[Cite as *Sabo v. Zimmerman*, 2012-Ohio-4763.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

JEANIE SABO, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
- vs -	:	**CASE NO. 2012-A-0005**
EARL ZIMMERMAN, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CV 103.

Judgment: Affirmed.

Malcom Stewart Douglas, 525 Lake Avenue, Ashtabula, OH 44004 (For Plaintiffs-Appellants).

William E. Riedel, Law Offices of Katherine S. Riedel Co., L.P.A., 5 Jefferson Commercial Park, 1484 State Route 46 North, Jefferson, OH 44047 (For Defendant-Appellees).

MARY JANE TRAPP, J.

{¶1} Jeanie and John Sabo appeal from a judgment of the Ashtabula County Court of Common Pleas which granted summary judgment in favor of defendants, Earl and June Zimmerman, regarding an incident where Mrs. Sabo tripped and fell in the Zimmermans' driveway. For the following reasons, we affirm the trial court's judgment.

Substantive Facts and Procedural History

{¶2} On June 2, 2007, the Zimmermans invited the Sabos' two daughters to a pool party for the Zimmermans' granddaughter at their residence. Mrs. Sabo knew the Zimmermans because she lived next door to Mr. Zimmerman's mother when she was growing up. Sometime in the afternoon, one of the Sabos' daughters ripped her bathing suit and telephoned Mrs. Sabo to bring another bathing suit over to the party. The Sabos drove to the Zimmermans' with the bathing suit.

{¶3} Between the driveway and the backyard at the Zimmermans' residence, there is a small grassy area and then a concrete patio, which leads to the backyard where the pool party was held. A square gray outdoor carpet was located between a narrow strip of the grass and the patio. After she got out of her car, Mrs. Sabo walked from the driveway toward the backyard. She tripped and fell as she stepped off the driveway into the grassy area, injuring her foot. Both the Zimmermans were inside the house at the time.

{¶4} The Sabos filed a complaint against the Zimmermans alleging negligence, and the Zimmermans moved for summary judgment.

{¶5} In her deposition, Mrs. Sabo testified that, as she walked toward the backyard from the driveway, she was "looking down and looking towards the back door." After she fell when stepping into the grass from the driveway, she looked at the driveway and saw that there was about a two-inch difference between the top of the grass and the driveway. In her affidavit attached to the plaintiffs' memorandum opposing summary judgment, she stated that while on the ground after the fall, she noted that "what had previously appeared to be an approximate two inch difference between the level of the grass and the concrete driveway was in reality between five and seven inches."

{¶6} Mr. Sabo, a mason and cement finisher, stated in his affidavit that when he went to assist his wife, he nearly fell in the same area as well. He stated he observed a six-to-seven-inch difference between the level of the driveway and the level of the grassy area *from the house side*, but alleged the drop-off was "impossible to tell" when approaching *from the driveway*.

{¶7} The trial court granted the Zimmermans' motion for summary judgment. On appeal, the Sabos raise the following assignment of error for our review:

{¶8} "The trial court erred in granting defendant's motion for summary judgment when genuine and material issues of fact remained for a jury, thereby committing prejudicial error."

Standard of Review for Summary Judgment

{¶9} We review de novo a trial court's order granting summary judgment**.** *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13. "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.*, 66 Ohio App.3d 826, 829 (9th Dist.1990).

{¶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* [75 Ohio St.3d 280 (1996)], 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.

Whether Duty is Owed

{¶11} "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." *Adelman v. Timman*, 117 Ohio App.3d 544, 549 (8th Dist.1997). Under the common law of premises liability, the status of the person who enters upon the land of another typically defines the scope of the legal duty the landowner owes the entrant. *Shump v. First Continental-Robinwood Assocs.*, 71 Ohio St.3d 414, 417 (1994).

{¶12} "Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315 (1996), citing *Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68 (1986). A landowner owes a duty to

exercise ordinary care to an invitee. *Provencher v. Ohio Dept. of Transp.*, 49 Ohio St.3d 265, 266 (1990). A premises owner must warn its invitees of latent or concealed dangers if the owner knows or should have known of the hidden dangers. *Aycock v. Sandy Valley Church of God*, 5th Dist. No. 2006 AP 09 0054, 2008-Ohio-105, ¶22, citing *Jackson v. Kings Island*, 58 Ohio St.2d 357, 358 (1979).

{¶13} A lesser duty is owed to a licensee. A licensee is a person "who enters the premises of another by permission or acquiescence, for his own pleasure or benefit, and not by invitation." *Light* at 68. Owners and occupiers of land owe a duty to licensees to refrain from willfully, wantonly, or recklessly injuring them. *Gladon* at 317.

"Open and Obvious" Doctrine

{¶14} *However*, regardless of whether a person is invitee or licensee, when a danger is "open and obvious," a premises owner owes no duty of care to any individuals on the premises. *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶5. "[T]he open and obvious doctrine obviates any duty to warn of an obvious hazard and bars negligence claims for injuries related to the hazard." (Citations omitted.) *Frano v. Red Robin Internatl., Inc.*, 181 Ohio App.3d 13, 2009-Ohio-685, ¶19 (11th Dist.) The rationale behind the doctrine is that "the open and obvious nature of the hazard itself serves as a warning." *Id.*, quoting *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644 (1992). *See also Costilla v. LeMC Enters.*, 11th Dist. No. 2003-P-0116, 2004-Ohio-6944. "The rule relieving a defendant from liability for harm resulting from 'open and obvious' hazards is a legal doctrine that has developed in suits against property owners by a person injured when he comes on the property." *Simmers* at 644. "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." A*rmstrong* at ¶13. "The owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *Simmers* at 644.

{¶15} Furthermore, "[b]ecause the open and obvious doctrine is related to the element of duty in a negligence claim, it focuses on the nature of the danger rather than the behavior of the plaintiff." *Lovejoy v. EMH Regional Med. Ctr.*, 9th Dist. No. 07CA009145, 2008-Ohio-3205, citing *Armstrong* at ¶13. "[T]the question of whether a particular danger is open and obvious is answered objectively, without regard to the injured plaintiff." *Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961, ¶10 (2d Dist.) The test "properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it." *Armstrong* at ¶13. "[T]he plaintiff's subjective state of mind when she encountered the danger – for example, what she was aware of at the time – may not be considered." *Hissong* ¶10, citing *Weaver v. Booher Carpet and Rug*, 2d Dist. No. 19982, 2004-Ohio-658, ¶9. Rather, "[w]hat is material to the open-and-obvious test is whether the danger is observable, which means it is 'discoverable or discernible by one who is acting with ordinary care under the circumstances.'" *Id.* at ¶11, quoting *Kidder v. Kroger Co.*, 2d Dist. 20405, 2004-Ohio-4261, ¶11. *See also Earnsberger v. Griffiths Park Swim Club*, 9th Dist. 0882, 2002-Ohio-3739, ¶24. A plaintiff "need not have actually observed the dangerous condition for it to be an 'open and obvious condition.'" *Leonard v. Modene & Assocs.*, 6th Dist. No. WD-05-085, 2006-Ohio-5471, ¶53, citing *Schmitt v. Duke Realty, LP*, 10th Dist. No. 04AP-251, 2005-Ohio-4245, ¶10 and *Brown v. Whirlpool Corp.*, 3d Dist. No. 9-04-12, 2004-Ohio-5101, ¶14.

{¶16} "[W]hether a particular danger is open and obvious depends heavily on the particular facts of the case." *Hissong* at ¶13. "The existence and the obviousness of a danger which allegedly exists on a premises is determined by a fact-specific inquiry and must be analyzed on a case-by-case basis." (Citations omitted.) *Leonard* at ¶53.

Open and Obvious Doctrine precludes Plaintiffs' Claim

{¶17} Here, the parties argue about whether Mrs. Sabo was an invitee or licensee, i.e., whether she came upon the premises for a purpose beneficial to the owners or for her own benefit. The status of Mrs. Sabo was immaterial, however. The case turns on whether the "open and obvious doctrine" precludes the Sabos' claim. Applying the summary judgment standard, the question to be answered is whether reasonable minds, looking at the evidence in the light most favorable to the Sabos, can conclude differently about whether the Zimmermans' elevated driveway was an open and obvious danger. In other words, whether the driveway's condition is objectively observable, i.e., whether a person in Mrs. Sabo's situation exercising reasonable care would have observed it.

{¶18} Reviewing the evidence de novo, in a light most favorable to the plaintiffs, we reach the same conclusion as the trial court, that is, reasonable minds could only come to the conclusion that the driveway's condition was open and obvious. The photographs in the record clearly show a difference in elevation visible to the naked eye between the driveway and the grassy area. The Sabos alleged the grass at the time of the incident was taller than what the photographs in the record depict, which potentially made the elevation differential less visible. However, the evidence shows that immediately next to the small strip of grass was an outdoor carpet and concrete patio, which were visibly lower in elevation than the driveway. Thus, regardless of the height

of the grass, a person in Mrs. Sabo's situation – walking from the driveway to the backyard, which necessarily involved passing through the visibly lower patio area – would have observed the elevation differential in exercise of reasonable care. Mrs. Sabo herself testified that the day was clear. There was no allegation that her view was obstructed by any objects on the driveway when she walked toward the backyard from her vehicle, or that her attention was diverted by circumstances which may have enhanced the purported risk of the driveway's condition.

{¶19} Because the driveway's condition was open and obvious, the Zimmermans had no duty to warn Mrs. Sabo, either as an invitee or a licensee. As no genuine issues of material fact remained for the jury to determine, the trial court properly entered summary judgment in favor of the Zimmermans. The first assignment of error is without merit.

{¶20} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.