others hold that duty is a question of law. Simply because resolution of a question of law involves consideration of the evidence does not convert the issue into a question of fact. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St. 2d 66, 68. I view this issue as being similar to governmental immunity, i.e. it acts as a complete bar to being sued and is decided by the court, not the jury. In other words, this question involves the "rules" of the game, and courts, not juries, decide the rules.

{¶ 44} Because I conclude as a matter of law that the crates are not an open and obvious hazard, I concur in judgment only.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and cause remanded for proceedings consistent with this opinion. Appellants shall recover of appellees the costs herein

taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J.: Concurs in Judgment Only
Harsha, J.: Concurs in Judgment Only with Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.