[Cite as *Gehm v. Tri-Cty. Cars, Inc.*, 2010-Ohio-1080.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

GLORIA GEHM	C. A. No. 09CA009693
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
TRI-COUNTY, INC.	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 08CV159516

DECISION AND JOURNAL ENTRY

Dated: March 22, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellants, Gloria and Lewis Gehm (collectively "the Gehms"), appeal from the decision of the Lorain County Court of Common Pleas granting summary judgment in favor of Defendant-Appellees, Tri-County Cars, Inc. ("Tri-County Cars"). This Court affirms.

I

{¶2} On June 26, 2008, the Gehms went to Tri-County Cars, a local car dealership, in search of a car to replace the one they were currently driving. Based on the information they provided to the salesman, Joel Wilson, he suggested they test drive a used Kia which was within their price range and had low mileage. The Gehms agreed, and waited outside the dealership while Wilson went to locate the keys to the car. While waiting, Gloria walked from the paved portion of the dealership's lot to look at a car displayed in an unpaved, grassy area adjacent to the paved lot. When walking on the unpaved area, Gloria's left foot got caught in a divot in the

uneven ground and she fell, landing on her right arm. As a result of her fall, Gloria broke her right wrist, which required surgery, followed by therapy.

{¶3} On November 17, 2008, the Gehms filed a complaint alleging negligence and loss of consortium based on the injuries Gloria sustained from her fall. Tri-County Cars filed a motion for summary judgment, arguing that they had no duty to warn the Gehms about the condition of the ground because it was open and obvious. The Gehms opposed the motion, arguing that the condition was not open and obvious, and even if it was, that there were attendant circumstances which increased the risk of harm to Gloria when she encountered the uneven ground. The trial court granted Tri-County Cars' motion for summary judgment. The Gehms timely appealed and assert one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE TRI-COUNTY CARS, INC., AS THERE WERE GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER THE HAZARDOUS CONDITION OF THE FIELD WHERE THE CARS WERE PARKED FOR CUSTOMER INSPECTION WAS OPEN AND OBVIOUS."

{¶4} In their sole assignment of error, the Gehms allege that the trial court erred by not applying the totality of the circumstances approach adopted by this Court in *Marock v. Barberton Liedertafel*, 9th Dist. No. 23111, 2006-Ohio-5423. They assert that summary judgment was improper because, had the court applied the correct legal standard to their motion and considered the totality of the circumstances, there would remain genuine issues of material fact as to whether a reasonable person would have discovered the divots and uneven ground in the unpaved area where Tri-County Cars displayed its cars for sale. We disagree.

{¶5} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. It applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co*. (1983), 13 Ohio App.3d 7, 12. Summary judgment is proper under Civ.R. 56(C) if:

> "(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 the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support its motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293; Civ.R. 56(E).

{¶6} In order to prevail on a negligence claim, a plaintiff must show the existence of a duty, a breach of the duty, and an injury proximately resulting from the breach of duty. *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77. As a threshold matter, in order to defeat a defendant's motion for summary judgment in a negligence action, the plaintiff must identify that a duty was owed to them by the defendant. See, e.g., *Galo v. Carron Asphalt Paving, Inc.*, 9th Dist. No. 08CA009374, 2008-Ohio-5001, at ¶16.

{¶7} There is no question the Gehms were business invitees of Tri-County Cars. As such, Tri-County Cars owed the Gehms a duty of ordinary care to maintain the premises in a reasonably safe condition. Under the "open and obvious" doctrine, however, an owner owes no

duty to protect business invitees from hazards which are so obvious and apparent that the invitee is reasonably expected to discover them and protect himself against them. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. A business is not "an insurer of the customer's safety," nor is it duty-bound to protect its invitees from such readily apparent dangers. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 203. Consequently, "the open-and-obvious doctrine *** acts as a complete bar to any negligence claims" because it eliminates the duty to warn in such cases. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶5.

{¶8} This Court analyzes the totality of the circumstances to determine if the danger is open and obvious. *Marock* at ¶14. In doing so, we consider both the nature of the dangerous condition and any attendant circumstances that may have existed at the time of the injury. Id. We consider attendant circumstances to include "any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time." *Jenks v. Barberton*, 9th Dist. No. 22300, 2005-Ohio-995, at ¶16, quoting *France v. Parliament Park Townhomes* (Apr. 27, 1994), 2d Dist. No. 14264, at *2. "The attendant circumstances must, taken together, divert the attention of the pedestrian, significantly enhance the danger of the defect, and contribute to the fall. Both circumstances contributing to and those reducing the risk of the defect must be considered." (Internal citations omitted). *Stockhauser v. Archdiocese of Cincinnati* (1994), 97 Ohio App.3d 29, 33-34.

{¶9} In its motion for summary judgment, Tri-County Cars relied on the deposition testimony of Chad Mayer, the owner of Tri-County Cars, and Wilson, the sales representative who worked with the Gehms. Mayer testified that cars displayed in the unpaved area where Gloria fell were regularly moved on and off the grass because they were taken to be washed on a

daily basis. He admitted that driving the cars on and off the grass caused "ridges" to form in the grass, and noted that the ridges were most apparent when it rained.

{¶10} Wilson similarly asserted in his deposition that cars on the grass were shuffled periodically and left divots that were three to four inches wide, approximately the width of a car tire. He explained that the ground's condition was a result of the cars being constantly moved around while the ground was wet, in conjunction with the frequent use of a heavy tractor to mow the area. According to Wilson, both events led to significant ruts and divots surrounding the cars. Wilson described the unpaved display area as "very bumpy" with ruts and divots throughout. Wilson indicated that sales staff was aware of the conditions around the display cars because it was "kind of obvious" and noted that the area looked bumpy and uneven as you approached it.

{¶11} Tri-County Cars appended photographs of the area taken four days after Gloria's fall. The photographs revealed patchy ground cover in the area where Gloria fell, which was comprised primarily of weeds and dry patches of dirt and stones. The location where Gloria fell was consistent with the surrounding area, which was covered with a combination of weed and dirt patches. Based on the deposition testimony and the photographs of the area, Tri-County Cars sustained its initial burden of establishing that the uneven condition of the ground where Gloria fell was open and obvious.

{¶12} In response, the Gehms argued that that the numerous ruts and divots in the ground surrounding the area where Gloria fell "provided camouflage" for the divot that actually caused her fall. They alleged that it would have been easier for Gloria to notice a single hazard in a well maintained grassy area than a dangerous hazard in a poorly maintained area. The Gehms pointed to Gloria's deposition testimony that the divot which caused her fall was "a

couple inches deep," but was covered with grass. The Gehms assert that the grass impaired Gloria's visibility of the ground's dangerous condition. Additionally, the Gehms pointed to Wilson's testimony that he twisted his ankle a few times while walking in the unpaved display area, despite his knowledge that the area was filled with ruts and divots from the cars.

{¶13} The Gehms further alleged that, even if the condition was open and obvious, there were attendant circumstances which, when viewed in the totality of the circumstances, were sufficient to present a distraction which would reduce the degree of care an ordinary person would utilize when encountering the divots in the ground. Specifically, they asserted that: (1) Gloria was unaware of the condition of the ground and was unfamiliar with the dealership and its unpaved display lot; (2) Tri-County Cars had superior knowledge of the dangerous condition of the ground and failed to inform its customers; (3) Gloria was looking at a car, not the ground, while walking on the unpaved lot, which was precisely the response Tri-County Cars sought to elicit from its customers by parking cars in that area; (4) even if Gloria had not been looking at the display cars and had been looking at the ground the entire time, the "heavy grass" obscured her ability to see the divot; and (5) the ground was dry at the time of her fall, in light of Mayer's deposition testimony that the divots were most apparent when it rained.

{¶14} Upon our review of the record, we note that, in response to interrogatories asking her to describe the condition that caused her fall, Gloria described the unpaved lot as "more like a field with mostly dirt and a little grass." She also indicated that it was sunny outside on the day of her fall.

{¶15} When viewing the foregoing evidence in the light most favorable to the Gehms and considering the totality of the circumstances as they existed at the time of Gloria's fall, we conclude that the condition of the ground which caused Gloria's fall was open and obvious. The

photographs of the ground support Wilson's testimony that the entire display area was full of weeds and dirt patches. The readily apparent condition of the ground should have put Gloria on notice that the ground was not well cared for or manicured, a condition which was compounded by the numerous cars parked upon it. Gloria acknowledged that the area was "more like a field," implying it was different in appearance than a grass-covered yard would be. Consequently, the observable condition of the ground precludes this Court from imposing a duty to warn upon Tri-County Cars. See *Paschal*, 18 Ohio St.3d at 203. Additionally, Gloria's unfamiliarity with the dealership does not represent a circumstance which would make the uneven ground unreasonably dangerous. *Armstrong v. Meade*, 6th Dist. No. L-06-1322, 2007-Ohio-2820, at ¶16 (concluding that "[u]nfamiliarity would tend to increase, not decrease, the degree of care an ordinary person would exercise"). Despite Gloria's assertions that the divot was camouflaged by grass and was less apparent to her because the ground was dry, we conclude that a reasonable person in the same situation would have discovered the uneven and unmaintained ground condition and exercised a corresponding degree of care when approaching it. *Marock* at ¶14. Accordingly, Tri-County Cars had no duty to warn Gloria about the condition of the unpaved display lot because it was open and obvious. *Armstrong* at ¶5. Because the Gehms failed to satisfy their reciprocal *Dresher* burden of identifying a material dispute of fact, the trial court properly granted summary judgment in favor of Tri-County Cars.

III

{¶16} The Gehms' sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

MOORE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

STEPHEN S. VANEK, Attorneys at Law, for Appellants.

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