[Cite as *Perry v. Anshu, L.L.C.*, 2021-Ohio-2365.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

DEBORAH PERRY,

Plaintiff-Appellant,

v.

ANSHU, LLC ET AL.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 20 CO 0016

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2019 CV 18

BEFORE:
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed

Atty. Matthew Blair, Blair & Latell Co., LPA, 724 Youngstown Warren Road, #12, Niles, Ohio 44446, for Plaintiff-Appellant and

Atty. Craig Pelini, Pelini, Campbell & Williams, LLC, 8040 Cleveland Avenue NW, Suite 400, North Canton, Ohio 44720, for Defendants-Appellees.

Dated:
June 23, 2021

Donofrio, J.

{¶1} Plaintiff-appellant, Deborah Perry, appeals from a Columbiana County Common Pleas Court judgment granting summary judgment in favor of defendant-appellee, Anshu, LLC, dba Suburban Market, on appellant's claim for personal injuries sustained as a result of a slip and fall at the entrance of appellee's market.

{¶2} On August 29, 2018, appellant went to appellee's place of business, the Suburban Market (the market) in Salem, Ohio to buy lottery tickets. Heavy rain was falling at the time. As she was about to enter the market, appellant stepped in a puddle of water just outside of the market door. She then stepped into the market onto the ceramic tile floor and slipped. Appellant fell, fracturing her wrist and injuring her shoulder.

{¶3} Appellant filed a complaint against appellee on August 13, 2019, for the injuries she sustained from her fall in the market. Appellee subsequently filed a motion for summary judgment. Appellee argued that because it was raining and appellant was aware of the open and obvious water on the floor, her negligence action failed. Appellant filed a memorandum in opposition to appellee's motion asserting a genuine issue of material fact existed based on testimony that a rug had been removed from the entrance way.

{¶4} The trial court granted appellee's motion for summary judgment. In so doing, the court found that on the day of appellant's fall, it was pouring down rain and appellant had just stepped in a deep puddle. Thus, it concluded the wet floor was an open and obvious danger and that no attendant circumstances diverted appellant's attention from the wet floor. Based on these facts, the court found appellee owed no duty to appellant to protect her from the rain water on the market floor. Therefore, it found appellee was entitled to summary judgment.

{¶5} Appellant filed a timely notice of appeal on August 13, 2020. She now raises a single assignment of error that states:

> THE TRIAL COURT ERRED IN GRANTING APPELLEE ANSHU, LLC'S MOTION FOR SUMMARY JUDGMENT.

{¶6} An appellate court reviews a summary judgment ruling de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

{¶7} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party 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. *Mercer v. Halmbacher*, 9th Dist. Summit No. 27799, 2015-Ohio-4167, ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶8} If the moving party meets its burden, then the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id*.; Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶9} Appellant argues that the trial court overlooked several pieces of evidence that would have created a genuine issue of material fact to preclude summary judgment. She contends that the doctrine of attendant circumstances applies. Specifically, appellant argues that she stepped into an eight-to-ten-inch deep puddle of water just outside of the market door, which caused her to be distracted. She further argues that there is usually a rug at the market entrance, which was not there the day she slipped.

{¶10} A negligence claim requires the plaintiff to prove: (1) duty; (2) breach of duty; (3) causation; and (4) damages. *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St.3d 82, 84, 671 N.E.2d 225 (1996).

{¶11} In this case, appellant was appellee's business invitee. "Business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Light v. Ohio University*, 28 Ohio

St.3d 66, 68, 502 N.E.2d 611 (1986). Generally, a premises owner owes a business invitee a duty to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition. *Id.*; *Presley v. Norwood*, 36 Ohio St.2d 29, 31, 202 N.E.2d 81 (1973).

{¶12} But a business owner does not owe invitees a duty to warn of dangers that are open and obvious. *Armstrong v. Best Buy Co. Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Id*. at the syllabus. That is because the owner may reasonably expect those entering the property to discover the dangers and take appropriate measures to protect themselves. *Simmers v. Bentley Constr. Co*., 64 Ohio St.2d 642, 644, 597 N.E.2d 504 (1992).

{¶13} In the present case, the trial court found that the puddle and wet floor were open and obvious. It noted that appellant was aware of the pouring rain and the deep puddle she stepped in. It further noted she was aware that her foot and shoes were soaking wet before she entered the market. The court found that the presence of water outside of the market gave appellant advance warning that water could be tracked into the store and, therefore, she presumptively knew that the floor might be wet and slippery. It also noted it was undisputed that appellant was able to see the tile floor and that she agreed there was "nothing hidden about it." Under these facts, the trial court found appellee did not owe a duty to appellant.

{¶14} We are to look objectively at whether a particular danger is open and obvious, without regard to the injured plaintiff. *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961, 927 N.E.2d 1161, ¶ 10 (2d Dist.). As such, the open-and-obvious test "'properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it.'" *Id*., quoting *Armstrong v. Best Buy Co*., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 13. A plaintiff's failure to look where he is walking is not necessarily dispositive of whether a danger is open and obvious. *Id*. at ¶ 12. But if the plaintiff admits that had he looked down he would have noticed the danger, then the danger is open and obvious. *Id*.

{¶15} In her deposition, appellant stated that on the day of her fall it was "pouring down rain." (Perry Dep. 18). In fact, she stated it was raining so hard that when she

arrived at the market, she waited in her car for approximately 20 minutes hoping that the rain would slow down. (Perry Dep. 19). Eventually, she decided to go into the market despite the fact that it was still pouring. (Perry Dep. 19). Appellant was wearing rubber-soled tennis shoes and had no umbrella. (Perry Dep. 19-20). Appellant stated that she got wet as she made her way toward the market. (Perry Dep. 21). Before she reached the market door, appellant stepped in a puddle of water approximately eight to ten inches deep and her foot got soaked up to her ankle. (Perry Dep. 21). Appellant stated it was daylight at the time and she was able to look down and see the puddle. (Perry Dep. 22). She then stepped into the market and slipped and fell. (Perry Dep. 23). When she slipped, appellant's shoes were wet from the rain. (Perry Dep. 23-24).

{¶16} Appellant admitted that she was well aware of the wetness on the floor caused by the rain. (Perry Dep. 24). She stated that she frequents the market daily. (Perry Dep. 28). She stated that had she looked down she would have noticed the moisture on the floor. (Perry Dep. 30). Appellant commented that there was no rug at the entranceway. (Perry Dep. 24). She stated that she saw the tile floor and there was nothing hidden about it. (Perry Dep. 30-31).[1]

{¶17} The Ohio Supreme Court has held that "'[o]rdinarily, no liability attaches to a store owner or operator for injury to a patron who slips and falls on the store floor which has become wet and slippery by reason of water and slush tracked in from the outside by other patrons.'" *Pesci v. William Miller & Assoc*., 10th Dist. Franklin No. 10AP-800, 2011-Ohio-6290, ¶ 15, quoting *Boles v. Montgomery Ward & Co*., 153 Ohio St. 381, 92 N.E.2d 9 (1950), paragraph two of the syllabus.

{¶18} In analyzing a slip-and-fall on a wet floor case this court, after examining other appellate cases, stated:

1 We should point out that appellant and appellee both cite to the deposition of Tajesh Patel (mistakenly referred to as Anshu Patel), who operates the market. But Patel's deposition was never filed in the trial court. And the trial court did not refer to or cite to Patel's deposition. The only deposition filed of record is appellant's deposition. Because Patel's deposition was never filed with or considered by the trial court, we will not consider it here.

> Because *Johnson* and *Schmitt* concern tracked-in rainwater, they are instructive here. The plaintiffs in those cases were aware of the weather conditions and in *Schmitt*, as in this case, the plaintiff admitted seeing puddles of water near the entrance. Boston was aware that employees were washing vehicles in an area beside the service entrance and that water was everywhere, including a puddle right in front of the door. While there was no direct testimony that other patrons tracked this water into the building, Boston herself testified that the bottom of her shoes were wet as she entered the building. Further, there is no evidence that the water came from any source other than the carwash water outside, and Boston does not claim that the water originated from another source. However, the situation presented here is more akin to *Johnson* than to *Schmitt*. Similar to the plaintiff in *Johnson* who fell after taking two or three steps, Boston fell after taking three or four steps inside the building. As a person entering a building on an inclement day could anticipate the presence of water on the floor inside the door, a patron could similarly anticipate that water from a car wash accumulating in front of the entrance could be tracked inside in the same way as rainwater. Thus, the water Boston slipped upon was an open and obvious hazard.

Boston v. A & B Sales, Inc., 7th Dist. Belmont No. 11 BE 2, 2011-Ohio-6427, ¶ 44. This court then went on to analyze whether any attendant circumstances prevented the plaintiff from discovering the open and obvious danger.

{¶19} Here the trial court was correct in concluding that the wet floor was an open and obvious danger that appellant should have anticipated. By appellant's own testimony, it was pouring down rain, she just stepped in a puddle, her rubber-soled shoes were wet, and the wet tile floor was not hidden by anything. Appellant, entering the market during a heavy rain with wet shoes could easily anticipate that the floor inside the door would be wet and slippery.

{¶20} Appellant claims that the deep puddle of water just outside the market and the fact that there was no rug at the market entrance were attendant circumstances that caused her to be distracted, thereby negating the open and obvious wet floor.

{¶21} Attendant circumstances can exist that distract a person from exercising the degree of care an ordinary person would have exercised in order to avoid the danger and can create a genuine issue of material fact as to whether a particular hazard is open and obvious. *Ellington v. JCTH Holdings, Inc*., 7th Dist. Mahoning No. 14 MA 64, 2015-Ohio-840, ¶ 15. "To serve as an exception to the open and obvious doctrine, an attendant circumstance must be 'so abnormal that it unreasonably increased the normal risk of a harmful result or reduced the degree of care an ordinary person would exercise.'" *Mayle v. Ohio Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 09AP-541, 2010-Ohio-2774, ¶ 20, quoting *Cummin v. Image Mart, Inc*., 10th Dist. Franklin No. 03AP-1284, 2004-Ohio-2840, ¶ 10. Attendant circumstances do not include regularly encountered, ordinary, or common circumstances. *Colville v. Meijer Stores Ltd*., 2d Dist. Miami No. 2011-CA-011, 2012-Ohio-2413, ¶ 30, citing *Cooper v. Meijer*, 10th Dist. Franklin No. 07AP-201, 2007-Ohio-6086, ¶ 17.

{¶22} In the present case, appellant never testified that she was distracted as she entered the market. It was daylight at the time. Appellant was well aware that it was raining, that she had stepped in a puddle, and that her shoes were wet. She also saw the tile floor and stated that had she looked down she would have noticed the moisture on the floor.

{¶23} No attendant circumstances existed to negate the open and obvious doctrine. The puddle appellant stepped in was not an attendant circumstance because a puddle outside during a heavy downpour is a regular and common circumstance. And the absence of a rug in no way distracted appellant from seeing the tile floor.

{¶24} In sum, because the wet floor during a rain storm was an open and obvious danger and because there was no evidence of attendant circumstances, the trial court properly granted summary judgment in favor of appellee.

{¶25} Accordingly, appellant's sole assignment of error is without merit and is overruled.

{¶26} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.