[Cite as *Hackett v. TJ Maxx*, 2010-Ohio-5824.]

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

CYNTHIA HACKETT	C.A. No. 24978
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008-09-6321
T J MAXX	
Appellee	

DECISION AND JOURNAL ENTRY

Dated: December 1, 2010

BELFANCE, Judge.

{¶1} Appellant, Cynthia K. Hackett, appeals the judgment of the Summit County Court of Common Pleas. For the reasons that follow, we affirm in part, and reverse in part.

BACKGROUND

{¶2} On January 7, 2005, Ms. Hackett visited the TJ Maxx store in Twinsburg to return an item purchased from the store. Ms. Hackett waited in line in front of the customer service counter while the customers ahead of her were assisted. A man with a ladder was approximately five feet away from Ms. Hackett as she waited. Unbeknownst to Ms. Hackett, the man was an independent contractor hired by TJ Maxx to maintain the light fixtures within the store. As Ms. Hackett was called forward by the sales clerk at the customer service counter, Ms. Hackett slipped and fell forward onto the floor. When she stood up, Ms. Hackett saw for the first time a large, clear cover for a fluorescent ceiling fixture lying flat on the floor in front of the service counter. Ms. Hackett obtained a bandage for the cut she sustained on her thumb, returned her

item, and began shopping in the store. Some ten or fifteen minutes after the fall, store employees spoke to Ms. Hackett concerning the incident.

{¶3} A couple of weeks later, Ms. Hackett sought medical treatment for pain that she attributed to her fall at TJ Maxx. Over the next months, Ms. Hackett experienced other pains and sought treatment.

{¶4} Ms. Hackett filed the instant cause of action for negligence against Appellees, TJ Maxx and A&K Energy Conservation ("A&K Energy"), the independent contractor whose worker was servicing the lighting at the TJ Maxx location where Ms. Hackett fell.[1] TJ Maxx and A&K Energy each filed a motion for summary judgment to which Ms. Hackett responded. The trial court granted summary judgment in favor of TJ Maxx and A&K Energy.

{¶5} On appeal, Ms. Hackett argues that the trial court erred in granting summary judgment in favor of TJ Maxx and A&K Energy. As to TJ Maxx, Ms. Hackett asserts that a genuine issue of material fact exists as to whether the light cover on which she fell was an open and obvious danger. As to A&K Energy, Ms. Hackett argues that the trial court erroneously concluded that her injury was not reasonably foreseeable.

SUMMARY JUDGMENT

{¶6} This Court reviews a trial court's ruling on a motion for summary judgment de novo and applies the same standard as the trial court. *Chuparkoff v. Farmers Ins. of Columbus, Inc.*, 9th Dist. No. 22712, 2006-Ohio-3281, at ¶12. The facts are viewed in the light most favorable to the nonmoving party. Id.

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[1] Ms. Hackett initially filed a negligence claim against TJ Maxx and A&K Energy on January 4, 2007. She voluntarily dismissed her claim without prejudice against both defendants on October 9, 2007 and re-filed the instant action.

{¶7} Pursuant to Civ.R. 56(C), summary judgment is appropriate when: "(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) it appears from the evidence that reasonable minds can come to but one conclusion, and 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." *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 448.

{¶8} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. Id. at 293. Pursuant to Civ.R. 56(E), the nonmoving party may not simply rest on the allegations of its pleadings; it must provide the court with evidentiary material, such as affidavits, written admissions, and/or answers to interrogatories, to demonstrate a genuine dispute of fact to be tried. See, also, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

TJ MAXX

{¶9} TJ Maxx argued in its motion for summary judgment that Ms. Hackett had not demonstrated that TJ Maxx was negligent with respect to her fall because she did not present evidence that TJ Maxx created the alleged dangerous condition or that TJ Maxx had notice of the dangerous condition. Alternatively, TJ Maxx argued that it owed no duty to Ms. Hackett because the alleged dangerous condition was open and obvious. The trial court granted summary judgment in favor of TJ Maxx based on the court's finding that the danger was open and obvious.

{¶10} Our review of the evidence leads us to the conclusion that the trial court erred when it determined that there was no dispute of fact as to whether the dangerous condition Ms. Hackett encountered was open and obvious. Ms. Hackett's deposition testimony creates a question of fact as to whether the condition was open and obvious such that she should have seen the light cover had she looked. See *Kirksey v. Summit Cty. Parking Garage*, 9th Dist. No. 22755, 2005-Ohio-6742, at ¶11. Ms. Hackett described the light cover as clear plastic that blended in with the color of the floor at TJ Maxx. Further, her statement that she could have seen it "[if she] was looking for it[,]" is ambiguous. The statement could be interpreted to mean that she would have seen the light cover had she looked down. Conversely, interpreting Ms. Hackett's statement in the light most favorable to her as the non-moving party, *Chuparkoff* at ¶12, her statement could also mean that if she had been aware that the cover was on the floor, she could have found it. Thus, a genuine issue of material fact exists as to whether the light cover was observable.

{¶11} Although we do not agree with the trial court's reasoning in granting TJ Maxx's motion for summary judgment, we nonetheless conclude that summary judgment was appropriately granted in favor of TJ Maxx because Ms. Hackett did not meet her *Dresher* burden to point to evidence that would demonstrate an issue of material fact as to TJ Maxx's alleged negligence. In support of summary judgment, TJ Maxx carried its *Dresher* burden as the moving party to indentify portions of the record which demonstrate an absence of a genuine issue of material fact as to an essential element of Ms. Hackett's claim by pointing to Ms. Hackett's deposition testimony. *Dresher*, 75 Ohio St.3d at 292. TJ Maxx asserted that Ms. Hackett's deposition failed to present evidence of negligence as to TJ Maxx. The burden then shifted to

Ms. Hackett to present evidence of a material issue of fact. Id. at 293. Ms. Hackett did not carry her burden on this issue.

{¶12} "To prevail in a negligence action, the plaintiff must show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting from the breach." *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, at ¶21, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. The business owner has a duty to warn customers of dangerous conditions of which the business owner was aware or should have been aware. *Alvarez v. Natl. City Bank*, 9th Dist. No. 24292, 2008-Ohio-444, at ¶7. Proof of constructive knowledge of a dangerous condition requires "a factual basis that the hazard existed for a sufficient time[.]" (Internal quotation and citation omitted.) Id.

{¶13} TJ Maxx argued in its motion for summary judgment and has argued again in this Court, that Ms. Hackett failed to produce evidence that TJ Maxx was negligent with respect to the light cover on the floor because she did not point to some evidence that: (1) TJ Maxx created the dangerous condition; (2) TJ Maxx employees had knowledge of the dangerous condition, or; (3) the dangerous condition existed for a sufficient amount of time before Ms. Hackett fell such that TJ Maxx can be charged with constructive knowledge of the condition. According to TJ Maxx, summary judgment was appropriate because Ms. Hackett failed to meet her burden under *Dresher* to demonstrate a genuine issue of material fact. See *Dresher*, 75 Ohio St.3d at 293. We agree.

{¶14} The record demonstrates that the worker servicing the lights was an employee of A&K Energy, an independent contractor hired by TJ Maxx. Ms. Hackett has not advanced a legal argument that TJ Maxx should be liable for the actions of the independent contractor, nor has she argued that TJ Maxx created the dangerous condition. In her response to TJ Maxx's

motion for summary judgment, Ms. Hackett did not present evidence tending to indicate that any employees of TJ Maxx were aware that the light cover was on the floor before she fell, which would possibly create a duty to warn her of it. Lastly, although Ms. Hackett testified in her deposition that she had been in the TJ Maxx store approximately five minutes before she fell, she did not make any assertions in her deposition or otherwise with respect to the length of time the light cover was on the floor before she fell. Additionally, Ms. Hackett stated that she did not see the light cover until *after* her fall.

{¶15} In response to summary judgment, Ms. Hackett has failed to provide evidentiary material to demonstrate a dispute of material fact. Civ.R. 56(E). Ms. Hackett did not provide any evidence suggesting that TJ Maxx created the danger or that it had actual or constructive knowledge of the danger. Accordingly, we conclude that the trial court's decision to grant summary judgment in favor of TJ Maxx was correct, albeit not for the reasons advanced by the trial court. See, e.g., *Murray v. David Moore Builders, Inc.*, 177 Ohio App.3d 62, 2008-Ohio-2960, at ¶12, quoting *State ex rel. Carter v. Schotten* (1994), 70 Ohio St.3d 89, 92. We overrule Ms. Hackett's assignment of error that the trial court erred in granting TJ Maxx's motion for summary judgment.

A&K ENERGY

{¶16} The parties do not dispute that A&K Energy was acting as an independent contractor for TJ Maxx on the day Ms. Hackett fell in the store. As an independent contractor, A&K Energy may not avail itself of the open and obvious doctrine. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, syllabus. Instead, we apply the traditional law of negligence. Id. at 645. We refer to the elements of negligence cited supra: a duty to the plaintiff, a breach by the defendant, and an injury sustained by the plaintiff caused by the breach. *Robinson* at ¶21, citing

Menifee, 15 Ohio St.3d at 77. The determination of whether a duty exists is a question of law for the court to decide. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318. "Under the law of negligence, a defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position." *Simmers*, 64 Ohio St.3d at 645. "Injury is foreseeable if a defendant knew or should have known that its act was likely to result in harm to someone." Id. The trial court found that it was not foreseeable that A&K Energy's actions in placing the light cover on the floor would have resulted in injury to anyone. We do not agree.

{¶17} Ms. Hackett acknowledged that she saw a man standing near a ladder at TJ Maxx on the day of her fall. She was uncertain whether she saw the ladder before or after her fall. Upon discovering what had caused her fall, Ms. Hackett deduced that the man with the ladder had been working on the lights. It was not until sometime after her fall when she spoke with TJ Maxx employees that she was informed that the man was an independent contractor servicing the ceiling light fixtures in the store. A&K Energy admitted in its answers to Ms. Hackett's interrogatories that its worker was in control of the workspace in which the lights were being serviced. Further, A&K Energy does not claim that it did not place the light cover in the location attested to by Ms. Hackett.

{¶18} Ms. Hackett further stated that she did not see the light cover as she proceeded to the counter, but that she later saw that it was lying about one foot in front of the counter. In her affidavit attached to her reply to summary judgment, Ms. Hackett averred that there were no physical warnings, such as signs, or verbal warnings from the A&K Energy employee that the light cover was lying in front of the customer service counter. Although she was wearing

rubber-soled shoes, when Ms. Hackett stepped onto the light cover, either her foot or the cover slipped and she fell forward, landing on her hands.

{¶19} The trial court concluded that no duty was owed to Ms. Hackett by A&K Energy because it was not reasonably foreseeable that placing the light cover on the floor could have resulted in an injury. In reaching its conclusion, the trial court stated that the cover was in an open space and not concealed. However, whether the light cover was openly observable is not determinative of whether A&K Energy owed a duty of care to Ms. Hackett, given that the nature of the alleged dangerous condition is relevant to evaluate issues of breach and proximate cause and affirmative defenses such as contributory negligence and assumption of the risk. Id. at 646.

{¶20} We conclude that A&K Energy owed a duty of care to customers such as Ms. Hackett. Ms. Hackett presented various facts in support of summary judgment that A&K Energy has not disputed. First, there is no dispute that A&K Energy was an independent contractor and in control of the workspace where the lights were being serviced. Second, Ms. Hackett's uncontroverted statements demonstrate that the light cover was lying flat on the floor in front of the service counter where customers were being assisted by TJ Maxx employees. Third, there were no warning signs or barricades in the area where the A&K Energy employee was working. Finally, Ms. Hackett testified at her deposition that the light cover was "see-through" and blended with the floor. A&K Energy has not disputed Ms. Hackett's description of the light cover. Given the above, uncontroverted facts, we conclude that it was reasonably foreseeable that a customer could be injured under circumstances where a clear, flat piece of plastic was placed in front of the service counter in an area used by customers. Thus, the trial court erred in finding that A&K Energy did not owe a duty of care to Ms. Hackett. Accordingly, summary judgment as to A&K Energy was not proper.

CONCLUSION

{¶21} Upon thorough review of the record, we hold that the trial court correctly granted summary judgment in favor of TJ Maxx, however, summary judgment as to A&K Energy was erroneous. We overrule Ms. Hackett's assignment of error as it relates to TJ Maxx and sustain her assignment of error with respect to A&K Energy. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the matter is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 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(E). 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 both parties equally.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
CONCURS, SAYING:

{¶22} I concur in the judgment and that part of the majority opinion dealing with A&K Energy. I also concur in the part of the majority opinion that concludes that Ms. Hackett failed to present evidence that TJ Maxx created the dangerous condition, that TJ Maxx was aware of the dangerous condition, or that the dangerous condition existed for sufficient time before she fell so that TJ Maxx should be charged with constructive knowledge of its existence. I do not join in that part of the majority opinion that concludes that the fluorescent light cover was not an open and obvious hazard. There is no reason to reach that question in this case, and I would not do so.

CARR, J.
CONCURS, IN PART, AND DISSENTS, IN PART, SAYING:

{¶23} I concur in the majority's judgment which reverses the trial court's award of summary judgment to A&K Energy. Specifically, I agree that under the circumstances a genuine issue of material fact exists regarding whether it was reasonably foreseeable that someone could be injured by the independent contractor's actions. Therefore, a genuine triable issue remains as to the existence of a duty on the part of A&K Energy. Accordingly, I agree that the trial court erred by granting summary judgment in favor of A&K Energy.

{¶24} I respectfully dissent, however, from the majority's decision to affirm the award of summary judgment in favor of TJ Maxx. The trial court granted summary judgment in favor of TJ Maxx upon concluding as a matter of law that the hazard constituted an open and obvious condition. I agree with the majority that the evidence demonstrates that a genuine issue of material fact remains in regard to whether the hazard was open and obvious. See *Henry v.*

Dollar General Store, 2d Dist. No. 2002-CA-47, 2003-Ohio-206, at ¶10 (stating that "whether a business owner owes a duty of care to protect customers against an open and obvious danger is for a court, not a jury, to resolve. Whether a given hazard is open-and-obvious, however, may involve a genuine issue of material fact, which a trier of fact must resolve.")

{¶25} A determination on the open-and-obvious issue does not foreclose an award of summary judgment to TJ Maxx, however, since the absence of a duty could be evidenced by showing that TJ Maxx had no notice of the hazard. The trial court did not consider this issue. I would, therefore, remand the matter to the trial court for consideration of whether a genuine issue of material fact exists in regard to the remaining issue of notice giving rise to a duty, as well as breach and proximate cause, if the trial court found that reasonable minds could differ about whether TJ Maxx had notice of a hazard. I would not, however, address those issues in the first instance as the majority does. See *Smith v. Ohio Bar Liability Ins. Co.*, 9th Dist. No. 24424, 2009-Ohio-6619, at ¶24 (Carr, J., dissenting). By determining those issues on appeal, where the trial court did not first consider them, the majority effectively forecloses the opportunity for appellate review for the losing party. See *Schaffer v. FirstMerit Bank, N.A.*, 186 Ohio App.3d 173, 2009-Ohio-6146, at ¶34 (Carr, J., concurring, in part, and dissenting, in part). Accordingly, I dissent from the majority's resolution of the appeal in regard to TJ Maxx.

APPEARANCES:

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