[Cite as *Hughes v. Forsyth-Moto, Inc.*, 2010-Ohio-1078.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

CARL E. HUGHES, et al.,	:	
Plaintiffs-Appellants,	:	Case No. 09CA3118
vs.	:	
FORSYTH-MOTO, INC., et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

COUNSEL FOR APPELLANTS: Thomas M. Spetnagel and Paige J. McMahon, 42 East Fifth Street, Chillicothe, Ohio 45601

COUNSEL FOR APPELLEES: Michael L. Close, Jay B. Eggspuehler, and Dale D. Cook, 300 Spruce Street, Floor One, Columbus, Ohio 43215

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-16-10

ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court summary judgment in favor of Forsyth-Moto, Inc., and FKG Oil Company, defendants below and appellees herein.

{¶ 2} Carl E. Hughes and Linda S. Hughes, plaintiffs below and appellants herein, raise the following assignment of error for review:

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES."

{¶ 3} On July 6, 2006, Mr. Hughes suffered injuries when his foot slipped on a spot of "Oil Dry" on the pavement at the Moto-Mart gas station. Moto-Mart employees had placed the Oil Dry on top of an oil spill that had occurred at the gas station near pumps seven and eight. The parties dispute whether Moto-Mart employees properly cleaned up the Oil Dry substance.

{¶ 4} On May 22, 2009, appellants filed a complaint and alleged that Mr. Hughes suffered physical injuries as a result of appellees' negligence in failing to maintain its premises in a reasonably safe condition and that appellees allowed a nuisance to exist. Appellants further asserted a loss of consortium claim.

{¶ 5} Appellees subsequently filed a summary judgment motion and argued that no genuine issue of material fact remained as to their liability. They asserted that the Oil Dry presented an open and obvious condition for which it owed no duty to Mr. Hughes.

{¶ 6} After considering the submitted materials, the trial court granted appellees summary judgment. This appeal followed.

{¶ 7} In their sole assignment of error, appellants contend that the trial court erroneously entered summary judgment in appellees' favor. Specifically, they assert that the Oil Dry and oil spill was not an open and obvious danger. They argue that appellees created an unreasonable danger by placing "Oil Dry" on the spill, and then neglected to sweep up the residue.

A

SUMMARY JUDGMENT STANDARD

{¶ 8} Initially, we note that appellate courts conduct a de novo review of trial court summary judgment decisions. See, e.g., Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. See Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786. Thus, to determine whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

{¶ 9} Civ. R. 56(C) provides, in relevant part, as follows:

> * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶ 10} Thus, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (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) reasonable minds can come to but one conclusion, and after 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. See,

e.g., Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

B

NEGLIGENCE

{¶ 11} A successful negligence action requires a plaintiff to establish that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. See, e.g., Texler v. D.O. Summers Cleaners (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 217; Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614; Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. If a defendant points to evidence to illustrate that the plaintiff will be unable to prove any one of the foregoing elements, and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to judgment as a matter of law. See Lang v. Holly Hill Motel, Inc., Jackson 06CA18, 2007-Ohio-3898, at ¶19, affirmed, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120.

{¶ 12} The existence of a defendant's duty is a threshold question in a negligence case. See Armstrong, at ¶13. In a premises liability case, the relationship between the owner or occupier of the premises and the injured party determines the duty owed. See, e.g., Gladon v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287; Shump v. First Continental-Robinwood Assocs. (1994), 71 Ohio St.3d 414, 417, 644 N.E.2d 291. In the case at bar, the parties do not dispute that Mr. Hughes was a business invitee.

{¶ 13} A premises owner or occupier possesses the duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that business invitees

will not unreasonably or unnecessarily be exposed to danger. Paschal v. Rite Aid Pharmacy, Inc. (1985), 18 Ohio St.3d 203, 203, 480 N.E.2d 474. A premises owner or occupier is not, however, an insurer of its invitees' safety. See id. While the premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers, see Jackson v. Kings Island (1979), 58 Ohio St.2d 357, 358, 390 N.E.2d 810, invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. See Brinkman v. Ross (1993), 68 Ohio St.3d 82, 84, 623 N.E.2d 1175; Sidle v. Humphrey (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus.

{¶ 14} Therefore, when a danger is open and obvious, a premises owner owes no duty of care to individuals lawfully on the premises. See Armstrong, at ¶5; Sidle, paragraph one of the syllabus. By focusing on duty, "the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it." Armstrong at ¶13. The underlying rationale is that "the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." Id. at ¶5. "The fact that a plaintiff was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff." Id. at ¶13. Thus, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to recovery. Id. at ¶5. Furthermore, the issue of whether a hazard is open and obvious may be decided as a matter of law when no factual issues

are disputed. Nageotte v. Cafaro Co., 160 Ohio App.3d 702, 710, 2005-Ohio 2098, 828 N.E.2d 683, at ¶28, citing Armstrong.

{¶ 15} In Anaple v. Standard Oil Co. (1955), 162 Ohio St. 537, 124 N.E.2d 128, the Ohio Supreme Court held that a plaintiff injured by an oil spill who seeks to recover against the owner of a gasoline service station must prove:

> "1. That the nature, size, extent and location of such grease spot involved a potential hazard to customers, sufficient to justify a reasonable conclusion that the duty of ordinary care, which the operator of such service station owes to his customers, would require such operator to prevent or remove such a grease spot or to warn his customers about it, and
>
> 2. (a) That such sufficient potential hazard was created by some negligent act of the operator of the service station or his employees, or
>
> (b) That such operator or his employees had, or should in the exercise of ordinary care have had, notice of that potential hazard for a sufficient time to enable them in the exercise of ordinary care to remove it or to warn customers about it."

Id., at paragraph one of the syllabus. Following Anaple, and applying the open and obvious doctrine, "courts generally have been unwilling to attach liability for conspicuous oil spills located in an area of the premises where a patron would reasonably expect to encounter them." Pokrivnak v. Par Mar Oil Co. (Nov. 6, 2000), Washington App. No. 99CA31. "Liability usually becomes an issue when an oil spill is in an 'unusual' place where an individual would not expect to encounter such a spill." Id. Thus, if the nature, size, and location of the oil is such that it is an open and obvious hazard, then the plaintiff is precluded from proving the first element of Anaple.

{¶ 16} For example, issues of fact have precluded summary judgment when a customer slipped and fell on oil accumulated in an area designated as a walkway. Diehlman v. Braunfels (Aug. 1, 1997), Lucas App. No. L-96-357, distinguishing Parras

v. Standard Oil Co. (1953), 160 Ohio St. 315, 116 N.E.2d 300 (holding that "it is a matter of common knowledge that motor vehicles leak or drop oil or grease, both in travel and while parked"); see, also, Collins v. Emro Marketing Co. (May 11, 1999), Franklin App. No. 98AP-1014 (finding that area upon which the plaintiff fell "resembled a sidewalk or cashier area, where a customer would not expect oil to accumulate"); Condorodis v. Allright Cincinnati, Inc. (Aug. 23, 1995), Hamilton App. No. C-940882 (stating that although oil on parking garage floor was open and obvious, "[t]here may well be instances where oil is not open and obvious, as in unlit areas, hidden slippery spots, or areas without vehicle traffic").

{¶ 17} In the case at bar, we do not believe any genuine issues of material fact exist as to whether the Oil Dry and oil spill constituted an open and obvious condition. The photographic evidence demonstrates that the oil spill had occurred in an area open to vehicular traffic, and close enough to the gasoline pumps that a patron should reasonably expect that an oil or gas spill may be present. Additionally, appellees' employees had not placed anything to obstruct Mr. Hughes' view of the spill, and the spill was large enough (approximately two feet) for Mr. Hughes to have seen it. Additionally, even if Mr. Hughes acted reasonably, the focus of the open and obvious condition doctrine is not based upon a plaintiff's conduct. "Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff." Armstrong, 99 Ohio St.3d at 82. We also note that Mr. Hughes admitted that it is not uncommon to encounter oil spills at gas stations, and that he is familiar with Oil Dry, even though he had not seen it used at this particular gas station before his injury. We agree with the trial court's conclusion that the evidence

shows that had Mr. Hughes looked, the Oil Dry would have been fully visible, regardless of whether he knew that this gas station used it. Consequently, no genuine issue of material fact remains to be litigated at trial as to whether the Oil Dry and oil spill constitute and open and obvious condition and, thus, as to whether appellees owed Mr. Hughes a duty. Because appellants cannot establish a negligence claim against appellees, their qualified nuisance and loss of consortium claims also fail. The trial court did not, therefore, erroneously grant appellees summary judgment.

{¶ 18} Accordingly, based upon the foregoing reasons, we hereby overrule appellants' sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, P.J. & Kline, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.