[Cite as *Herbst v. Kroger Co.*, 2009-Ohio-2767.]

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

Elizabeth M. Herbst	Court of Appeals No. L-08-1413
Appellant	Trial Court No. CI0200706831
v.	
The Kroger Company	**DECISION AND JUDGMENT**
Appellee	Decided: June 12, 2009

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Scott A. Winckowski, for appellant.

Sarah A. McHugh, for appellee.

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SINGER, J.

{¶ 1} This is an accelerated appeal from a judgment of the Lucas County Court of Common Pleas that granted summary judgment in favor of appellee, The Kroger Company, on the action of appellant, Elizabeth M. Herbst, for damages stemming from injuries she suffered after she fell in appellee's store. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth the following assignment of error:

{¶ 3} "Summary Judgment in favor of the property owner is inappropriate where genuine issues of material fact exist whether a dangerous condition was open and obvious and attendant circumstances preclude judgment."

{¶ 4} The facts giving rise to this appeal are as follows. On October 17, 2005, appellant went to appellee's store where she regularly shopped. As she walked through the door, her right foot became entangled in rolled up carpet and she fell on her face. She broke her glasses, sustained multiple bruises and suffered a concussion. On October 15, 2007, appellant filed a complaint alleging negligence on the part of appellee. Specifically, appellant sought to recover for her injuries alleging that appellee knew or should have known that the rolled up carpet created a hazardous condition. Appellee subsequently filed a motion for summary judgment in which it asserted that, under the open and obvious doctrine, it did not owe a duty to appellant. In its October 22, 2008 judgment, the trial court concluded that the rolled up carpet was open and obvious. Finding that appellee therefore was under no duty to warn appellant of any danger, the trial court entered judgment for appellee.

{¶ 5} On appeal, appellant asserts that there are genuine issues of material fact sufficient to preclude the application of the open and obvious doctrine. Appellant claims that the trial court erred by failing to consider certain attendant circumstances which distracted her and prevented her from fully ascertaining the danger in the store the day she was injured.

{¶ 6} We note at the outset that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Nat'l. Bank v. Saratoga Apts*. (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 7} Generally, in order to establish negligence, a plaintiff has the burden to show the existence of a duty on the part of the defendant, a breach of that duty, and that the breach proximately caused the aggrieved party's injury. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680. The issue of whether or not a duty exists in a negligence action is one of law for the court to determine. *Gin v. Yachanin* (1991), 75 Ohio App.3d 802, 804, citing *Mussivand v. David* (1989), 45 Ohio St.3d 314.

{¶ 8} It is undisputed that appellant was a business invitee on the premises at the time of the accident. Therefore, appellee owed a duty of ordinary care to maintain the premises in a reasonably safe condition and to warn of "latent and hidden dangers ." *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. Where a danger is "open and obvious," a landowner or business owner owes no duty of care to individuals lawfully on the premises. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, at syllabus. The rationale underlying this doctrine is that the open and obvious nature of the hazard

itself serves as a warning and that 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.,* 64 Ohio St.3d 642. Even when an invitee does not actually see the object or hazard until after he or she falls, no duty exists when the invitee could have seen the object or hazard if he or she had looked. *Haymond v. BP America,* 8th Dist. No. 86733, 2006-Ohio-2732. Accordingly, when applicable, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims. *Armstrong*, supra, ¶ 5. Whether a hazard is an open and obvious condition is a matter of law to be determined by the court and, therefore, a proper basis for summary judgment. Id.

{¶ 9} While there is no precise definition of attendant circumstances, they generally include any distraction that would come to the attention of an invitee in the same circumstances and reduce the degree of care an ordinary person would exercise at the time. *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 499. Attendant circumstances may create a genuine issue of material fact as to whether a danger was open and obvious and prevent the application of the open and obvious doctrine.

{¶ 10} In her deposition, appellant testified that the weather was beautiful and that the lighting conditions in the store were good. She testified that the rolled up carpet "was right in the doorway." She also described the carpet as a big roll "sticking out" into the doorway. Appellant argues that it was an attendant circumstance that the carpet was not

visible until the door opened, however, she also testified that there was nothing blocking her view and that had she looked down, she would have seen the carpet and avoided it. The evidence submitted in the case before us clearly demonstrates that the trial court correctly applied the open and obvious doctrine. Further, appellant has advanced no issue of material fact regarding attendant circumstances to preclude application of the open and obvious doctrine. Since, as a matter of law, appellee was under no obligation to warn appellant of the rolled up carpet, the trial court properly entered summary judgment for appellee. Accordingly, appellant's sole assignment of error is not well-taken.

{¶ 11} On consideration whereof, the judgment of the Lucas County Court of Common Pleas 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE