[Cite as *Furano v. Sunrise Inn of Warren, Inc.*, 2009-Ohio-3150.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JOSEPHINE FURANO, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-T-0132**
- vs -	:	
SUNRISE INN OF WARREN, INC., d.b.a. SUNRISE INN,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2006 CV 03057.

Judgment: Affirmed.

Thomas R. Wright, Rossi & Rossi, 26 Market Street, 8th Floor, P.O. Box 6045, Youngstown, OH 44501-6045 (For Plaintiffs-Appellants).

Randall M. Traub, Pelini, Campbell, Williams & Traub, L.L.C., Bretton Commons, #400, 8040 Cleveland Avenue, N.W., North Canton, OH 44720 (For Defendant-Appellee).

MARY JANE TRAPP, P.J.

{¶1} Josephine and Richard Furano appeal from the judgment of the Trumbull County Court of Common Pleas granting summary judgment in favor of Sunrise Inn of Warren, Inc., d.b.a. Sunrise Inn, in connection with an incident where Mrs. Furano tripped over a tire stop after exiting her vehicle in the parking lot of Sunrise Inn. For the following reasons, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} On November 27, 2004, Mrs. Furano, age sixty-seven, and her husband drove to Sunrise Inn for dinner. They arrived at the restaurant at 6:00 p.m. and pulled into a parking spot in its parking lot. Her husband normally came around to open the door for her. On this occasion, Mrs. Furano told her husband not to, because there was little room between their vehicle and a vehicle parked next to it. Describing the incident at her deposition, she stated: "So I got out, and I'm guiding along the car, and all of a sudden fell." She testified that she fell as her toe caught the cement embankment serving as the tire stop. She fell flat on her face and sustained injuries in her shoulders and left foot.

{¶4} The tire stop is approximately six feet long and five inches high. According to Mr. Furano's affidavit, the tire stop protruded between three to six inches from the passenger-side front tire, and was "almost completely blocked from view" by her own vehicle.

{¶5} Mrs. Furano testified at her deposition that although she and her husband had been to the restaurant 50 times, they never parked in that particular area of the parking lot. She could not remember the lighting conditions of the parking lot at the time. There was no evidence in the record indicating the tire stop was incorrectly placed or in a state of disrepair.

{¶6} The Furanos filed a complaint against Sunrise Inn for the injuries Mrs. Furano sustained from the fall. Sunrise Inn moved for summary judgment, which the trial court granted. The Furanos now appeal from that decision, assigning the following error for our review:

{¶7} "The trial court erred in granting appellee's motion for summary judgment in light of its conclusion that the tire stop was not insubstantial or open and obvious due to attendant circumstances."

{¶8} **Standard of Review**

{¶9} This court reviews de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id. citing *Parenti v. Goodyear Tire & Rubber Co*. (1990), 66 Ohio App.3d 826, 829.

{¶10} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no

evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶11} "In order to establish an actionable claim for negligence, the plaintiff must establish: (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." *Frano v. Red Robin Int'l., Inc*., 11th Dist. No. 2008-L-124, 2009-Ohio-685, ¶17, citing *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565; *Bond v. Mathias* (Mar. 17, 1995), 11th Dist. No. 94-T-5081, 1995 Ohio App. LEXIS 979, *6.

{¶12} "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.

{¶13} **The Open and Obvious Doctrine**

{¶14} Mrs. Furano was a business invitee on the premises of Sunrise Inn. "A shopkeeper owes business invitees a 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.* (1985), 18 Ohio St.3d 203, 203.

{¶15} "A shopkeeper is not, however, an insurer of the customer's safety." Id. "[U]nder the open and obvious doctrine, a business owner has no duty to warn or protect a business invitee against dangers which are known to the invitee or those which are so obvious that he or she may reasonably be expected to discover them." *Fink v. Gully Brook, Inc.*, 11th Dist. No. 2004-L-109, 2005-Ohio-6567, ¶12, citing *Abbott v. Sears, Roebuck & Co*., 11th Dist. No. 2003-T-0085, 2004-Ohio-5106, ¶19. "Rather, business invitees are expected to discover open and obvious dangers and take appropriate steps to protect themselves." *Fink* at ¶12, citing *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644. "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." *Fink* at ¶12, citing *Ward v. Wal-Mart Stores, Inc.* (Dec. 28, 2001), 11th Dist. No. 2000-L-171, 2001 Ohio App. LEXIS 6006, *5.

{¶16} "The rationale behind the [open and obvious] doctrine is that the open and obvious nature of the hazard itself serves as a warning." *Frano* at ¶19, quoting *Simmers* at 644. "The open and obvious doctrine concerns the first element of negligence, whether a duty exists. 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." *Frano* at ¶19 (citations omitted).

{¶17} As this court noted recently in *Frano*, 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 and held that the emphasis in analyzing open and obvious danger cases relates to the threshold issue of duty. *Frano* at ¶20. "[T]he 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." Id., quoting *Armstrong* at ¶82.

{¶18} A tire stop, in order to perform its inherent function of preventing a vehicle from traveling further, is necessarily elevated from the ground. The hazard presented by a tire stop, however, is so open and obvious that anyone exiting a vehicle which has just pulled into a parking spot fronted by a tire stop is reasonably expected to take precautions and negotiate his or her steps around the elevation.

{¶19} In this case, there is no allegation by Mrs. Furano that the particular tire stop she tripped over was defectively placed or poorly maintained. The tire stop is located exactly where it should be and appears to have existed in the same condition it always has. Furthermore, Mrs. Furano had been to the restaurant 50 times prior to the incident, and therefore, is reasonably expected to be aware of the existence of the tire stops in the parking lot, even though she had not parked in that particular spot before.

{¶20} Under these facts, the open and obvious doctrine obviates any duty by Sunrise Inn to warn Mrs. Furano of the obvious hazard presented by the tire stop or to take any action to protect her from the hazard. There is no genuine issue of material fact regarding Sunrise Inn's duty to Mrs. Furano as to the existence of the tire stop, and it is therefore unnecessary to consider the issues of breach and causation in this case. The trial court properly granted summary judgment in favor of Sunrise Inn.

{¶21} **The Attendant Circumstances Doctrine is Inapplicable**

{¶22} The Furanos argue an issue of fact is created in this case under the doctrine of attendant circumstances. They allege that the tire stop was almost completely obscured by their own vehicle, protruding only three to six inches from the passenger-side front tire, and that there was little room between their vehicle and the next vehicle for Mrs. Furano to negotiate her steps. They argue these conditions constituted attendant circumstances which create an issue of fact regarding "whether, while negotiating within the close quarters and proceeding only a few feet, there was a reasonable opportunity for [her] to discover the almost completely obscured tire stop."

{¶23} We are aware that in Ohio the courts have created the doctrine of attendant circumstances, which negate the open and obvious rule under certain circumstances. Under this doctrine, "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." *Hudspath v. Cafaro,* 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, ¶19, citing *Collins v. McDonald's Corp.*, 8th Dist. No. 83282, 2004-Ohio-4074, ¶12. "The 'attendant circumstances' of a slip and fall may create a material issue of fact as to whether the danger was open and obvious." *Frano* at ¶22, citing *Louderback v. McDonald's Restaurant*, 4th Dist. No. 04CA2981, 2005-Ohio-3926, ¶19.

{¶24} "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." *Hudspath* at ¶19, citing *McGuire v. Sears Roebuck and Co*. (1996), 118 Ohio App.3d 494, 499. "The 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 (citations omitted). "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." *Hudspath* at ¶19, citing *Menke v. Beerman* (Mar. 9, 1998), 12th Dist. No. CA97-09-182, 1998 Ohio App. LEXIS 868, *2-3.

{¶25} The Furanos argue the attendant circumstances exist in this case, namely, that the tire stop was almost completely obscured by their own vehicle and that there was little room between their vehicle and the adjacent vehicle. We disagree. These circumstances alleged by the Furanos reflect at most the *difficulties* in negotiating the steps around the elevation of the tire stop after exiting the vehicle. They do not reflect any *distraction* or *diversion* that would warrant an application of the doctrine of attendant circumstances. In order to accept their claim that the attendant circumstances here creates an issue of fact as to whether a properly placed tire stop was an open and obvious danger, we would have to stretch the doctrine of attendant circumstances beyond its logical construct.

{¶26} The Furanos cite our decision in *Briel v. Dollar General Store*, 11th Dist. No. 2007-A-0016, 2007-Ohio-6164 to support their claim that "navigating in close quarters" can serve as an attendant circumstance. In that case, a customer went into a store to purchase a card. The card aisle was partially obstructed by a stack of boxes; as a result, to enter or exit from that entrance of the aisle required the customer to "scoot" between the stack of boxes and a pole. The customer caught her foot on a box which was slightly protruding from the bottom of the stack, causing her to trip and fall. This court concluded that there was a genuine issue of material fact as to whether the

attendant circumstances existed to negate the open and obvious rule. We reasoned that the circumstances consisting of the customer's trying to circumvent between a pole and a stack of boxes, and the fact that the other entrance of the aisle was also blocked by more boxes, did indeed create a situation that would suffice under the totality of the circumstances to create a genuine issue of material fact as to whether a reasonable person would notice the protruding box.

{¶27} The facts in the instant case are not analogous to *Briel*. Unlike the boxes which were stacked haphazardly in *Briel*, the tire stop which Mrs. Furano tripped over was located exactly where it should be and has been there since its installation. Patrons using a parking spot fronted by a tire stop are reasonably expected to, upon exiting their vehicles, negotiate their steps in the close quarters between parked vehicle. No conditions in Sunrise Inn's parking lot created by the defendant diverted Mrs. Furano's attention or unreasonably increased the typical risk associated with parking in a spot fronted by a tire stop. Unfortunately, the Furanos created the circumstance when they parked their car in such close quarters. The Furanos' reliance on *Briel* is misplaced. Other attendant circumstances cases cited by them are similarly inapplicable.

{¶28} Under the undisputed facts of this case, Sunrise Inn did not owe a duty to Mrs. Furano to protect her from the elevation of the tire stop. As common features in parking lots, properly placed and maintained tire stops are open and obvious hazards and do not constitute a latent dangerous condition.

{¶29} Because we conclude no genuine issue of material fact existed regarding Sunrise Inn's duty to Mrs. Furano, the trial court properly granted summary judgment in favor of Sunrise Inn. The Furanos' assignment of error is overruled.

{¶30} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.