[Cite as *Rayburn v. Delaware Cty. Agricultural Soc.*, 2015-Ohio-1903.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DOROTHY RAYBURN	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
DELAWARE COUNTY	:	Case No. 15 CAE 02 0016
AGRICULTURAL SOCIETY	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 13 CVC 10 0908
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 18, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
GEORGE R. ORYSHKEWYCH 6100 Oak Tree Boulevard Suite 200 Independence, OH 44131	PAUL-MICHAEL LA FAYETTE 300 East Broad Street Suite 350 Columbus, OH 43215

Farmer, J.

{¶1} On June 10, 2012, appellant, Dorothy Rayburn, fell on property owned by appellee, Delaware County Agricultural Society, and sustained serious injuries. Appellant apparently fell on "disintegrating concrete" where the sidewalk met the parking lot.

{¶2} On October 25, 2013, appellant filed a complaint against appellee, alleging negligence in maintaining the premises. On July 14, 2014, appellee filed a motion for summary judgment, arguing the open and obvious doctrine. By judgment entry filed February 5, 2015, the trial court agreed and granted the motion and dismissed the complaint.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL JUDGE ERRED, AS A MATTER OF LAW, BY GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFF/APPELLANT."

{¶5} Preliminarily, we note this case comes to us on the accelerated calendar. App.R. 11.1, which governs accelerated calendar cases, provides in pertinent part the following:

> **(E) Determination and judgment on appeal**
>
> The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason

> for the court's decision as to each error to be in brief and conclusionary form.
>
> The decision may be by judgment entry in which case it will not be published in any form.

{¶6} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Association,* 11 Ohio App.3d 158 (10th Dist.1983).

{¶7} This appeal shall be considered in accordance with the aforementioned rules.

I

{¶8} Appellant claims the trial court erred in granting summary judgment to appellee as "attendant circumstances" exist to negate the open and obvious doctrine. We disagree.

{¶9} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined 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) 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. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶10} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35 (1987).

{¶11} In order to establish a claim for negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately from the breach. *Feldman v. Howard,* 10 Ohio St.2d 189 (1967). The existence of a duty is a threshold question in a negligence case.

{¶12} Appellant was an invitee. As an invitee, appellee owed appellant the duty "of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc.,* 18 Ohio St.3d 203, 203 (1985). "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy Company, Inc.,* 99 Ohio St .3d 79, 2003-Ohio-2573, syllabus.

{¶13} In *Armstrong* at ¶ 5, the Supreme Court of Ohio discussed the open and obvious doctrine as follows:

The sole issue before this court concerns the viability of the open-and-obvious doctrine, which states that a premises-owner owes no duty to persons entering those premises regarding dangers that are open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 42 O.O.2d 96, 233 N.E.2d 589, paragraph one of the syllabus. The rationale underlying this doctrine 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." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644, 597 N.E.2d 504. A shopkeeper ordinarily owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 18 OBR 267, 480 N.E.2d 474; *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 12 O.O.3d 321, 390 N.E.2d 810. When applicable, however, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims.

{¶14} As the *Armstrong* court explained at ¶ 13:

By focusing on the duty prong of negligence, the rule properly considers the nature of the dangerous condition itself, as opposed to the

> nature of the plaintiff's conduct in encountering it. 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.

{¶15} "[T]he landowner's duty is not to be determined by questioning 'whether the [condition] could have been made perfect or foolproof. The issue is whether the conditions that did exist were open and obvious to any person exercising reasonable care and watching where she was going.' " *Jackson v. Pike County Board of Commissioners,* 4th Dist. Pike No. 10CA805, 2010-Ohio-4875, ¶ 18, quoting *Orens v. Ricardo's Restaurant,* 8th Dist. Cuyahoga No. 70403, 1996 WL 661024 (Nov. 14, 1996).

{¶16} Appellant argues although the disintegrating concrete might have been open and obvious, attendant circumstances exist to negate the open and obvious doctrine. As explained by our brethren from the Twelfth District in *Vanderbilt v. Pier 27, LLC,* 12th Dist. Butler No. CA2013-02-029, ¶ 19:

> Attendant circumstances are an exception to the open and obvious doctrine. *Colvin v. Kroger Co., Inc.,* 12th Dist. Madison No. CA2005-07-026, 2006-Ohio-1151, 2006 WL 589381, ¶ 15; *McGuire v. Sears, Roebuck & Co.,* 118 Ohio App.3d 494, 498, 693 N.E.2d 807 (1st Dist.1998). Attendant circumstances are "distractions that contribute to an injury by diverting the attention of the injured party and reduce the degree of care

an ordinary person would exercise at the time." *Galinari v. Koop,* 12th Dist. Clermont No. CA2006–10–086, 2007-Ohio-4540, 2007 WL 2482673, ¶ 21; *Armentrout v. Meyer's Garden Ctr. & Landscaping, Inc.,* 12th Dist. Butler No. CA2004-12-315, 2005-Ohio-5901, 2005 WL 2936698, ¶ 11. In turn, for this exception to apply, "[a]n attendant circumstance must divert the attention of the injured party, significantly enhance the danger of the defect, and contribute to the injury." *Forste v. Oakview Constr., Inc.,* 12th Dist. Warren No. CA2009-05-054, 2009-Ohio-5516, 2009 WL 3350450, ¶ 22; *Isaacs v. Meijer,* Inc., 12th Dist. Clermont No. CA2005-10-098, 2006-Ohio-1439, 2006 WL 766692, ¶ 16. Attendant circumstances may include such things as the time of day, lack of familiarity with the route taken, and lighting conditions. *Hart v. Dockside Townhomes, Ltd.,* 12th Dist. Butler No. CA2000-11-222, 2001 WL 649763, *2 (June 11, 2001).

{¶17} Therefore, the narrow issue raised in this appeal is whether there were distractions that diverted appellant's attention and reduced "the degree of care an ordinary person would exercise at the time," thereby significantly enhancing the danger of the defect. Appellant argues facts exist to establish such a distraction. Appellant suggests that because others were exiting the facility and proceeding in the same direction as she, her attention was diverted causing a significant enhancement of the dangerous defect in the disintegrating sidewalk.

{¶18} In her disposition, appellant explained she attended a graduation party at a log cabin on premises owned by appellee. Rayburn depo. at 15, 20. Upon leaving

the party, appellant's son and daughter went to retrieve the car and she was walking with a group of people when she stepped off the curb she hadn't seen and fell between two parked cars. *Id.* at 26-29. Appellant guessed that she didn't see the curb because of all the people around her. *Id*. at 28. Appellant stated there were "so many people there, I didn't see the sidewalk." *Id.* at 19. When she fell, she did not fall into anyone as no one was close enough to her. *Id.* at 28-29. No one was walking behind her. *Id.* at 31. Appellant did not look back to see what caused her to fall. *Id.* at 34. Appellant remembers that she did not see the sidewalk or the curb. *Id.* at 36. She admitted "as you sit here today, you can't say exactly what you tripped over or what caused you to fall." *Id.* at 37. Appellant identified Exhibits A and B as photographs depicting the area of her fall. *Id.* at 20. At the time of the fall, appellant was seventy-four years old and did not need assistance to "get around." *Id.* at 8, 23.

{¶19} A witness and family friend, Joyce Phillips, exited the log cabin and was behind appellant when she fell. Phillips depo. at 22. Appellant "stepped on the curb, and it gave way and she fell." *Id.* Ms. Phillips was "right behind her," but "couldn't grab her, you know, because she had already gone down." *Id.* at 23. Appellant was stepping off the curb to walk between two parked vehicles to get to the parking lot. *Id.* at 24. Ms. Phillips did not know which vehicle appellant fell against because after appellant fell, "I was running up to her." *Id.* at 25. When asked if anyone was walking directly in front of appellant, Ms. Phillips stated "[t]here were people all around." *Id.* at 22. Appellant did not land into anyone in front of her when she fell. *Id.* at 26. Ms. Phillips did not know if there was anyone in front of appellant when she fell "because I was trying to assist her." *Id.*

{¶20} In its judgment entry filed February 5, 2015, the trial court found attendant circumstances did not exist, citing in support, *Vanderbilt, supra,* wherein the court at ¶ 20 determined "the presence of a crowd of people does not constitute an attendant circumstance."

{¶21} We find the trial court correctly relied on the *Vanderbilt* decision. In the case sub judice, as in *Vanderbilt* , there is no evidence to establish that the numerous people in the area distracted appellant to the point of reducing "the degree of care an ordinary person would exercise at the time." In fact, appellant set off on her own course to walk between two parked cars and fell because she did not see the curb. She did not say that anyone was in front of her to conceal the curb/sidewalk or divert her attention away from the curb/sidewalk. A family friend who was behind her also could not say that anyone was in front of appellant.

{¶22} Upon review, we find the trial court did not err in determining that attendant circumstances did not exist and did not err in granting summary judgment to appellee.

{¶23} The sole assignment of error is denied.

{¶24} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

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