[Cite as *Alvarado v. Cinemark USA, Inc.*, 2003-Ohio-881.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81702

ALLEN W. ALVARADO,	:	
	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
	:	
v.	:	AND
	:	
CINEMARK USA, INC. ET AL.,	:	OPINION
	:	
Defendants-Appellees	:	
	:	

DATE OF ANNOUNCEMENT
OF DECISION: FEBRUARY 27, 2003

CHARACTER OF PROCEEDING: Civil Appeal from
Common Pleas Court,
Case No. CV-448626.

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION:

APPEARANCES:

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TIMOTHY E. McMONAGLE, J.:

{¶1} Plaintiff-appellant, Allen W. Alvarado, appeals the decision of the Cuyahoga County Common Pleas Court granting the motion for summary judgment filed by defendant-appellee, Cinemark USA, Inc. ("Cinemark"), on appellant's complaint for negligence. For the reasons that follow, we affirm.

{¶2} The record reveals that appellant went to see a movie on the evening of May 2, 2000 at a theater owned by Cinemark. While walking from the movie theater, he tripped over a curb and sustained injuries. Appellant subsequently brought suit against Cinemark and four unnamed defendants alleging that they were negligent in maintaining the premises and that this negligence caused the injuries he sustained.

{¶3} Cinemark moved for summary judgment, supporting its motion with appellant's deposition testimony as well as affidavits of current or former employees of Cinemark. Succinctly, Cinemark argued that it was entitled to summary judgment because (1) the curb was open and obvious thereby negating any duty owed to appellant; and (2) any duty of reasonable care was not breached because Cinemark had no prior knowledge of any defect in its sidewalk. Appellant opposed the motion, arguing that summary judgment is inappropriate based on this court's opinion in *Schindler v. Gales Superior Supermarket* (2001), 142 Ohio App.3d 146. The trial court ultimately granted Cinemark's motion.

{¶4} Appellant is now before this court and in his sole assignment of error argues that genuine issues of material fact

exist as to whether Cinemark is responsible for the injuries he sustained.

{¶5} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, citing *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, paragraph three of the syllabus; see, also, Civ.R. 56(C).

{¶6} In order to defeat a motion for summary judgment on a negligence claim, a plaintiff must establish that a genuine issue of material fact remains as to whether (1) a defendant owed a duty of care; (2) the defendant breached this duty; and (3) the breach was the proximate cause of plaintiff's injury causing damage. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142; *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75.

{¶7} An owner or occupier of property owes a duty of ordinary care to invitees to maintain the premises in a reasonably safe condition so that an invitee is not unreasonably or unnecessarily exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc,* (1985), 18 Ohio St.3d 203. While a premises owner is not an insurer of its

invitees' safety, 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. *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 358. Invitees likewise have a duty in that they 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; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. Whether a duty exists is a question of law for the court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

{¶8} In its motion for summary judgment, Cinemark argued that it owed no duty to appellant because the curb was "open and obvious." Under the open and obvious doctrine, an owner or occupier of property owes no duty to warn invitees of hazardous conditions that are open and obvious. *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644. The rationale behind 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*, 64 Ohio St.3d at 644.

{¶9} As stated by appellant, this court recently reviewed the open and obvious doctrine in *Schindler v. Gale's Supermarket, Inc.*, 142 Ohio App.3d 146 Determining that there needs to be some consistency in the manner with which the courts analyze and interpret premises liability cases, the *Schindler* court stated:

{¶10} "Because the *Texler* decision is the most recent pronouncement from the supreme court on this issue, its admonitions should not be lightly taken. Indeed, when analyzed in terms of the duty owed, I find the doctrine questionable because it rests on a legal fiction in that it relieves the premises owner of the duty to warn. See *Basar v. Steel Service Plus* (Apr. 27, 2000), Cuyahoga App. No. 77091, at 12 (McMonagle, J., concurring). To say that a claim is barred because the defendant owed the plaintiff no duty to warn him of the danger is to disregard an express duty on the part of the premises owner to maintain the premises in a reasonably safe condition. Id. at 22. With this in mind, this court is of the opinion that the time has come to analyze the openness and obviousness of a hazard not in terms of the duty owed but rather in terms of causation." Id. at 153.

{¶11} The *Schindler* court thereafter concluded this analysis necessitated the application of comparative negligence principles and, as such, summary judgment would be appropriate if compelling evidence indicates that the only conclusion a reasonable trier of fact could reach is that the plaintiff was over fifty percent negligent. Id. at 154; see, also, *Klauss v. Marc Glassman, Inc.*, Cuyahoga App. No. 80741, 2003-Ohio-157; *Lozitsky v. Heritage* Cos., Cuyahoga App. No. 79103, 2002-Ohio-500; *Bellili v. Goldberg Cos.* (Aug. 16, 2001), Cuyahoga App. No. 79061, 2001 Ohio App. Lexis 3601; *Arsham v. Cheung-Thi Corp.* (May 31, 2001), Cuyahoga App. No. 78280, 2001 Ohio App. Lexis 2444; cf. *Bullucks v. Moore*, 1st Dist. No. C-020187, 2002-Ohio-7332; *Bumgardner v. Wal-Mart Stores, Inc.*,

2nd Dist. No. 2002-CA-11, 2002-Ohio-6856; *Akers v. Lenox Inn*, 5th Dist. No. 01CA59, 2002-Ohio-4052.

{¶12} We find such compelling evidence in this case. Appellant testified in deposition that he fell over a curb separating the sidewalk from the parking area adjacent to the Cinemark theater. There was no evidence to suggest that the curb, or the area immediately surrounding it, was defective in any way. Nor was there any evidence to suggest that the curb was in disrepair or otherwise poorly maintained or constructed. On the contrary, appellant testified that he did not see the curb because the parking area was poorly illuminated. A business owner, however, is under no duty to provide an illuminated parking area. *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, paragraph one of the syllabus; see, also, *Mowery v. Shoaf*, 148 Ohio App.3d 403, 2002-Ohio-3006, at ¶33. "Darkness is always a warning of danger, and for one's own protection, it may not be disregarded." *Jeswald v. Hutt*, 15 Ohio St.2d at paragraph three of the syllabus. It was a curb, not unlike other curbs over which individuals such as appellant traverse on a daily basis. Without more, we are unwilling to say that a common and ordinary occurrence of everyday life creates an issue of fact precluding summary judgment. Reasonable minds, therefore, could only conclude that appellant's inability to undertake a common and ordinary task such as negotiating a curb enroute to an adjacent parking area was the proximate cause of his injury or, at the very least, that appellant's negligence was greater than that of Cinemark's.

Consequently, it was not error for the trial court to grant Cinemark's motion for summary judgment because there was no genuine issue of material fact on the issue of causation.

Judgment affirmed.

It is ordered that appellee recover of appellant 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 Cuyahoga County Common Pleas Court to carry this judgment into execution.

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

TIMOTHY E. McMONAGLE
JUDGE

PATRICIA A. BLACKMON, P.J., AND

JAMES J. SWEENEY, J., CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).