[Cite as *Esterman v. Speedway, L.L.C.*, 2015-Ohio-659.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LINDA ESTERMAN, Plaintiff-Appellant, and ROBERT ESTERMAN, Plaintiff, vs. SPEEDWAY LLC, Defendant-Appellee.	: : : : : : :	APPEAL NO. C-140287 TRIAL NO. A-1300854 *O P I N I O N.*

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: February

Santen & Hughes and *Stephanie M. Day*, for Plaintiff-Appellant,

Roetzel & Andress, LPA, Bradley A. Wright and *Brian J. Augustine*, for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Plaintiff-appellant Linda Esterman tripped and fell over a parking barrier or wheel stop in the parking lot of a gas station owned and operated by defendant-appellee Speedway LLC ("Speedway"). Esterman sued Speedway for negligence, and Speedway argued that the parking barrier was an open and obvious condition, which obviated Speedway's duty to warn her of the barrier. The trial court agreed with Speedway and entered summary judgment in its favor. Because we agree with the trial court that the parking barrier was an open and obvious condition, and Speedway owed no duty to warn Esterman of it, we affirm the judgment of the trial court.

{¶2} On December 27, 2011, Esterman was on her way to work at St. Joseph's orphanage for a shift scheduled to begin at 5 a.m.—four hours earlier than her usual start time—when she stopped at Speedway to purchase a lottery ticket. Esterman had stopped at that particular Speedway often on her way to and from work. Esterman pulled her car into a space directly in front of the Speedway store and walked inside. It was cold and lightly raining at the time. When Esterman left the store, she walked on the sidewalk under the storefront awning until she reached a display of store merchandise blocking the sidewalk. Esterman then traversed in front of a pickup truck parked next to her car, and started down to the driver's side of her car when she tripped over a five-inch-high, eight-and-a-half-inch-wide, concrete parking barrier. The pickup truck had pulled over the parking barrier, exposing only "inches" of the nearly six-foot long side of the barrier.

{¶3} Esterman admitted that she had not been looking where she was walking just before the fall, but that she had kept her gaze forward because crime had

risen in the area. Esterman also testified that the storefront lighting had been dim, and that the barrier had been the same color as the parking lot. Although Esterman had visited the Speedway location multiple times, she testified that she had never seen that barrier before, and that the barrier was the only one of its kind in the parking lot. Esterman alleges that as a result of her fall, she suffered a shoulder injury and could not work.

{¶4} Speedway moved for summary judgment, relying solely on Esterman's deposition testimony. Speedway argued that the parking barrier was an open and obvious condition, which negated any duty on the part of Speedway to warn Esterman of the barrier. Esterman opposed Speedway's summary-judgment motion, and attached an affidavit from Thomas Huston, an engineer, who opined that Speedway created an unreasonable risk of harm by failing to illuminate the parking barrier, anchor it to the parking lot, and paint the barrier a contrasting color. The trial court granted Speedway's motion, and this appeal ensued.

{¶5} In a single assignment of error, Esterman challenges the trial court's decision finding that the barrier was open and obvious. Under Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party. *See Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *V.R. v. Cincinnati-Hamilton Cty. Community Action Agency*, 1st Dist. Hamilton No. C-140230, 2014-Ohio-5061, ¶ 8. This court reviews a ruling on summary judgment de novo. *V.R.* at ¶ 8.

{¶6} In order to succeed on a cause of action for negligence, a plaintiff must first show that the defendant owed the plaintiff a duty of care. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 10. A business owner owes a duty to business invitees to maintain the premises in a safe condition; however, a business owner has no duty to warn its invitees against known or open and obvious dangers, which invitees can reasonably be expected to discover and protect against. *See id.*; *Robinson v. Bates*, 112 Ohio St.3d 17, 24, 2006-Ohio-6362, 857 N.E.2d 1195; *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5.

{¶7} A danger is open and obvious if it is not "hidden, concealed from view, or undiscoverable upon ordinary inspection[.]" *Thompson v. Ohio State Univ. Physicians, Inc.*, 10th Dist. Franklin No. 10AP-612, 2011-Ohio-2270, ¶ 12. In slip-and-fall cases, courts have determined that a person does not have to actually see the dangerous condition prior to the fall in order for the condition to be open and obvious, and courts have found no duty to warn existed where the condition could have been seen had a person looked. *See id.*

{¶8} In support of its motion for summary judgment, Speedway relies on a number of cases where courts have determined that parking barriers were open and obvious conditions. *See Haymond v. B.P. Am.*, 8th Dist. Cuyahoga No. 86733, 2006-Ohio-2732; *Stazione v. Lakefront Lines, Inc.*, 8th Dist. Cuyahoga No. 83110, 2004-Ohio-141; *Zambo v. Tom-Car Foods*, 9th Dist. Lorain No. 09CA009619, 2010-Ohio-474; *Mullins v. Darby Homes*, 10th Dist. Franklin No. 98AP-1616, 1999 Ohio App. LEXIS 3427 (July 27, 1999).

{¶9} Those cases are of limited value in this case, however, because in those cases, none of the parking barriers were partially concealed from the plaintiffs' views by parked vehicles pulled over the barriers, as was the case here. *See Darby Homes* at *4 (where the plaintiff fell on a concrete parking barrier in a driveway of a model home, and nothing obscured the plaintiff's view of the parking barrier for at least ten feet); *B.P. Am.* at ¶ 19 (where the plaintiff tripped over a parking barrier in the parking lot of a gas station, and the court noted that nothing obstructed the view of the parking barrier); *Lakefront Lines, Inc.* at ¶ 12 (where the plaintiff fell over a parking barrier in the parking lot of a bus terminal, and the court noted that the "location and size of the parking barrier * * * was obvious and apparent enough that it was reasonable in this situation for appellee to expect appellant to notice the barrier and protect herself accordingly"); *Tom-Car Foods* at ¶ 11 (where the plaintiff tripped over a parking barrier approaching the entrance of a grocery store, and the court noted that nothing blocked the plaintiff's view of the parking barrier once the plaintiff rounded the vehicle parked next to the aisle containing the barrier).

{¶10} The issue in this case is whether the portion of the parking barrier over which Esterman tripped was observable upon ordinary inspection. Esterman does not contend that the portion of the barrier over which she tripped was concealed by the truck, but she argues that other "attendant circumstances" at the time of her fall create a genuine issue of material fact as to whether that portion of the parking barrier was observable upon ordinary inspection. *See Hudspath v. Cafaro Co.*, 11th Dist. Ashtabula No. 2004-A-0073, 2005-Ohio-6911.

{¶11} In determining whether a dangerous condition is open and obvious, attendant circumstances can create a genuine issue of material fact. *Martin v. Christ*

Hosp., 1st Dist. Hamilton No. C-060639, 2007-Ohio-2795, ¶ 19. "Attendant circumstances" reduce the degree of care an ordinary person exercises and "must, taken together, (1) divert the attention of the pedestrian, (2) significantly enhance the danger of the defect, and (3) contribute to the fall." *Shepherd v. City of Cincinnati*, 168 Ohio App.3d 444, 452, 2006-Ohio-4286, 860 N.E.2d 808 (1st Dist.). An attendant circumstance must be a "significant distraction," and cannot include "regularly encountered, ordinary, or common circumstances." *Haller v. Meijer, Inc.*, 10th Dist. Franklin No.11AP-290, 2012-Ohio-670, ¶ 10; *Colville v. Meijer Stores Ltd.*, 2d Dist. Miami No. 2011-CA-011, 2012-Ohio-2413, ¶ 30. Moreover, attendant circumstances do not include a person's activity at the time of a fall unless the person's attention was diverted by "an unusual circumstance of the property owner's own making." *McConnell v. Margello*, 10th Dist. Franklin No. 06AP-1235, 2007-Ohio-4860, ¶ 10.

{¶12} Esterman contends that the following amounted to "attendant circumstances": the dim lighting in the parking area; the store merchandise blocking the sidewalk; the color of the barrier blending in with the parking lot and no similar barriers in the lot; the rainy weather; and crime in the area, causing Esterman to keep her gaze upwards.

{¶13} We determine that the conditions surrounding Esterman's fall do not rise to the level of attendant circumstances sufficient to create a genuine issue of material fact as to whether the portion of the parking barrier over which Esterman tripped was open and obvious. Darkness and dim lighting in a parking lot are circumstances regularly encountered by business customers and should increase the care a reasonable customer exercises—not decrease it. *See Shipman v. Papa John's*,

3d Dist. Shelby No. 17-14-17, 2014-Ohio-5092, ¶ 30-31 (finding that darkness and dim lighting are not attendant circumstances). As to the store merchandise displayed on the sidewalk, Esterman does not contend that the displays were unique or particularly distracting, only that she had to walk around the displays to reach her car. *See McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d 494, 500, 693 N.E.2d 807 (1st Dist.1996) (where the court determined that department store displays were not attendant circumstances contributing to a plaintiff's fall where the plaintiff "failed to point to any particular display or any particular aspect of the goods on display which would distinguish the area in question from one regularly encountered in a retail setting"). With regard to the rainy weather that morning, Esterman does not argue that the rain somehow concealed the exposed portion of the barrier or made it significantly more dangerous. *See Jenkins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, ¶ 17 (plaintiff failed to show how the rain enhanced the danger of a crack in a sidewalk).

{¶14} Although the concrete parking barrier was the same color as the parking lot and the sole one of its kind in the lot, parking barriers situated directly in front of a storefront, such as the one stumbled on by Esterman, are safety measures regularly encountered by business invitees. *See McGuire* at 500. Finally, Esterman's testimony that she kept her gaze forward because crime had risen in the area cannot be considered an attendant circumstance where no evidence was presented that her attention was diverted by "an unusual circumstance of the property owner's own making." *McConnell*, 10th Dist. Franklin No. 06AP-1235, 2007-Ohio-4860, at ¶ 10. Thus, none of the circumstances surrounding Esterman's fall constitute unusual, significant diversions that would rise to the level of attendant circumstances.

{¶15} Esterman further argues that Huston's affidavit, which she presented in response to Speedway's summary-judgment motion, evinces that the parking barrier was an unreasonably dangerous tripping hazard because it was not painted a contrasting color, secured to the center of the parking stall, or adequately illuminated, and that the trial court erred in ignoring the affidavit. We fail to see how Huston's expert opinion could be relevant to the ultimate issue of whether a parking barrier is discoverable upon ordinary inspection to a business invitee under the open and obvious doctrine. *See Armstrong*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶ 16.

{¶16} Therefore, we conclude that the portion of the parking barrier over which Esterman tripped was an open and obvious condition, and that no attendant circumstances apply to create a genuine issue of material fact on this issue. We overrule Esterman's assignment of error.

{¶17} We affirm the decision of the trial court granting summary judgment in favor of Speedway.

Judgment affirmed.

HENDON, P.J., and **CUNNINGHAM, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.