COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FRANCES WITTROCK	**:**	
Plaintiff	**:**	**CASE NO. 2010 CVH 01252**
vs.	**:**	**Judge McBride**
BEST BUY CO., INC., et. al.	**:**	**DECISION/ENTRY**
Defendants	**:**	

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Smith, Rolfes & Skavdahl Company, LPA, Patricia J. Trombetta and Zachary F. McCune, attorneys for the defendant Best Buy Co., Inc., 600 Vine Street, Suite 2600, Cincinnati, Ohio 45202.

Adam Wright, Assistant U.S. Attorney for defendant Medicare c/o Secretary of the Department of Health and Human Services, US Attorney's Office Southern District of Ohio, 221 East Fourth Street, Suite 400, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion for summary judgment filed by the defendant Best Buy Co., Inc. (hereinafter "Best Buy").

The court scheduled and held a hearing on the motion for summary judgment on June 11, 2012. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to Judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[1]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[2] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[3]

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[1] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

[2] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

[3] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[4]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[5] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can be resolved only by a finder of fact because they may reasonably resolved in favor of either party."[6]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[7] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[8]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for

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[4] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[5] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[6] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[7] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[8] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[9] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[10] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[11]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[12] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[13] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[14] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[15]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported

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[9] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[15] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.

allegations.[16] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[17]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[18]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[19]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed

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[16] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[17] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[18] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[19] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

affidavit.[20] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[21] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[22]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[23]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[24]

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[20] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.
[21] *Davis v. Loopco Indus., Inc.,* 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[22] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[23] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[24] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

FACTS OF THE CASE

On October 11, 2011, the plaintiff Frances Wittrock and her two sons drove to the Best Buy store located in Eastgate, Clermont County, Ohio, to look at a small television that she was interested in purchasing.[25] The plaintiff inquired as to the availability of the particular television in which she was interested and a store employee informed her that it was not currently available.[26] The plaintiff then proceeded to walk around the television section of the store looking at the different televisions that were available.[27] The plaintiff estimated that she was in the store approximately twenty minutes prior to her fall.[28]

The plaintiff went down an aisle which she had previously been in that same day.[29] At the end of the aisle, the plaintiff stopped in front of an end cap display to look at a television contained within the display.[30] This particular television was located towards the back of the display, so the plaintiff got close to the end cap and leaned over to look at the information card for the television.[31] The plaintiff had to get very close to the display to read the card because she was not wearing her glasses.[32] After reading the information card, the plaintiff turned to her right and, according to her testimony, her

[25] Deposition of Brian Langenbahn (May 2011) at pg. 7; Deposition of Frances Wittrock at pgs. 34-35.
[26] Deposition of Frances Wittrock at pgs. 36-39.
[27] Id.
[28] Id. at pg. 43.
[29] Id. at pg. 39.
[30] Id.
[31] Id.
[32] Id. at pg. 52.

left foot “dragged on something” and she fell, sustaining injuries.[33] The plaintiff testified that when she was on the floor after her fall she saw a strip of metal underneath the end cap display that looked like it was possibly a guide for a baseboard.[34] There was no baseboard in the front of the end cap display.[35] The metal strip was attached to the bottom of the end cap and did not reach the floor.[36]

There is conflicting testimony regarding exactly how the plaintiff fell on the day in question. Christopher Wittrock, the plaintiff’s son, states that that he and the plaintiff were actually walking when she fell and, while he admits that he does not know what caused her fall due to the fact that he was walking in front of her, his “educated guess” is that something metal on the corner of the end cap “grabbed her foot” as she was walking and she fell.[37] There is also testimony that the plaintiff stated on the day of the incident that she actually fell over the end cap.[38] CJ Massey, a Best Buy employee, testified that he witnessed the plaintiff’s fall and that it did not appear to him that the plaintiff caught her foot on the display area but that, instead, that she simply tripped over her own feet.[39] However, this being a summary judgment motion, the court will take the plaintiff’s testimony regarding the events of the day in question in a light most favorable to her as the non-moving party.

Brian Langenbahn, a Best Buy employee who was present at the store on the day in question, testified that he noticed a black bracket that extended out on the side of

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[33] Id. at pgs. 40 and 52.
[34] Id. at pgs. 50-51 and 54-55.
[35] Id. at pg. 50.
[36] Id. at pg. 64.
[37] Deposition of Christopher Wittrock at pg. 56.
[38] See, e.g., Deposition of Charles Wittrock at pg. 34; and Langenbahn Depo. at pg. 14.
[39] Deposition of CJ Massey (May 2011) at pgs. 9-12.

the display, and Langenbahn testified that he believes that a person turning that corner could catch their foot on that bracket.[40] However, the plaintiff's testimony is not that she was walking around the corner of the display, but that she was standing directly in front of it when she began to walk away and fell.

Krystal Konn, a customer solutions manager at Best Buy, notes that the base at the front of the subject end cap display was not flush with the carpet.[41] She testified that one would have to be walking straight into the end cap for their shoe to get stuck underneath it.[42] Likewise, CJ Massey testified that one's foot could slide under the front and corners of the end cap display at issue due to its lack of a flush baseboard in the front of the display.[43] While this testimony was given in reference to an incorrectly-identified end cap, Krystal Konn indicated in her later deposition that, while the end cap has been moved, it still looks the same.[44]

This court previously held a hearing on summary judgment on August 8, 2011. However, counsel contacted the court shortly before the case was set for a decision on the motion and indicated that the wrong end cap had mistakenly been identified as the end cap at issue. The court granted leave for the plaintiff to add a spoliation claim to her complaint and for new motion(s) for summary judgment to be filed following further discovery.

[40] Langenbahn (May 2011) Depo. at pgs. 17-18.
[41] Deposition of Krystal Konn (May 2011) at pg. 21.
[42] Id. at pg. 22.
[43] Massey Depo. at pgs. 15-16.
[44] Konn (Dec. 2011) Depo. at pgs. 12 and 15.

The end cap at issue in the case at bar was set back approximately sixteen feet from its original location in June or July 2010.[45] This occurred during a transformation project that was done in the majority of the Best Buy stores as part of a remodeling decision made by the corporate entity.[46] The procedure during these transformations with regard to moving end caps is to disassemble the end cap, move the end cap to its new desired location, and then reassemble the end cap.[47]

In May 2010, counsel for the plaintiff sent written correspondence to a third-party claims representative requesting that no one be allowed to spoil any evidence including, but not limited to, photographs and/or video that may be relevant to the incident, and this letter was acknowledged by a claims representative.[48] None of the employees deposed in this case were made aware of this letter.[49] The court would note that these letters were not properly authenticated by way of an affidavit and were instead simply attached to the plaintiff's memorandum in response to the motion for summary judgment. However, the court will consider the letters as there was no objection raised by the defendant to their consideration.[50]

LEGAL ANALYSIS

[45] Deposition of CJ Massey (Dec. 2011) at pg. 8 and Deposition of Brian Gesell at pg. 9.
[46] Gesell Depo. at pg. 9; Deposition of Greg Plunkett at pg. 12; and Deposition of Christopher Speer at pg. 24-25.
[47] Id. at 14.
[48] Response of Plaintiff to Motion for Final Summary Judgment, Exhibits A and B.
[49] Deposition of Krystal Kohn (Dec. 2011) at pg. 12-13; Plunkett Depo. at pg. 17; Langenbahn Depo. (Dec. 2011) at pg. 9; Massey Depo. at pg. 10.
[50] *Foster v. Cleveland Clinic Foundation* (Dec. 16, 2004), 8th Dist. Nos. 84156 and 84169, 2004-Ohio-6863, at ¶ 8, citing *Stegawski v. Cleveland Anesthesia Group*, 37 Ohio App.3d 78, 83, 523 N.E.2d 902 (Ohio App. 8th Dist., 1987).

(A) NEGLIGENCE

"To prevail on a civil negligence claim, a plaintiff must prove: (1) the defendant owed a duty of care; (2) the defendant breached that duty; (3) the breach was the proximate cause of injury; and (4) she sustained damages."[51]

"In a premises liability case, the relationship between the owner or occupier of the premises and the injured party determines the duty owed."[52] "Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability."[53] "An invitee is defined as a person who rightfully enters and remains on the premises of another at the express or implied invitation of the owner and for a purpose beneficial to the owner."[54] The record is clear and the parties agree that the plaintiff was an invitee at the Best Buy store on the date in question.

"An owner or occupier of a business owes its invitees a duty of ordinary care in maintaining the premises in a 'reasonably safe condition' so that its customers are not exposed to danger * * * and has the duty to warn its invitees of latent or hidden dangers."[55] "Storeowners, however, are not insurers against all accidents and injuries

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[51] *Occhipinti v. Bed Bath & Beyond, Inc.* (May 27, 2011), 11th Dist. No. 2010-L-109, 2011-Ohio-2588, ¶ 15.
[52] *Aycock v. Sandy Valley Church of God* (Jan. 8, 2008), 5th Dist. No. 2006-AP-09-0054, 2008-Ohio-105, ¶ 21, citing *Gladon v. Greater Cleveland Regional Authority* (1996), 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E. 287.
[53] Id., citing *Shump v. First Continental-Robinwood Assoc.* (1994), 71 Ohio St.3d 414, 417, 1994-Ohio-427, 644 N.E.2d 291.
[54] Id. at ¶ 22, citing *Gladon*, supra, 75 Ohio St.3d at 315.
[55] *Isaacs v. Meijer, Inc.* (March 27, 2006), 12th Dist. No. CA2005-10-098, 2006-Ohio-1439, ¶ 10, citing *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 204, 480 N.E.2d 474; and *Armstrong v. Best Buy Co., Inc.* (2003), 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, ¶ 5.

to their business invitees."[56] "An owner's duty to warn its invitees of latent or hidden dangers only extends to conditions which the invitee, by the exercise of ordinary care, would not be expected to discover for himself. An owner is under no duty to protect a business invitee from dangers that are known to such invitee or are so obvious and apparent that he may be reasonably expected to discover them and protect himself against them."[57]

"Thus, 'where the danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises."[58] "The rationale behind this rule is that 'the open and obvious nature of the hazard itself serves as a warning.' "[59] "Open and obvious hazards are neither hidden from view nor concealed and are discoverable by ordinary inspection."[60] " '[T]he dangerous condition at issue does not actually have to be observed by the plaintiff * * * to be an 'open and obvious' condition under the law. Rather, the determinative issue is whether the condition is observable.' "[61]

The case of *Sopko v. Marc Glassman, Inc.* (April 30, 1999), 11th Dist. No. 98-L-006, 1999 WL 266478, cited by the plaintiff in its brief, deals with a trip and fall over an end cap display.[62] I n that case, end cap displays were located on both sides of a supermarket checkout aisle.[63] The plaintiff attempted to walk around her cart in order to

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[56] Id., citing *Paschal* at 203.
[57] Id., citing *Paschal* at 203-204.
[58] Id. at ¶ 11, quoting *Armstrong* at ¶ 14.
[59] Id., quoting *Armstrong* at ¶ 5.
[60] Id., citing *Parsons v. Lawson Co.*, 57 Ohio App.3d 49, 50-51, 566 N.E.2d 698 (Ohio App. 5th Dist., 1989).
[61] Id., quoting *Lydic v. Lowe's Cos., Inc.* (Sept. 24, 2002), 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶ 10.
[62] *Sopko v. Marc Glassman, Inc.* (April 30, 1999), 11th Dist. No. 98-L-006, 1999 WL 266478, at *1.
[63] Id.

stand in front of it and, as she did so, her foot hit the platform of the end cap display and she fell.[64] The undisputed evidence demonstrated that the plaintiff saw the end cap platform but that she simply misjudged its location as she attempted to walk around her shopping cart.[65] As a result, the court found no liability on the part of the premises owner because the owner was under no duty to protect the plaintiff from a danger that was apparent to her.[66]

In *Silbernagel v. Meijer Stores Ltd. Partnership* (Oct. 30, 2006), 12th Dist. No. CA2006-02-040, 2006-Ohio-5658, the plaintiff tripped over the frame of a large display in a grocery store.[67] The plaintiff testified that the display frame had been pushed behind an adjacent display, thus obscuring it from his view.[68] The court noted that the display frame was one to two feet high and black in color, which contrasted with the lightly-colored flooring in the store.[69] The court also found that, while the display may have not been visible to the plaintiff as he walked up the aisle, once he turned to cross the main aisle of the store, the frame was clearly visible.[70] As a result, the court found that the display frame was an open and obvious hazard.[71]

In *Lumley v. Marc Glassman, Inc.* (Feb. 6, 2009), 11th Dist. No. 2007-P-0082, 2009-Ohio-540, the plaintiff, while attempting to gain access to a freezer containing frozen pizzas, moved into a space between the freezer and a wooden pallet sitting in

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[64] Id.
[65] Id. at *3.
[66] Id.
[67] *Silbernagel v. Meijer Stores Ltd. Partnership* (Oct. 30, 2006), 12th Dist. No. CA2006-02-040, 2006-Ohio-5658, at ¶ 4.
[68] Id.
[69] Id. at ¶ 12.
[70] Id.
[71] Id. at ¶ 13.

the aisle.[72] When doing so, her foot caught under the wooden pallet, causing her to be thrown forward; when she stepped with her other foot, it caught in the metal brace of the freezer, causing her again to pitch forward.[73] The court concluded that the wooden pallets sitting in the aisle were clearly open and obvious conditions.[74]

The plaintiff in *Occhipinti v. Bed Bath & Beyond, Inc.* (May 27, 2011), 11th Dist. No. 2010-L-109, 2011-Ohio-2588, reached for an item on a shelf located a few inches above her head.[75] A round metal bar which would normally be attached to the sides of the shelving unit was located in front of the shelf.[76] As the plaintiff grabbed the box she wanted on the shelf, the metal bar became dislodged, striking her on the nose and causing her injury.[77] The court held that there was no evidence in the record that the defendant had actual or constructive knowledge of the condition of the metal bar and, as a result, the defendant owed no additional duty of care to warn the plaintiff with respect to her use of the shelving structure and the metal bar.[78]

As noted above, there is testimony in the record before the court in the case at bar that the plaintiff merely tripped over the end cap display, or even simply over her own feet. If these facts were undisputed, summary judgment would be appropriate as the existence and location of the end cap display itself was unquestionably an open and obvious condition. However, the plaintiff's testimony asserts that she did not trip over the display but that, instead, a piece of metal running along the bottom of the display

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[72] *Lumley v. Marc Glassman, Inc.* (Feb. 6, 2009), 11th Dist. No. 2007-P-0082, 2009-Ohio-540, ¶ 4.
[73] Id.
[74] Id. at ¶ 63.
[75] *Occhipinti* at ¶ 4.
[76] Id.
[77] Id. at ¶ 5.
[78] Id. at ¶ 27.

caught her foot as she walked away, causing her to fall. There is a question of fact as to how the plaintiff fell. This being a motion for summary judgment, the court must take the evidence in a light most favorable to the plaintiff and, therefore, the court will consider her version of events as to how the fall in question occurred.

There is little to no testimony in the record before the court as to whether recessed metal underneath the end cap was observable upon ordinary inspection by a reasonable person. At one point during her testimony, the plaintiff stated "you couldn't see it really walking around, you know, look down at the baseboard."[79] That testimony is ambiguous even in context as to whether the plaintiff is actually saying that the condition she believes caused her fall could not be seen when she was walking around. There is testimony from others who observed the condition of the end cap after the plaintiff's fall on the day in question and those witnesses observed the lack of a baseboard and the metal strip that was not flush with the floor. However, the witnesses' focus was directed toward the bottom of the end cap display, specifically looking at the condition after the plaintiff's fall. There was no testimony that an ordinary person using reasonable care would notice the condition at the bottom of the display as they approached it or otherwise travelled through the store.

Furthermore, the surveillance video depicting the area in question shortly after the plaintiff's fall does not sufficiently demonstrate that there is no question of fact as to whether the condition of the metal in front of the display was observable.[80] Despite the defendant's effort to characterize a difference in the color of the condition with the color of the floor, the video, combined with the submitted photographs of Best Buy end caps,

[79] Wittrock Depo. at pg. 52.
[80] Defendant's Exhibit B.

shows that, in fact, the black metal base sat on a dark carpet, making little contrast between the base and the floor. While this carpet was very close to the light-tan linoleum floor, there is not sufficient evidence before the court demonstrating that the condition was readily observable on the date in question. Therefore, the court cannot find as a matter of law that the condition was observable. "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."[81]

There is testimony in the record that one's foot could slide under the metal strip at issue if a customer were very close to and facing the display. This is, in fact, what the plaintiff testified was her location and position immediately prior to her fall. Therefore, reasonable minds could differ as to whether the condition at the bottom of this particular end cap display was a latent defect or danger. The question of whether Best Buy could reasonably expect that a customer could stand close enough to the display that his or her foot could slide under the display and that a metal strip could then catch their foot as they walked away is also a question of fact for the jury, not a question of law to be decided by this court.

The defendant presented the affidavit of Robert Stevens in support of its motion for summary judgment. Robert Stevens is an architect who, after examining various evidence in this case including photographs of the subject end cap as well as treatises and guidelines averred that "within a reasonable degree of architectural certainty, the subject end cap base is not hazardous to pedestrians using reasonable care."[82]

[81] *Aycock*, supra, at ¶ 25.
[82] Second Affidavit of Robert Stevens, R.A. at ¶ 14.

However, this expert affidavit does not establish that the defendant is entitled to judgment as a matter of law. Stevens' affidavit states that the end cap is not hazardous to pedestrians using reasonable care. However, the court has before it a set of facts by which reasonable minds could differ as to the question of what constitutes "reasonable care." Whether Frances Wittrock was using reasonable care by standing so close to the end cap (because she was not wearing her glasses) that her foot was able to slide underneath the end cap is not a subject that is within the purview of Robert Stevens' architectural expertise.

The plaintiff also submitted an expert affidavit and report. The court has reviewed the report and affidavit of David Johnson, who is a forensic engineer.[83] The court would note that there is some question as to whether several of the conclusions set forth by Johnson in his report were based on his personal knowledge or were reasonably derived from the evidence examined by him. However, the court need not examine this issue because the expert report is not determinative of the present motion; this court has already determined that a question of fact exists as to whether the bottom of the end cap is a latent danger.

Finally, the court cannot find as a matter of law that the defendant had no notice of the subject condition. "In order to demonstrate a breach of duty, the [plaintiff] must show one of the following: (1) that [the defendant], through its officers or employees, was responsible for the hazard complained of, (2) that [the defendant] or its agents had actual knowledge of the hazard and neglected to give adequate notice of its presence or remove it promptly, or (3) that the danger had existed for a sufficient length of time to

[83] Affidavit of David Johnson, P.E., CSP and Exhibits.

reasonably justify the imposition of constructive notice."[84] The evidence in the record demonstrates that the end cap displays at the store were installed 10 to 15 years ago when the store first opened.[85] Therefore, this alleged condition of the gap between the "bracket" or metal piece and the floor existed for a sufficient length of time to create an issue of fact as to whether Best Buy had constructive notice of the alleged condition.

(B) SPOLIATION OF EVIDENCE

To successfully maintain a claim for spoliation of evidence, a plaintiff must show the following: "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts."[86]

The present case was filed several weeks prior to the remodeling of the store and the plaintiff was served within a short period of time. Therefore, there was pending litigation and the defendant had knowledge of the pending litigation at the time of the remodel. As a result, the first two elements have been satisfied for the purposes of surviving a summary judgment motion.

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[84] *Hansen v. Wal-Mart* (May 20, 2008), 4th Dist. No. 07CA2990, 2008-Ohio-2477, ¶ 12, citing *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, 589, 49 N.E.2d 925; and *Pruitt v. Hayes* (Mar. 5, 1998), 4th Dist. No. 97CA14, 1998 WL 106159.
[85] Konn (2011) Depo. at pg. 25.
[86] *O'Brien v. Olmstead Falls* (June 2, 2008), 8th Dist. Nos. 89966 and 90336, 2008-Ohio-2658, ¶ 17, quoting *Smith v. Howard-Johnson Ins. Co., Inc.* (1993), 67 Ohio St.3d 28, 29, 615 N.E.2d 1037.

However, the plaintiff has failed to demonstrate a willful destruction of the end cap by the defendant designed to disrupt the plaintiff's case. There is no evidence that the defendant "willfully, *i.e.,* wrongfully or with malicious intent"[87] moved the end cap in order to disrupt the plaintiff's case. Willful destruction of evidence requires more than mere negligence; it contemplates an intentional wrongful act that is premeditated and done with malicious intent.[88]

The defendant cites to the case of *Cunningham v. Thacker Serv., Inc.* (Nov. 13, 2003), 10th Dist. No. 03AP-455, 2003-Ohio-455, in which the plaintiff fell while traversing a handicapped-access ramp at a convenience store.[89] I n April 1996, counsel for Cunningham sent a letter to the defendants advising them of Cunningham's injuries and informing them that a claim for damages would be filed.[90] I n April 1997, the ramp on which the plaintiff fell was removed and replaced with a new ramp "in an effort by Shell Oil Company to improve handicapped access at its local stations."[91] The trial court held that "the passage of time between the notice provided to appellees of appellants' claim and the destruction of the ramp, combined with the indication that the destruction occurred as part of a district-wide effort to improve ramps, refuted that the destruction of the ramp was willful or designed to disrupt appellants' case."[92] However, the appellate

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[87] *Maytock v. Moore* (Sept. 1, 2000),6th Dist. No. L-00-1077, 2000 WL 1232417, *3, citing, *Drawl v. Cornicelli*, 124 Ohio App.3d 562, 567, 706 N.E.2d 849 (Ohio App. 11th Dist., 1997).
[88] *Meluch v. O'Brien* (Dec. 13, 2007), 8th Dist. Nos. 89008 and 89626, 2007-Ohio-6633, ¶¶ 25-26, quoting, *White v. Ford Motor Co.*, 142 Ohio App.3d 384, 387-388, 755 N.E.2d 954 (Ohio App. 10th Dist., 2001); citing, *Cornicelli*, supra.
[89] *Cunningham v. Thacker Serv., Inc.* (Nov. 13, 2003), 10th Dist. No. 03AP-455, 2003-Ohio-455*, a*t ¶ 2.
[90] Id. at ¶ 11.
[91] Id.
[92] Id.

court did not reach the merits of this issue because it determined that there was no evidence that it was the construction of the ramp that caused the fall; instead, it was the snowy conditions which caused the fall, making the removal of the ramp irrelevant to the plaintiff's case.[93]

In *Abbott v. Marshalls of MA, Inc.* (March 15, 2007), 8th Dist. No. 87860, 2007-Ohio-1146, an employee of the defendant taped over surveillance footage of an alleged shoplifting incident which formed the basis of the plaintiff's claims.[94] The footage was taped over the day following the incident, despite the fact that it was against store policy to record over any such tape for thirty-one days and it was store policy to pull any video of an alleged shoplifting and retain that video for possible litigation purposes.[95] The court found that, in light of the importance of the videotape and the fact that the employee's action went against store policy, there was sufficient evidence that the defendant willfully recorded over the tape with the intent of disrupting the plaintiff's case.[96]

The facts of the *Abbott* case were such that there was sufficient evidence to make a reasonable inference that the destruction of the evidence at issue was done with the intent to disrupt the plaintiff's case. The evidence in the case at bar does not rise to that level, even taking all evidence in a light most favorable to the plaintiff as the non-moving party.

The plaintiff seeks to infer such wrongdoing from the fact that, in their initial depositions, the Best Buy employees identified the incorrect end cap as the one

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[93] Id. at ¶ 12.
[94] *Abbott* at ¶ 25.
[95] Id.
[96] Id.

involved in the plaintiff's fall. However, a reading of the depositions and the prior filings indicates that all parties involved, including plaintiff and/or her counsel, were under the impression that this was the correct end cap. For instance, during Brian Langenbahn's first deposition, counsel for the plaintiff states "[b]efore your deposition, we went out and looked at the area where Ms. Wittrock fell[,]" with no indication from plaintiff's counsel that there was any question as to the identity of the correct end cap.[97] The plaintiff would have known as well as a Best Buy employee where she fell, since she is the one who experienced the fall. The duty is on the plaintiff as much as it is any Best Buy employee to properly identify the end cap which she claims caused her fall. While the end cap was moved, the plaintiff could have recognized that the area in which she fell no longer contained an end cap (since it was moved back 16 feet), which should have prompted an inquiry by counsel. There is no evidence that the plaintiff at any time thought that the end cap discussed throughout the first year of the pendency of this case was the incorrect end cap or was not located where she remembered falling. Therefore, it appears that all parties involved, not merely the defendant's employees, were under the mistaken impression as to which end cap was allegedly involved in the plaintiff's fall. There is no reasonable inference of malice or providing intentional misleading information on the part of the Best Buy employees.

Furthermore, since all parties were confused as to the precise location of the plaintiff's fall, this provides the only reasonable explanation and inference as to why the Best Buy employees indicated that this end cap had not changed in any way because, in fact, this particular incorrect end cap was not moved during the remodeling project.

[97] Langenbahn (May 2011) Depo. at pg. 10.

Instead, it was the now correctly-identified end cap that was relocated during the transformation. Therefore, there is no reasonable inference to be made from the prior deposition answers of willful destruction as that term is defined in spoliation case law of the end cap in question.

Additionally, the end cap was moved as part of a store-wide "transformation" that was uniformly performed in Best Buy stores in this region as evidenced by the testimony of Brian Gesell. There is no evidence that this particular end cap was moved back from its original location in order to disrupt the plaintiff's case. Instead, the evidence demonstrates it was moved back to conform to a corporate-ordered store transformation of the layout of some of the store's display areas.

The court finds that there is no genuine issue of fact remaining as to the plaintiff's claim of spoliation of evidence and, consequently, summary judgment shall be granted on that claim.

The court would note for the record that it reached this conclusion without consideration of the deposition of David Johnson and the supplemental memorandum filed by the defendant on August 29, 2012. This deposition and memorandum were filed well out of time and were given no consideration by the court.

CONCLUSION

The defendant has failed to meet its burden of establishing that it is entitled to judgment as a matter of law on the issue of negligence. Therefore, the defendant's

motion for summary judgment is not well-taken and is hereby denied as to the plaintiff's negligence claim.

The defendant's motion for summary judgment is well-taken and is hereby granted as to the plaintiff's claim for spoliation of evidence.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 31stth day of August 2012 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride