[Cite as *Zambo v. Tom-Car Foods, Inc.*, 2010-Ohio-474.]

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

GEORGE ZAMBO	C.A. No. 09CA009619
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
TOM-CAR FOODS	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 07CV152935

DECISION AND JOURNAL ENTRY

Dated: February 16, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} George Zambo tripped over a parking bumper as he approached the entrance of Tom-Car Foods. He broke both his arms trying to catch himself and suffered a detached retina. He sued Tom-Car and Magram Investments, the owner of the shopping center in which Tom-Car was located. The trial court granted summary judgment to Tom-Car and Magram because it concluded that the parking bumper was an open and obvious danger and that the violation of a federal regulation was not negligence per se. This Court affirms because the court correctly concluded that the parking bumper was an open and obvious danger.

FACTS

{¶2} Mr. Zambo called his mother to ask if there was anything she needed before he left on a business trip to Germany. She said she could use some milk, so he drove to Tom-Car, a convenience store located in a small shopping center near his home. Mr. Zambo had been to

Tom-Car between six and eight times. He had also been in the shopping center's parking lot on other occasions to go to his bank.

{¶3} Mr. Zambo arrived at the shopping center around 11:00 a.m. The sky was a little overcast. He parked his car and walked across the asphalt parking lot toward Tom-Car's entrance. The two parking spaces closest to the entrance were handicap spaces. They were along the front of the store and were separated by an aisle that was about as wide and long as a typical parking space. The aisle's perimeter was marked with yellow paint, and there were three yellow stripes painted horizontally or at a slight diagonal across it. At the end of the aisle closest to Tom-Car's entrance was an approximately 4- to 6-inch high, 4- to 6-foot wide concrete barrier known as a parking bumper, parking barrier, parking stop, stop bar, tire stop, or wheel stop. The barrier was black, but had three 8- to 12-inch wide yellow stripes painted diagonally along its side.

{¶4} Mr. Zambo approached the aisle that was between the handicap spaces from the right. Because there was a vehicle parked in the handicap space on the right side of the aisle, he could not see the aisle until he rounded the vehicle. He also could only see the top of Tom-Car's entrance before he rounded the vehicle. He walked up the aisle, but just as he was "getting ready to open [Tom-Car's] door," he fell straight forward, apparently having tripped over the parking bumper. He got up and bought the milk for his mother, but had to go to the hospital afterward instead of on his trip.

{¶5} The Zambos sued Tom-Car and Magram for negligently permitting a dangerous condition on their premises. Tom-Car and Magram moved for summary judgment, arguing that the parking bumper was an open and obvious condition. The Zambos resisted, arguing that the bumper was not open and obvious and that Tom-Car and Magram were negligent per se because

the bumper's placement violated regulations promulgated under the Americans with Disabilities Act. The trial court granted judgment to Tom-Car and Magram because it concluded that the parking bumper was an open and obvious danger and that the violation of a regulation is not negligence per se.

OPEN AND OBVIOUS DOCTRINE

{¶6} The Zambos' assignment of error is that the trial court incorrectly determined that the parking bumper was an open and obvious danger. In reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶7} "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.*, 18 Ohio St. 3d 203, 203 (1985). "A shopkeeper is not, however, an insurer of the customer's safety." *Id.* "[If] a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St. 3d 79, 2003-Ohio-2573, syllabus. "[T]he open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims." *Id.* at ¶5. "The rationale behind the doctrine is that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *Simmers v. Bentley Constr. Co.*, 64 Ohio St. 3d 642, 644 (1992).

{¶8} Open and obvious dangers are not hidden, are not concealed from view, and are discoverable upon ordinary inspection. *Kirksey v. Summit County Parking Garage*, 9th Dist. No. 22755, 2005-Ohio-6742, at ¶11. "The determinative issue is whether the condition [was] observable." *Id.* "[T]he dangerous condition . . . does not actually have to be observed by the plaintiff in order for it to be an 'open and obvious' condition under the law." *Id.* A duty does not exist if the plaintiff did not notice the condition until after he fell, but could have seen it if he had looked. *Id.*

{¶9} To determine whether a danger was open and obvious, this Court considers the hazard itself and any attendant circumstances that existed at the time of the incident. *Marock v. Barberton Liedertafel*, 9th Dist. No. 23111, 2006-Ohio-5423, at ¶14 ("[C]onsideration of attendant circumstances is merely a generalized version of the reasonableness test subsumed by the open and obvious doctrine."). "While there is no precise definition of attendant circumstances, they . . . 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. City of Barberton*, 9th Dist. No. 22300, 2005-Ohio-995, at ¶16 (quoting *McLain v. Equitable Life Assurance Co.*, 1st Dist. No. C-950048, 1996 WL 107513 at *5 (Mar. 13, 1996)). The question is whether, considering the totality of the circumstances, a genuine issue of material fact exists regarding whether a reasonable person in Mr. Zambo's situation would have discovered the parking bumper in the handicap aisle. *Marock*, 2006-Ohio-5423, at ¶14; *Jenks*, 2005-Ohio-995, at ¶15.

{¶10} The Zambos have argued that the parking bumper was not observable because it was similar in color to the asphalt and paint stripes used in the parking lot. They have noted that the bumper was black with yellow stripes, similar to the aisle's yellow striping on asphalt. They

have also argued that Mr. Zambo was distracted by Tom-Car's entrance, which was only about an arms-length away at the time he fell. According to the Zambos, it is reasonable for someone to be distracted as he approaches the entrance of a store because he must look out for other customers coming or going from the store. They have also argued that it is unreasonable to expect a parking bumper in a handicap aisle that is not intended for vehicles. They have further argued that the parking bumper in the handicap aisle was not in alignment with the bumpers in the parking spaces. Finally, they have argued that Mr. Zambo's view of the handicap aisle was blocked by the vehicle parked in the adjacent parking spot and have theorized that there might have been shadows from the store or car that affected the light conditions on the bumper.

{¶11} Construing the evidence in a light most favorable to the Zambos, this Court concludes that the parking bumper was an open and obvious danger. Mr. Zambo testified at his deposition that, once he rounded the vehicle parked next to the handicap aisle, there was nothing blocking his ability to see the parking bumper and that it was clearly visible. While his focus may have been on Tom-Car's entrance when he reached the end of the handicap aisle, the bumper would have come into view when he rounded the adjacent vehicle and would have continued to be visible throughout the time he walked up the aisle, which was about as long as a typical parking space. Although the Zambos have argued that the bumper was similar in color to the parking lot, Mr. Zambo did not say that it "was hidden or not observable by ordinary inspection." *Johnson v. Golden Corral*, 4th Dist. No. 99CA2643, 2000 WL 1358635 at *2 (Sept. 12, 2000). "A reasonable person can be expected to take note of an object obstructing [his] path that is of the dimension of a common parking barrier." *Haymond v. BP America*, 8th Dist. No. 86733, 2006-Ohio-2732, at ¶18; *Mullins v. Darby Homes*, 10th Dist. No. 98AP-1616, 1999 WL 536641 at *2 (July 27, 1999) ("While the average person cannot be expected to spend all his or

her time looking down while walking, a reasonable person can be expected to take note of an object obstructing his or her path which is of the dimensions of the concrete [parking] barrier here.").

{¶12} Mr. Zambo admitted that the purpose of the bumpers was to stop cars from driving onto the sidewalk that ran along the front of the shopping center. See *Furano v. Sunrise Inn of Warren Inc.*, 11th Dist. No. 2008-T-0132, 2009-Ohio-3150, at ¶18 ("A tire stop, in order to perform its inherent function of preventing a vehicle from traveling further, is necessarily elevated from the ground."). He also admitted that the sidewalk ran in front of the handicap aisle. Accordingly, even if it is unusual for a parking bumper to be located in a handicap aisle, the one in this case protected pedestrians on the sidewalk from anyone who might have attempted to park there. The question is whether a reasonable person would have discovered it under the circumstances. Having considered the characteristics of the parking bumper and the attendant circumstances at the time Mr. Zambo was walking to Tom-Car's entrance, this Court concludes that he would. The Zambos' assignment of error is overruled.

CONCLUSION

{¶13} The trial court correctly determined that there is no genuine of issue of material fact that the parking bumper Mr. Zambo tripped over was an open and obvious danger. The judgment of the Lorain County Common Pleas Court 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.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCUR

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶14} Although I agree that the parking bumper was "open and obvious" here and summary judgment was appropriately granted, I would solely look at the totality of the circumstances in making that determination instead of looking at attendant circumstances.

{¶15} This Court has held:

> "Under this approach, the existence of attendant circumstances would serve effectively to reimpose a duty, where the original hazard was open and obvious. This Court here clarifies our position and breaks with the other district courts which find attendant circumstances to be an exception to the open and obvious doctrine. Rather, this Court adopts the view that the consideration of attendant circumstances is merely a generalized version of the reasonableness test subsumed by the open and obvious doctrine. Therefore, the issue before us is whether, considering the totality of the circumstances, a genuine issue of material fact exists regarding whether a reasonable person would have discovered the case of empty beer bottles against the wall, i.e. whether that hazard was open and

> obvious." *Marock v. Barberton Liedertafel*, 9th Dist. No. 23111, 2006-Ohio-5423, at ¶14.

{¶16} Consequently, after reviewing the totality of the circumstances here, I agree that the parking barrier was open and obvious.

APPEARANCES:

MARK G. PETROFF, and DAVID A. HAMAMEY, II, attorneys at law, for appellants.

RICHARD A. DILISI, attorney at law, for appellee.

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