Rel: October 29, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200449

Janene Owens

v.

Ganga Hospitality, LLC

Appeal from Montgomery Circuit Court
(CV-19-900030)

SELLERS, Justice.

Janene Owens fell outside a hotel owned and operated by Ganga Hospitality, LLC ("Ganga"). Owens sued Ganga in the Montgomery Circuit Court, alleging negligence and wantonness. The trial court

entered a summary judgment in favor of Ganga, and Owens appealed. We affirm the trial court's judgment.[1]

On the night of January 4, 2017, Owens, her husband, her daughter, and her son-in-law arrived at the hotel. Her son-in-law, Mike Martini, parked their vehicle in a covered area next to the front door of the hotel, where hotel guests park temporarily while loading or unloading luggage. Photographs in the record show that there is a raised concrete platform on the side of the loading and unloading area that is farthest from the front door of the hotel, which the parties refer to as a "curb." The platform is painted red, in clear contrast to the surrounding area. There is a bench on top of the platform.

Owens was seated in the back seat of the vehicle, behind the driver. It was dark when Owens and her family arrived at the hotel, and Owens's sight is extremely limited. She is completely blind in her left eye and has

[1]In her complaint, Owens also named "Ganga Hospitality d/b/a Baymont Inn & Suites" as a defendant. However, Ganga's answer to Owens's complaint, and the parties' briefs to this Court, indicate that there is no separate entity known as Ganga Hospitality d/b/a Baymont Inn & Suites and that the proper defendant is simply Ganga Hospitality, LLC.

20/200 vision in her right eye. She describes herself in her brief to this Court as "blind." At the time of the accident, she also had trouble walking and typically used a cane for mobility. Her agility was further hampered from the affects of a stroke that impacted her cognitive skills.

Owens testified that, after Martini parked the vehicle in the covered loading and unloading area, Owens opened the back driver's side door of the vehicle and placed her left foot on the ground. She then placed her right foot on the ground while turning around to face the vehicle, with her back to the raised platform. She then began to back away from the vehicle. While moving backward, her right foot contacted the edge of the platform and "she fell into a very hard object."[2]

Owens claimed in her complaint that the presence of the concrete platform was unreasonably dangerous and that Ganga acted negligently and wantonly in failing to remove it and in failing to provide adequate lighting in the area. She also alleged that Ganga negligently and wantonly failed to warn Owens of the alleged hazard. Ganga moved for

[2]Owens does not explain whether the object she fell into was the bench or something else.

a summary judgment, arguing that the allegedly dangerous condition was open and obvious, that Owens was contributorily negligent, and that there is no evidence indicating that Ganga acted wantonly. The trial court granted Ganga's summary-judgment motion; Owens appealed. On appeal, Owens has abandoned her wantonness claim and proceeds only with her negligence claim.[3]

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded

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[3]Owens also abandoned a claim, set out in an untimely amended complaint, purporting to assert a private cause of action under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

> persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

> "The scope of the duty owed by an invitor to a business invitee is as follows:
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> > " 'Alabama law is well-settled regarding the scope of the duty an invitor owes a business invitee. "The owner of premises owes a duty to business invitees to use reasonable care and diligence to keep the premises in a safe condition, or, if the premises are in a dangerous condition, to give sufficient warning so that, by the use of ordinary care, the danger can be avoided." Armstrong v. Georgia Marble Co., 575 So. 2d 1051, 1053 (Ala. 1991) ....'
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> "South Alabama Brick Co. v. Carwie, 214 So. 3d 1169, 1176 (Ala. 2016) (emphasis omitted)."

Unger v. Wal-Mart Stores E., L.P., 279 So. 3d 546, 550 (Ala. 2018).

> " 'The duty to keep premises safe for invitees applies only to defects or conditions which are in the nature of hidden dangers, traps, snares, pitfalls, and the like, in that they are not known to the invitee, and would not be observed by him in the exercise of ordinary care. The invitee assumes all normal or ordinary risks attendant upon the use of the premises, and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and obvious dangers, nor is he liable for injury to an invitee resulting from a danger

> which was obvious or should have been observed in the exercise of reasonable care.' "

Lamson & Sessions Bolt Co. v. McCarty, 234 Ala. 60, 63, 173 So. 388, 391 (1937) (quoting 45 C.J. § 244, p. 837). There is no duty to remedy, or to warn about, open and obvious hazards. Dolgencorp, Inc. v. Taylor, 28 So. 3d 737, 742 (Ala. 2009). Whether an alleged danger is open or obvious is an objective inquiry. Id. A hazard is open and obvious if it would be apparent to, and recognized by, a reasonable person in the position of the invitee. Hines v. Hardy, 567 So. 2d 1283, 1284 (Ala. 1990). The existence of a duty is a question for the court. Unger, 279 So. 3d at 550.

The evidence clearly establishes that the platform was open and obvious to people without significant visual impairment. Owens does not point to any testimony from her family members indicating that they did not see the platform or that they tripped on it. Martini agreed during his deposition that he probably stepped onto the platform or walked around it after exiting the vehicle. Owens's expert witness did not opine that the existence and condition of the platform presented a danger that was not open and obvious to someone who is not visually impaired. Photographs

in the record depict the platform at night and indicate that the area is brightly lit and that the platform is painted red, which clearly contrasts with the surrounding area. The difference in elevation between the platform and the surrounding area is obvious from the photographs.

Although Owens alleged in her complaint that the area was not adequately illuminated, the only evidence she points to on appeal is her own deposition testimony that the area was "dark." But she relies upon that same testimony in support of an averment that she is "blind." Elsewhere in her brief, she asserts that her "visual impairment is so severe she cannot see." Testimony from someone who is blind is not sufficient evidence to establish that the loading and unloading area was not properly illuminated. Indeed, when shown the above-referenced photographs, which demonstrate that the raised platform is open and obvious and well illuminated, Owens could not identify the content of the photographs.[4]

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[4]Woodward v. Health Care Authority of Huntsville, 727 So. 2d 814 (Ala. Civ. App. 1998), upon which Owens relies, is distinguishable. In that case, the plaintiff fell off a curb outside a parking garage. But the plaintiff in Woodward presented expert testimony that the curb presented a

The primary dispute in this case appears to be whether Owens's visual impairment affects the rule that a premises owner has no duty to eliminate, or to warn about, dangers that are open and obvious. Owens notes that a hazard is open and obvious if the risk "would be recognized by a reasonable person in the position of the invitee," and she asserts that "[a] person in the position of [Owens] is blind and cannot see." In other words, she contends that the issue of openness and obviousness should be evaluated from the point of view of a person with Owens's level of visual impairment and not from the point of view of a typical person with typical vision.

Owens has not directed the Court's attention to any precedent from Alabama or any other jurisdiction considering whether an invitee's impaired vision affects the open-and-obvious analysis. At least some

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tripping hazard that was not open and obvious and was essentially hidden. According to the Court of Civil Appeals, "[t]he testimony indicate[d] that, because of the existing lighting at the time, and the color of the sidewalk and driveway, the curb, or change in height from the sidewalk to the driveway, was not visible, but, rather, gave the appearance of one flat mass of concrete." Id. at 817.

courts have suggested that it does not. See, e.g., Prostran v. City of Chicago, 349 Ill. App. 3d 81, 86, 811 N.E.2d 364, 368, 285 Ill. Dec. 123, 127 (2004) (noting that "[w]hether a condition is open and obvious depends on the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge," and that "[c]ourts in other jurisdictions have applied this objective standard even where the plaintiff is visually impaired" (citing, among other cases, Lauff v. Wal-Mart Stores, Inc., No. 1:01-CV-777, Oct. 2, 2002 (W.D. Mich. 2002) (not reported in Federal Supplement); and Sidorowicz v. Chicken Shack, Inc., 469 Mich. 912, 673 N.W.2d 106 (2003)(table))). See also Lugo v. Ameritech Corp., 464 Mich. 512, 518 n.2, 629 N.W.2d 384, 387 n.2 (2001) (holding that whether a plaintiff has "a particular susceptibility to injury" is "immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous"). But see Harris v. Boh Bros. Constr. Co., 322 So. 3d 397, 413 (La. Ct. App. 2021) (concluding that Louisiana's "open and obvious to all" doctrine did not apply in a negligence action brought by a blind plaintiff).[5]

[5]In its summary-judgment motion and in its brief to this Court, Ganga cites Sidorowicz v. Chicken Shack, Inc., No. 239627, Jan. 17, 2003

As noted, "[i]n a premises-liability setting, we use an objective standard to assess whether a hazard is open and obvious." Jones Food Co. v. Shipman, 981 So. 2d 355, 362 (Ala. 2006).

> "[I]n order for a defendant-invitor in a premises-liability case to win a summary judgment or a judgment as a matter of law grounded on the absence of a duty on the invitor to eliminate open and obvious hazards or to warn the invitee about them, the record need not contain undisputed evidence that the plaintiff-invitee consciously appreciated the danger at the moment of the mishap."

Sessions v. Nonnenmann, 842 So. 2d 649, 653 (Ala. 2002). " ' "Obvious" means that the condition and risk are apparent to, and would be recognized by, a reasonable person in the position of the invitee. Therefore, the "obvious" test is an objective one.' " Hines v. Hardy, 567 So. 2d 1283, 1284 (Ala. 1990) (quoting Terry v. Life Ins. Co. of Georgia, 551 So. 2d 385, 386 (Ala. 1989)). See also Restatement (Second) of Torts §

(Mich. Ct. App. 2003) (unpublished opinion). In that case, the Michigan Court of Appeals held that a legally blind plaintiff could not recover in a premises-liability action after he slipped in a puddle of water in a restroom because, although the plaintiff was unable to see the water because of his visual impairment, the water would have been open and obvious to "an ordinarily prudent person." In the Sidorowicz decision cited in Prostran, the Michigan Supreme Court denied leave to appeal the decision of the Michigan Court of Appeals. Owens ignores Sidorowicz.

343A cmt. b. (Am. L. Inst. 1965) (" 'Obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.").

There are a number of ways a person with Owens's level of visual impairment could be injured by alleged hazards that are otherwise open and obvious and, in fact, pose almost no danger at all to people with normal vision. Deciding whether an allegedly dangerous condition is open and obvious based on the point of view of a blind plaintiff might transform premises owners into insurers against all injuries suffered by people with significant visual impairment, no matter how harmless the condition is to people without that impairment. See generally Ex parte Mountain Top Indoor Flea Mkt., Inc., 699 So. 2d 158, 161 (Ala. 1997) (noting that premises owners are not insurers of the safety of invitees).[6] Ingress to and

[6]We note that this case does not involve an injury to a child invitee. See generally Collier v. Necaise, 522 So. 2d 275, 279 (Ala. 1988) ("Surely, one may postulate many cases in which a child invitee might not be able to appreciate the perils presented by a dangerous condition that would appear 'open and obvious' to an adult. The child's ignorance of the danger in such a case would trigger the duty to warn on the part of the occupier

egress from premises could be deemed unreasonably hazardous based on any number of factors completely outside the control of a business invitor. Adopting various and competing common-law standards of care based on the disability of a particular invitee would impose too great a duty on premises owners by requiring specific accommodations to alleviate conditions that are not inherently hazardous or dangerous.

It is not, however, necessary to decide in this case whether a plaintiff's visual impairment should or should not be ignored in determining if an allegedly dangerous condition is open and obvious. This is so because, even taking into consideration Owens's level of visual impairment, the raised platform was open and obvious. As noted, the inquiry is an objective one. The question is whether a reasonable person exercising reasonable care should have discovered the dangerous condition. Owens alleges that she is completely blind in one eye and

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of the land, even though there might be no duty to warn an adult in the same position. Each of these cases must be examined individually, taking into account the child's age, experience, and maturity in determining whether the child invitee is 'ignorant' of the danger so that the duty to warn remains extant.").

nearly completely blind in the other. She chose to walk backward after exiting the vehicle in which she was a passenger. Although she typically uses a cane, she did not do so in this particular instance. There were family members present who could have helped her, but she chose not to ask for help. In Coker v. McDonald's Corp., 537 A.2d 549, 551 (Del. Super. Ct. 1987), the Delaware Superior Court stated that "what is an open and obvious condition to a blind person depends upon what, if any, tools or aids the blind person utilizes to discover the condition, and the degree to which such aids are used." Owens used no tools or aids to discover obstructions that might have been in her path. Had she taken reasonable care, she would have discovered the concrete platform. Accordingly, even considering her particular disability, the alleged danger was open and obvious.

In a final argument, Owens asserts that Ganga violated the Americans with Disabilities Act ("the ADA"), 42 U.S.C. § 12101 et seq. Although she expressly denies seeking a private civil remedy under the ADA, she cites opinions from other jurisdictions that, she asserts, indicate that ADA requirements are relevant to establishing the standard of care

applicable in a state-law premises-liability action. None of the precedent Owens cites is binding on this Court.

In any event, there appears to be no relevant ADA standard or violation in the present case. Owens does not actually direct us to any particular portion of the ADA or a regulation promulgated thereunder. Instead, she summarizes her expert witness's opinion that having a bench on top of the raised concrete platform violates the ADA. But, according to the expert's testimony, that alleged violation is based on a regulatory standard that prohibits discrimination against disabled persons in the form of a lack of access to amenities like the bench. In other words, the alleged ADA violation is based on discrimination against disabled people who are unable to step onto the platform and reach the bench. Owens's expert did not opine that the mere presence of the concrete platform itself, without regard to the bench, constituted a violation of any regulation promulgated under the ADA aimed at promoting safety for the visually impaired. To the contrary, he admitted that, if the bench were not present, there would have been no discrimination and no ADA violation at all. Thus, Owens has not persuasively demonstrated that the alleged

ADA violation, in the form of a failure to provide equal access to the bench, was the proximate cause of her fall. Moreover, Owens fails to clearly and cogently address Ganga's alternative argument that, even if her negligence claim could possibly be supported by ADA standards, it nevertheless fails in the event this Court concludes, as we have, that the alleged danger created by the concrete platform was open and obvious.

In sum, Owens has not demonstrated that the trial court erred in granting Ganga's motion for a summary judgment, which argued primarily that Ganga owed Owens no duty because the raised concrete platform was open and obvious. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

Bolin, Wise, and Stewart, JJ., concur.

Parker, C.J., concurs in part and concurs in the result.

PARKER, Chief Justice (concurring in part and concurring in the result).

I agree that Ganga Hospitality, LLC, is not liable for the injuries suffered by Janene Owens when she tripped on the raised concrete platform. The platform was an open and obvious hazard because a reasonable person exercising ordinary care under the circumstances, including the circumstance of being blind, would have perceived it. Because a premises owner has no duty to remedy or warn invitees about open and obvious hazards, Dolgencorp, Inc. v. Taylor, 28 So. 3d 737, 742 (Ala. 2009), and because Owens's argument based on the Americans with Disability Act, 42 U.S.C. § 12101 et seq., fails for the reasons explained in the main opinion, her negligence claim must fail.

However, I have a few reservations about the main opinion that prevent me from concurring fully. First, after correctly explaining that the open-and-obvious inquiry is an objective one, the main opinion appears to analyze the obviousness of the platform subjectively, by reference to what Owens did and failed to do. See ___ So. 3d at ___. To the extent that evidence of Owens's available means of perception was evidence of what a reasonable person in her position could have perceived, it was evidence

that the hazard was open and obvious. But the hazard was not open and obvious merely because Owens could have perceived it. Evidence of what a particular plaintiff could have done for self-preservation is neither necessary nor sufficient to determine that a hazard was open and obvious, because such evidence does not itself establish what would be ordinary care under the circumstances. It is not difficult to imagine examples where reasonable care might not require utilizing every available means of perception. Conversely, a plaintiff might use some means to assist her perception but still negligently fail to perceive a hazard. By focusing on Owens's acts and omissions, the opinion seems to stray from the objective test for obviousness.

In addition, I question the opinion's suggestion that the objectivity of the open-and-obvious standard requires it to always be based on a person without visual impairment. I'm not sure that premises owners' duty to keep premises safe from unreasonably hazardous conditions would never require a premises owner to account for an invitee's impairment, visual or otherwise. The open-and-obvious rule is simply a particular application of the duty of reasonable care. See Restatement (Third) of

Torts: Liability for Physical and Emotional Harm § 51 (Am. L. Inst. 2012) ("[A] land possessor owes a duty of reasonable care to entrants on the land with regard to ... artificial conditions on the land that pose risks to entrants on the land ...."); Jenelle Mims Marsh, Alabama Law of Damages § 33:13 (6th ed. 2012) (similar); see generally 1 Michael L. Roberts, Alabama Tort Law § 8.03[7] (6th ed. 2015) (discussing relationship between land possessor's duty of reasonable care and open-and-obvious rule). Normally, a premises owner need not remove or warn about hazards that invitees would ordinarily perceive, because reasonable care, by definition, does not involve taking extraordinary precautions against improbable injuries. See 1 Dan B. Dobbs et al., The Law of Torts § 127 (2d ed. 2011) (explaining that a reasonable person "uses care only to avoid inflicting risks that are sufficiently great to require precaution"). But there may be particular situations in which reasonable care does require a premises owner to account for known or likely impairments of invitees. Reasonable care by a hotel may not be the same as reasonable care by a school for the blind; reasonable care by one hosting a visual-arts exhibit may not be the same as reasonable care by one hosting a convention for

the blind. Accordingly, I do not necessarily share the main opinion's concern about "[a]dopting various and competing common-law standards of care," ___ So. 3d at ___. There is one standard -- reasonableness -- but what is reasonable may depend partly on whether a premises owner has reason to believe that invitees will have diminished ability to perceive and avoid hazards.