[Cite as *Baker v. J.I.G.S. Invests., Inc.*, 2010-Ohio-5180.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DOLORES BAKER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2010-T-0045**
- vs -	:	
J.I.G.S. INVESTMENTS, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 3405.

Judgment: Affirmed.

Michael D. Harlan, Betras, Maruca, Kopp, Harshman & Bernard, L.L.C., 6630 Seville Drive, #1, P.O. Box 129, Canfield, OH 44406-0129 (For Plaintiffs-Appellants).

William M. Shackelford, The Cincinnati Insurance Company, 50 South Main Street, #615, Akron, OH 44308 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Dolores and Charles Baker, appeal from the February 26, 2010 judgment entry of the Trumbull County Court of Common Pleas, granting the motion for summary judgment of appellee, J.I.G.S. Investments, Inc.

{¶2} On August 27, 2007, Mrs. Baker arrived at 4308 Belmont Avenue, Liberty Township, Trumbull County, Ohio, a commercial building owned by appellee, to attend a doctor appointment. As Mrs. Baker walked outside toward the entrance, she fell on a dip in the sidewalk which formed a handicap access ramp. There are two yellow signs

at the entrance of the building that state, "WATCH YOUR STEP." As a result of the fall, Mrs. Baker suffered broken elbows, a sprained wrist, and a fractured ankle.

{¶3} On December 10, 2008, appellants filed a complaint against appellee and defendants Jaffer Nazim, M.D., John and Jane Doe No. 1, and John and Jane Doe No. 2, alleging personal injury due to a slip-and-fall which occurred on appellee's property.[1] Mr. Baker, Mrs. Baker's husband, also made a claim for loss of consortium. Appellee filed an answer on January 7, 2009.

{¶4} On January 13, 2010, appellee filed a motion for summary judgment pursuant to Civ.R. 56. Appellants filed a response on February 16, 2010.

{¶5} Pursuant to its February 26, 2010 judgment entry, the trial court granted appellee's motion for summary judgment. It is from that judgment that appellants filed a timely appeal, asserting the following assignments of error for our review:

{¶6} "[1.] IT WAS AN ERROR OF LAW AND AN ABUSE OF THE TRIAL COURT'S DISCRETION TO WEIGH THE EVIDENCE AND FIND THAT THE DIP IN THE SIDEWALK WAS NOT A HIDDEN DANGER.

{¶7} "[2.] IT WAS AN ERROR OF LAW AND AN ABUSE OF THE TRIAL COURT'S DISCRETION TO WEIGH THE EVIDENCE AND FIND THAT THE DIP IN THE SIDEWALK WAS AN OPEN AND OBVIOUS HAZARD."

{¶8} Preliminarily, we note that "[t]his court reviews de novo a trial court's order granting summary judgment." *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, at ¶8, citing *Hagood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-

1. Defendants are not named parties to the instant appeal.

Ohio-3363, at ¶13. "'A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.'" Id.

{¶9} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280, 296,] the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. 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 but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40.

{¶10} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff.* (Emphasis added.)" Id. at ¶41.

{¶11} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" Id. at ¶42. (Parallel citations omitted.)

{¶12} In their first assignment of error, appellants argue that the trial court erred by weighing the evidence and finding that the dip in the sidewalk was not a hidden danger.

{¶13} In their second assignment of error, appellants contend that the trial court erred by weighing the evidence and finding that the dip in the sidewalk was an open and obvious hazard.

{¶14} Because appellants' assignments of error are interrelated, we will address them together.

{¶15} In *Porter v. Cafaro Co.*, 11th Dist. No. 2008-T-0026, 2008-Ohio-5533, at ¶18-25, this court indicated the following:

{¶16} "This court stated in *O'Brien v. Bob Evans Farms, Inc*., 11th Dist. No. 2003-T-0106, 2004-Ohio-6948 at ¶19-22:

{¶17} "'"To prevail on a claim for negligence the plaintiff must prove the following elements: (1) the existence of a duty owed by the defendant to the plaintiff, (2) the breach of duty, (3) causation, and (4) damages." *Erie Ins. Co. v. Cortright*, 11th Dist. No. 2002-A-0101, 2003-Ohio-6690, at ¶12.

{¶18} "'In *Estate of Mealy v. Sudheendra*, 11th Dist. No. 2003-T-0065, 2004-Ohio-3505, at ¶29-30, this court stated that:

{¶19} "'"(a) business owner owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition. *Jones v. H. & T. Enterprises* (1993), 88 Ohio App.3d 384, 388, ***, (***). (T)he extent of (a business owner's) duty (is) to keep their premises in a reasonably safe condition and to warn (invitees) about any hidden dangers of which he had or should have had knowledge. See, e.g., *Robinson v. Martin Chevrolet, Inc*. (May 28, 1999), 11th Dist. No. 98-T-0070, 1999 Ohio App. LEXIS 2466, at *4-5.

{¶20} "'"Moreover, the mere fact that a party slipped and fell, of itself, is insufficient to create an inference that premises are unsafe or to establish negligence, there must be evidence showing that some negligent act or omission caused the plaintiff to slip and fall. *Green v. Castronova* (1966), 9 Ohio App.2d 156, 162, *** (***). Put differently, negligence will not be presumed and cannot be inferred from the mere fact that an accident occurred. *Beair* (*v. KFC National Management Co*. (Mar. 23, 2004), 10th Dist. No. 03AP-487, 2004-Ohio-1410)." (Parallel citations omitted.)

{¶21} "This court stated in *Hudspath*, supra, at ¶18-19:

{¶22} "'The duty of reasonable care a premises-owner generally owes its invitees ceases to exist where dangers or obstructions are so obvious that the invitee may reasonably be expected to discover them and protect herself against them. *Armstrong v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 80, 2003-Ohio-2573, *** (***). This principle is based upon the legal acknowledgement that one is put on notice of a hazard by virtue of its open and obvious character. Id. Where a danger is obvious, an owner may reasonably expect that persons entering the premises will discover those hazards and take proper measures to protect themselves. When applicable, the open and obvious doctrine abrogates the duty to warn and completely precludes negligence claims. *Hobart v. City of Newton Falls*, 11th Dist. No. 2002-T-0122, 2003-Ohio-5004, ¶10.

{¶23} "'However, the question of whether something is open and obvious cannot always be decided as a matter of law simply because it may have been visible. *Collins v. McDonald's Corp*., 8th Dist. No. 83282, 2004-Ohio-4074, at ¶12, citing *Texler v. D. O. Summers Cleaners & Shirt Laundry Co*., 81 Ohio St.3d 677, *** (***). Rather, the "attendant circumstances" of a slip and fall may create a material issue of fact as to whether the danger was open and obvious. *Louderback v. McDonald's Restaurant*, 4th Dist. No. 04CA2981, 2005-Ohio-3926, at ¶19. Attendant circumstances include any distraction that would divert the attention of a pedestrian in the same circumstances and thereby reduce the amount of care an ordinary person would exercise. *McGuire v. Sears, Roebuck and Co*. (1996), 118 Ohio App.3d 494, 499, *** (***). In short, attendant circumstances are all facts relating to a situation such as time, place, surroundings, and other conditions that would unreasonably increase the typical risk of

a harmful result of an event. See *Menke v. Beerman* (Mar. 9, 1998), 12th Dist. No. CA97-09-182, 1998 Ohio App. LEXIS 868, at 2-3, citing *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319, ***, (***).' (Parallel citations omitted.)" (Parallel citations omitted.)

{¶24} In the case at bar, appellee owed Mrs. Baker, an invitee, a duty of ordinary care to maintain the premises in a reasonably safe condition so that she would not be unnecessarily and unreasonably exposed to danger. By no means is appellee, as a property owner, an insurer of an invitee's safety.

{¶25} At the entrance to appellee's building, two bright yellow signs with black lettering clearly state, "WATCH YOUR STEP." According to Mrs. Baker's deposition, she indicated that nothing blocked her view of the condition of the sidewalk and that she simply did not see the dip. Also, the photographs in the record clearly establish the slope in the sidewalk as well as the unobstructed caution signs. Thus, no hidden danger existed. Given the open and obvious nature of the dip in the sidewalk which formed a handicap access ramp, appellee had no duty to warn Mrs. Baker, beyond the posted caution signs, of any "danger."

{¶26} When viewing the evidence in a light most favorable to Mrs. Baker, the trial court properly determined that reasonable minds could only conclude that appellee did not violate any duty as the condition of the sidewalk was open and obvious and did not constitute a hazard. Thus, the trial court properly granted appellee's motion for summary judgment.

{¶27} In addition, we note that since Mrs. Baker's causes of action failed to survive appellee's motion for summary judgment, Mr. Baker's cause of action for loss of consortium must also fail, as "[t]he derivative cause of action for loss of consortium

cannot provide greater relief than the relief permitted for the primary cause of action." *Lynn v. Allied Corp.* (1987), 41 Ohio App.3d 392, 402, citing *Messmore v*. *Monarch Machine Tool Co*. (1983), 11 Ohio App.3d 67.

{¶28} Appellants' first and second assignments of error are without merit.

{¶29} For the foregoing reasons, appellants' assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed. It is ordered that appellants are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.