[Cite as *Brown v. Classic Ventures Food Div., Inc.*, 2005-Ohio-112.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 84656

MARTIN BROWN Plaintiff-Appellant vs. CLASSIC VENTURES FOOD DIVISION, INC. Defendant-Appellee	:	JOURNAL ENTRY AND OPINION
DATE OF ANNOUNCEMENT OF DECISION	:	January 13, 2005
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court Case No. CV-504078
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellant

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant Martin Brown ("Brown") appeals from the decision of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of appellee Classic Ventures Food Division, Inc., dba Arby's Restaurant ("Arby's"). For the reasons adduced below, we affirm.

{¶ 2} The following facts give rise to this appeal. On July 26, 2001, Brown was driving his vehicle on Mayfield Road in Mayfield Heights, Ohio. Brown made a right turn into the parking lot of Arby's. Upon entering the parking lot, Brown proceeded to drive over a concrete parking curb to the right of the entrance drive. His car got stuck on the curb.

{¶ 3} Brown stated in his deposition that he could not see the curb from the driver's seat in his car. Photos of the curb reflect that it separated a parking section of the lot from the entrance and exit drive. The curb appears as a concrete slab that extends the length of a parking space. The end of the slab has a six-foot section painted bright yellow. The slab appears to be about curb height but larger in width.

{¶ 4} Brown filed this action to recover for personal injuries he allegedly incurred. The complaint raises claims for negligence and violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12181.

{¶ 5} Arby's filed a motion for summary judgment that was granted by the trial court. The trial court found Arby's owed no duty of care to Brown because the condition was open and obvious and the ADA does not recognize a cause of action for monetary damages.

{¶ 6} Brown has appealed the trial court's decision, raising one assignment of error for our review which provides:

{¶ 7} "The trial court erred in granting defendant's motion for summary judgment because an issue of material fact existed as to the open and obvious nature of the obstruction in the parking lot of defendant's Arby's restaurant."

{¶ 8} This court reviews a trial court's grant of summary judgment de novo. *Ekstrom v. Cuyahoga County Comm. College*, 150 Ohio App.3d 169, 2002-Ohio-6228. Before summary judgment may be granted, a court must determine 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 the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Dussell v. Lakewood Police Department*, 99 Ohio St.3d 299, 300-301, 2003-Ohio-3652, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326.

{¶ 9} In this case, Brown argues there is a material issue of fact as to whether the curb was an open and obvious condition. Brown claims the nature of the condition was not open and obvious to motorists.

{¶ 10} The open and obvious doctrine states that an owner of a premises owes no duty to persons entering those premises regarding dangers that are open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. The Supreme Court of Ohio reaffirmed the open and obvious doctrine in *Armstrong v. Best Buy*, 99 Ohio St.3d 79, 2003-Ohio-2573. The open and obvious nature of the hazard itself serves as a warning. Id. at 80. 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., citing *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644, 1992-Ohio-42. When the open and obvious doctrine is applicable, it obviates the duty to warn and acts as a complete bar to recovery. *Armstrong*, 99 Ohio St.3d at 80.

{¶ 11} Open and obvious hazards are neither hidden or concealed from view nor nondiscoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51. "The determination of the existence and obviousness of a danger alleged to exist on a premises requires a review of the facts of the particular case."

Miller v. Beer Barrel Saloon (May 24, 1991), Ottawa App. No. 90-OT-050.

{¶ 12} In this case, the photographs of the Arby's parking lot show that the curb was long, brightly colored, and open to view. Numerous courts have found similar parking barriers and curbs to be open and obvious conditions. See *Stazione v. Lakefront Lines, Inc.*, Cuyahoga App. No. 83110, 2004-Ohio-141 (parking barrier, not unlike others encountered by individuals on a daily basis, was an open and obvious condition); *Sigler v. Paramount Parks, Inc.*, Warren App. No. CA2003-02-017, 2003-Ohio-5542 (four-inch, yellow-striped curb neither hidden nor concealed from view was open and obvious); *Johnson v. Golden Corral* (Sept. 12, 2000), Scioto App. No. 99CA2643 (concrete barrier in restaurant parking lot that was not hidden from view or concealed was open and obvious); *Mullins v. Darby Homes* (July 27, 1999), Franklin App. No. 98AP-1616 (concrete barriers commonly used in parking lots that were large and clearly visible were open and obvious). It is also recognized that "[e]ven an obstruction that sits low to the ground in an area frequented by customers may be open and obvious as a matter of law, so long as it is not concealed." *Johnson*, supra, citing *Pruitt v. Hayes* (Mar. 5, 1988), Lawrence App. No. 97CA14.

{¶ 13} Brown attempts to distinguish this case on the basis that he was driving in a vehicle, as opposed to traveling on foot. He argues that the curb was not open and obvious to a motorist.

More specifically, Brown asserts that his view of the curb was obstructed by his vehicle and that there was no sign or other visible warning to alert motorists of the danger. Brown also claims there is an issue of fact because other motorists have driven over this curb, as evidenced by scratches depicted in the photos and deposition testimony of the store manager.

{¶ 14} We do not find these arguments create a genuine issue of fact under the circumstances of this case. The photographs show no visible obstruction or concealment of the curb by anything in the parking lot. The view of the parking lot is unobstructed from the street. A vehicle needs to cross an apron and a sidewalk before entering the actual parking lot. The curb in question runs the length of a parking space, has a six-foot, brightly-painted yellow end and is to the right of the entranceway. The photographs reflect that the curb would have been plainly visible to motorists entering the parking lot from either direction.

{¶ 15} Although Brown argues that he did not see the six-foot yellow curb, the fact that a plaintiff or others may not have actually seen a danger that caused harm is insufficient to demonstrate that the hazard was latent rather than open and obvious. See *Sigler*, supra. A reasonable person can be expected to take note of an object obstructing his path that is of the dimensions of a common parking barrier. See *Mullins*, supra. Moreover, bright yellow curbs are common and ordinary occurrences

in parking lots that motorists, as well as pedestrians, should expect to encounter. The mere fact that a curb or other object may be obstructed from view once a vehicle is upon it does not in and of itself establish that the condition was not open and obvious.

{¶ 16} The photographs clearly show that the curb constituted an open and obvious condition that Brown should have been aware of, and he should have taken appropriate steps to protect himself. We conclude Brown's sole assignment of error is without merit.

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.

ANTHONY O. CALABRESE, JR., J., AND

JAMES D. SWEENEY, J.*, CONCUR.

SEAN C. GALLAGHER

PRESIDING JUDGE

*Sitting by assignment: Judge James D. Sweeney, retired, of the Eighth District Court of Appeals.

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).