[Cite as *O'Brien v. Cleveland Dept. of Port Control*, 2011-Ohio-1695.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95417

KELLIE O'BRIEN

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND DEPARTMENT OF PORT CONTROL, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT: AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-690455

BEFORE: E. Gallagher, J., Stewart, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: April 7, 2011

ATTORNEY FOR APPELLANT

Thomas J. Silk
Mark J. Obral & Associates
1370 Ontario Street, #1520
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEES

For Cleveland Department of Port Control

Thomas J. Connick
Dubyak Connick Thompson & Bloom, LLC
3401 Enterprise Pkwy.
Suite 205
Cleveland, Ohio 44122-7341

For Delta Industrial Services

William F. Scully Jr.
Williams, Moliterno & Scully Co., L.P.A.
2241 Pinnacle Parkway
Twinsburg, Ohio 44087

For Standard Parking Corporation

Steven D. Strang
Darlene E. White
Gallagher Sharp
6th Floor, Bulkley Bldg.
1501 Euclid Avenue
Cleveland, Ohio 44115

EILEEN A. GALLAGHER, J.:

{¶ 1} Kellie O'Brien ("O'Brien") appeals from the decision of the trial court granting the motions for summary judgment filed by defendants-appellees, City of Cleveland Department of Port Control ("City") and Standard Parking Corporation ("Standard Parking") (collectively referred to as the "defendants-appellees"). O'Brien argues the trial court erred in granting the motion for summary judgment as there existed genuine issues of material fact. For the following reasons, we affirm the decision of the trial court.

{¶ 2} On May 14, 2008, O'Brien drove to the Cleveland Hopkins International Airport ("airport") to pick up two friends, who were on a return flight from California. O'Brien parked on the second floor of the parking deck in the open air parking garage. As she walked from her car to the airport entrance, she was wearing tennis shoes and carrying a small purse. While walking at a normal pace and being attentive to her surroundings, she noticed what she described as a large puddle of water in front of the airport entrance from at least two feet away from her. At deposition, the following exchange was had:

> "Q. Earlier you testified that as you were walking towards the door you saw the puddle of water?
>
> "A. I was noticing my surroundings like a typical person walking, watching their steps. I was looking at the whole, everyone around me, where I was walking, things like that. And then at that time I did see it but I wasn't like, my eyes weren't glued at the floor on the puddle, I was more looking at the surrounding parts.

"Q. About how far apart from the puddle were you when you first noticed it?

"A. Probably two feet, two footsteps away when I was walking in."

{¶ 3} The puddle of water was clearly visible to O'Brien and nothing was obstructing or impeding her view of it as she walked towards the airport entrance. As she neared the door, O'Brien observed not only the puddle, but two men exiting through the doorway. O'Brien stopped, moved to her right side, and backed up to allow the men to exit the door with their luggage. O'Brien testified at deposition:

> "I was walking normal, watching where I'm going of course. When I was walking in two guys were walking out of the actual door that I was going in, they had their luggage, and so I moved, I stopped and I moved over to the right-hand side so they could come out first because they were coming out of the entrance and I was walking in the entrance. So I just assumed that that would be helpful for them."

{¶ 4} O'Brien stood next to the puddle of water that she had previously observed while she waited for the two men to pass through the door. O'Brien acknowledged that she knew she could slip and fall if she stepped into the puddle, so she tried to avoid it. Nonetheless, O'Brien changed her course of travel and walked through the puddle of water in which she slipped and fell, causing injury. O'Brien explained:

"Q. Why were you trying to avoid the puddle of water?

"A. So I wouldn't slip and fall or have any problems with having footprints.

"Q. So you realized that you could slip and fall in the puddle of water that you saw on the floor?

"A. Yes."

{¶ 5} O'Brien then described her fall as follows:

"Q. Now when you stepped with your right foot to go into the building after the gentlemen had passed you what happened?

"A. I walked in and then when I stepped probably maybe just one step, I slipped backwards and fell, went to the left and then that's when I turned like this to catch my fall and that's when I sprained my knee and my ankle.

"Q. What exactly, did you walk through the doors and slipped and fell or did you slip and fall before you got to the doors?

"A. Before I got into the doors."

{¶ 6} The two men that O'Brien observed earlier helped her to her feet and O'Brien proceeded into the airport where she reported the incident to a security officer. She walked back to the area to show the security officer where she had fallen then back into the airport to greet her friends. As she left the airport a second time, she showed her friends where she had fallen. O'Brien stated that she had no idea how the puddle of water was created, who created the puddle, how long it had been there, or whether anyone was aware of its existence before her fall.

{¶ 7} On April 4, 2009, O'Brien filed the instant action against the City, Standard Parking, and Delta Industrial Services, alleging personal injuries sustained when she slipped and fell in the puddle of water in the parking garage. O'Brien alleged that all defendants were negligent in failing to maintain the parking garage and negligent in failing to warn her of a condition that the defendants knew, or reasonably should have known, existed.

{¶ 8} In February 2010, the City, Standard Parking, and Delta Industrial Services filed their separate motions for summary judgment, asserting various defenses, including that O'Brien's injury resulted from an open and obvious condition. On April 30, 2010, O'Brien filed a combined brief in opposition, arguing, among other things, that attendant circumstances created a genuine issue of material fact concerning whether the condition was open and obvious. O'Brien attached to the brief in opposition an affidavit from herself and one from Lee Cekanski, an independent investigator, who testified as to the possible cause of the puddle. On that same day, O'Brien voluntarily dismissed Delta Industrial Services from the case.

{¶ 9} Both the City and Standard Parking each filed motions to strike O'Brien's attached affidavits, arguing that the affidavit of O'Brien directly contradicted her prior deposition testimony and that Lee Cekanski's statements were inadmissible as either lay or expert testimony. On June 16, 2010, the trial court denied the parties' motions to strike but granted the parties' motions for summary judgment in the following journal entry:

> "The Court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. Defendant Standard Parking Corporation['s] Motion for Summary Judgment is granted. Defendant City of Cleveland Department of Port Control['s] Motion for Summary Judgment is granted. Court costs assessed to the plaintiffs."

{¶ 10} O'Brien appeals, raising the following sole assignment of error: "[t]he Trial Court erred in granting summary judgment to the moving Defendants where several

compelling questions of fact were presented." We find O'Brien's assigned error to lack merit.

{¶ 11} We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. Id.; *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. Pursuant to Civ.R. 56, summary judgment is appropriate when: (1) no genuine issues as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the non-moving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

{¶ 12} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

{¶ 13} In order to establish an actionable claim for negligence, a plaintiff must

establish that (1) the defendant owed a duty to him, (2) the defendant breached that duty, (3) the defendant's breach of duty proximately caused his injury, and (4) he suffered damages. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 1998-Ohio-184, 697 N.E.2d 198.

{¶ 14} In the present case, O'Brien filed the instant premises liability claim against the City, the owner of the short-term parking lot, and Standard Parking, the lessor of the short-term parking lot. As the lessor, Standard Parking did not own the parking garage, but did provide managerial services for the property. Accordingly, while it is clear that O'Brien was a business invitee on the City's premises, it is not clear whether O'Brien was a business invitee of defendant Standard Parking. O'Brien provides no argument in support of her contention that she was a business invitee of Standard Parking. Nonetheless, even assuming that Standard Parking acted as a landowner, O'Brien's claims against both defendants-appellees fail as a matter of law.

{¶ 15} "A business owner owes a business invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition so that invitees are not subject to unreasonable dangers." *Frano v. Red Robin Internatl., Inc.*, 181 Ohio App.3d 13, 2009-Ohio-685, 907 N.E.2d 796, _18; *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474. "Although a business is not an insurer of its invitees' safety, it must warn them of latent or concealed dangers if it knows or has reason to know of the hidden dangers." *Frano*; at _18, citing *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 390

N.E.2d 810.

{¶ 16} "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." *Adelman v. Timman* (1997), 117 Ohio App.3d 544, 549, 690 N.E.2d 1332. A business has no duty to protect an invitee from dangers that are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589. "The rationale behind the [open and obvious] doctrine is that the open and obvious nature of the hazard itself serves as a warning." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504. The open and obvious doctrine concerns the first element of negligence, whether a duty exists. *Sidle*. Therefore, the open and obvious doctrine obviates any duty to warn of an obvious hazard and bars negligence claims for injuries related to the hazard. *Henry v. Dollar Gen. Store*, Greene App. No. 2002-CA-47, 2003-Ohio-206; *Hobart v. Newton Falls*, Trumbull App. No. 2002-T-0122, 2003-Ohio-5004. Where a hazard is open and obvious, a business owner owes no duty to an invitee, and it is unnecessary to consider the issues of breach and causation. *Frano; Ward v. Wal-Mart Stores Inc.*, Lake App. No. 2000-L-171, 2001-Ohio-4041.

{¶ 17} The Supreme Court of Ohio reaffirmed the viability of the open and obvious doctrine in *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d

1088. In *Armstrong*, the court held that the emphasis in analyzing open and obvious danger cases relates to the threshold issue of 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. Id. "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. Moreover, the open and obvious danger does not actually have to be observed by the plaintiff in order for it to be an open and obvious condition under the law. *Konet v. Mark Glassman, Inc.*, Lake App. No. 2004-L-151, 2005-Ohio-5280. The determinative issue is whether the condition was observable. Id.

{¶ 18} 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.*, Cuyahoga App. No. 83282, 2004-Ohio-4074, citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 1998-Ohio-602,693 N.E.2d 271. 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*, Scioto App. No. 04CA2981, 2005-Ohio-3926. 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 & Co.*

(1996), 118 Ohio App.3d 494, 693 N.E.2d 807. Stated otherwise, "[t]he attendant circumstances must, taken together, divert the attention of the pedestrian, significantly enhance the danger of the defect, and contribute to the fall." *Stockhauser v. Archdiocese of Cincinnati* (1994), 97 Ohio App.3d 29, 33, 646 N.E.2d 198. 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. *Frano*; see, also, *Menke v. Beerman* (Mar. 9, 1998), Butler App. No. CA97-09-182, citing *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319, 421 N.E.2d 1275.

{¶ 19} Here, the evidence is undisputed that O'Brien saw and was aware of the puddle in front of the entrance to the airport. O'Brien testified in her sworn deposition that what she described as a "large puddle of water" was clearly visible. O'Brien also admits that she observed her surroundings as she proceeded through the garage, that she observed the puddle from a distance of approximately two feet, and that she was well aware of the approach of the two men who were exiting the door. O'Brien likewise conceded that no obstruction impeded her view of the water; therefore, she had knowledge of the puddle's existence. Moreover, O'Brien not only knew the puddle existed, but she appreciated the risks of slipping and falling in the water if she walked through it prior to her actually walking through the puddle. As quoted above, O'Brien stated that she initially avoided the water so that she would not slip and fall. Nonetheless, O'Brien decided to walk through the water where she

slipped and fell, causing injury.

{¶ 20} Notwithstanding the foregoing, O'Brien attached her own affidavit to her joint brief in opposition to defendants-appellees' motions for summary judgment in which she attempts to distinguish her deposition testimony. Specifically, in her affidavit O'Brien states that she did not see the puddle until after she fell, that she did not appreciate the existence and potential danger of the puddle, and that the color of the water on concrete made it difficult to see. The Ohio Supreme Court addressed this very issue and determined that "an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment ***." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47.

{¶ 21} Based on the foregoing, we find that the puddle was an open and obvious condition, which O'Brien not only observed but appreciated. Additionally, O'Brien's self-serving affidavit does not create a fact issue concerning the open and obvious nature of the puddle.

{¶ 22} Next, O'Brien argues that the existence of attendant circumstances created a fact issue as to whether the puddle was open and obvious. O'Brien claims that the two men walking out of the airport door as she approached the puddle constituted an attendant circumstance. This argument is without merit.

{¶ 23} In support of her argument, O'Brien relies on the following cases, all of which involve attendant circumstances that included conditions that completely impeded the plaintiff's ability to see or diverted the plaintiff's attention away from the conditions at issue. See *Collins*; *Henry; Grossnickel v. Village of Germantown* (1965), 3 Ohio St.2d 96, 209 N.E.2d 442; and *Texler.* In particular, O'Brien relies heavily on this court's decision in *Collins*. However, unlike the facts in this case, the plaintiff in *Collins* never observed the alleged open and obvious condition prior to his injury. Specifically, Collins stated in his deposition that as he left the McDonald's restaurant, he held the door open for two women who were also leaving, he held a cup of coffee in his hand and was engaged in conversation with the two women. Collins then tripped on a hole on McDonald's property. Collins never saw the hole before he tripped.

{¶ 24} Additionally, O'Brien relies on the case of *Schmitt v. Duke Realty LP*, Franklin App. No. 04AP-251, 2005-Ohio-4245. In *Schmitt,* the Tenth Appellate District determined that the issue of whether a hazard is open and obvious may be a question for the jury to resolve before the court determines whether the landowner has a duty to the business invitee. Again, unlike the facts in the present case, the *Schmitt* court determined that genuine issues of material fact existed that precluded the grant of summary judgment. Specifically, in *Schmitt*, the court held that reasonable minds could differ as to whether the condition was open and obvious. (The alleged condition was a puddle of water located 15-20 feet away from the

door, and the court held that the water was so far away from the door that it could not be considered an open and obvious condition.)

{¶ 25} Accordingly, O'Brien's reliance on the above-cited cases is misplaced and factually distinguishable from the instant matter. The evidence in the present case does not support a finding of attendant circumstances. Rather, the evidence demonstrates that it was O'Brien's own disregard of the condition, after observing the puddle and appreciating the potential risk of falling if she walked through it, that resulted in her fall.

{¶ 26} In light of the foregoing analysis, we hold that the trial court did not err in granting the defendants-appellees' motions for summary judgment as no genuine issue of material fact existed concerning whether the puddle was an open and obvious condition. Accordingly, neither the City nor Standard Parking had a duty to warn O'Brien of the puddle's existence. *Frano; Armstrong*. This court's determination that the defendants-appellees owed no duty to O'Brien obviates any need to analyze the remaining elements of O'Brien's negligence claim.

{¶ 27} O'Brien's sole assignment of error is overruled.

{¶ 28} The judgment of the trial court is affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

EILEEN A. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR