[Cite as *Cottrell v. El Castillo Grande Mexican Restaurant*, 2010-Ohio-815.]

STATE OF OHIO))ss: COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
BRENT D. COTTRELL, et al. Appellees v. EL CASTILLO GRANDE MEXICAN RESTAURANT, et al. Appellants	C.A. No. 09CA009624 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 08CV156539

DECISION AND JOURNAL ENTRY

Dated: March 8, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellants, Brent Cottrell and Kelly Cottrell (collectively "the Cottrells"), appeal from the decision of the Lorain County Court of Common Pleas granting summary judgment in favor of Defendant-Appellees, New Castle Restaurant, Inc. and Richard Roman, its president (collectively "New Castle"). This Court affirms.

I

{¶2} On May 5, 2006, the Cottrells went with a friend to El Castillo Grande Mexican Restaurant ("El Castillo Grande") in Lorain to celebrate Cinco de Mayo. They arrived at approximately 5:30 p.m. and dined for over an hour. Upon exiting the restaurant, the Cottrells had to navigate their way through the crowd that had gathered to wait outside the restaurant. In doing so, Mr. Cottrell descended several concrete steps, but upon reaching the final step before the sidewalk, he tripped and fell, injuring his leg. The step he fell from had cracked concrete in the middle of it, and portions of the step around the crack were crumbled and deteriorated.

{¶3} The Cottrells filed a complaint against El Castillo Grande and New Castle, alleging that they negligently permitted a dangerous condition on the property. Their complaint included a claim for loss of consortium stemming from Mr. Cottrell's injuries. The Cottrells also named Medical Mutual Insurance Company ("Medical Mutual") as a defendant for purposes of determining its subrogation rights related to the medical bills it had paid for Mr. Cottrell's injury. New Castle answered the complaint and filed a cross-claim against El Castillo Grande. Medical Mutual filed a counterclaim against the Cottrells asserting its subrogation rights, as well as a cross-claim against El Castillo Grande and New Castle asserting the same.

{¶4} New Castle moved for summary judgment, arguing that it did not have a duty to warn the Cottrells about the step because it was an open and obvious condition. Additionally, New Castle asserted that, as a commercial landlord who leased the property to El Castillo Grande, it had no obligation to maintain or repair the conditions on the property. The Cottrells opposed New Castle's motion, arguing that there was a genuine issue of material fact as to whether the step's condition was open and obvious and challenging New Castle's assertion that it was precluded from any liability based on the lease agreement it held with the restaurant.

{¶5} The trial court granted New Castle's motion for summary judgment. In the same journal entry, the trial court also dismissed the Cottrells' case with prejudice. The Cottrells timely appeal, asserting one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT TAKING INTO ACCOUNT THE ATTENDANT CIRCUMSTANCES SURROUNDING PLAINTIFF'S ACCIDENT, THEREBY RAISING A QUESTION OF FACT AS TO WHETHER THE DEFECT WAS OPEN AND OBVIOUS[.]"

{¶6} As a preliminary matter, we note that the Cottrells do not argue that the trial court erred in dismissing their case with prejudice simultaneous to granting New Castle's motion for summary judgment. Instead, the Cottrells assert only that the trial court erred in granting New Castle's motion for summary judgment. The Cottrells argue that the trial court failed to consider the attendant circumstances which were present when Mr. Cottrell exited the restaurant. We disagree.

{¶7} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. It applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12. Summary judgment is proper under Civ.R. 56(C) if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support its motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293; Civ.R. 56(E). In order to prevail on a negligence claim, a plaintiff must show the existence of a duty, a breach of the duty, and an injury proximately resulting from the breach of duty. *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶8} It is undisputed that Mr. Cottrell was a business invitee at El Castillo Grande when he fell on the steps. See *Holl v. Montrose, Inc.* (1992), 82 Ohio App.3d 644, 647-48. Consequently, he was owed a duty of ordinary care. Id. "[Where] a danger is open and obvious, [however,] 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. Instead, "the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims." Id. at ¶5. Moreover, a shopkeeper is not "an insurer of the customer's safety" nor is a shopkeeper "under [any] duty to protect [its] invitees from dangers 'which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them.'" *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 203-04, quoting *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus.

{¶9} This Court analyzes the totality of the circumstances to determine if the danger is open and obvious. *Marock v. Barberton Liedertafel*, 9th Dist. No. 23111, 2006-Ohio-5423, at ¶14. In doing so, we consider both the nature of the dangerous condition and any attendant circumstances that may have existed at the time of the injury. Id. Central to this analysis is "whether the condition is observable." *Kirksey v. Summit Cty. Parking Garage*, 9th Dist. No. 22755, 2005-Ohio-6742, at ¶11. We have clarified that "the dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be an 'open and obvious' condition[,] *** [nor does it matter if] the plaintiff did not notice the condition until after he [] fell, [if he] could have seen the condition *** had [he] looked." Id. Consideration of attendant circumstances takes into account the conditions as they existed at the time of the incident including the time, place, and surroundings. *Galo v. Carron Asphalt Paving, Inc.*, 9th Dist. No.

08CA009374, 2008-Ohio-5001, at ¶10. Such circumstances might unreasonably increase the risk of harm given the dangerous condition by reducing the amount of care an ordinary person would exercise. Id. ¶15. Therefore, in this case we must determine, given the totality of the circumstances, whether a reasonable person exiting the restaurant would have discovered the cracked and crumbled cement on the step outside El Castillo Grande.

{¶10} In New Castle's motion for summary judgment, it argued that the condition on the step was open and obvious, thus precluding it from any liability for Mr. Cottrell's injuries. New Castle supported its argument by appending portions of Mr. Cottrell's deposition testimony where he stated he went to El Castillo Grande approximately twice a month for nearly a year and had always entered and exited by the same steps. He denied that the weather or daylight that day had anything to do with his fall. He further admitted that he was not looking down at the ground as he descended the steps because he was trying not to bump into other patrons who were standing on the steps waiting outside the restaurant or his friend who was walking in front of him. He stated that he had not paid much attention to the condition of the step as he entered or exited the restaurant. Based upon the foregoing, we conclude New Castle satisfied its initial *Dresher* burden of establishing the condition of the step was open and obvious.

{¶11} In response, the Cottrells argued that a genuine factual dispute remained as to whether the condition was open and obvious, given the existence of the following attendant circumstances: (1) the crowd gathered on the steps; (2) the close proximity Mr. Cottrell was maintaining to the friend who was with him in order to not bump into others on the steps; and (3) his view of the steps being obstructed given the two foregoing facts. The Cottrells appended photographs of the restaurant's steps to their motion opposing summary judgment, arguing that the dangerous condition was not observable in light of the many people waiting on the steps

when they exited. They relied on Mr. Cottrell's deposition testimony about the sizeable crowd waiting outside the restaurant, which made it more difficult for him to descend the steps or see where he was walking. Mr. Cottrell stated that the people who were waiting had lined both sides of the steps which is why he had to proceed down the middle of the steps. Given the number of people standing nearby, Mr. Cottrell placed his hand on his friend's back at one point to steady himself while descending the steps. Mr. Cottrell argues these conditions diverted his attention which increased the risk of harm presented by the step's condition and contributed to his fall.

{¶12} Our review of the record requires we conclude that the trial court did not err in granting summary judgment in favor of New Castle. The photographs in the record evidence that the crack in the middle of the step and the crumbled concreted around it were readily observable. Mr. Cottrell admitted that he entered the restaurant by way of the same steps, where the condition was observable and unobstructed by any people waiting outside the restaurant. Though Mr. Cottrell asserts the crowd created an attendant circumstance which distracted him and reduced the amount of care he was able to exercise, his testimony belies this assertion. Instead, it reveals that he was being more careful while descending the steps, as he admits he was trying not to bump others who were waiting and held onto his friend in an attempt to steady himself while walking through the crowd.

{¶13} Based upon the totality of the circumstances, including the crowd that was present as Mr. Cottrell descended the stairs, we conclude that a reasonable person in the same situation would have discovered the condition of the step. *Marock* at ¶14. Accordingly, New Castle had no duty to warn Mr. Cottrell about the condition of the step because it was open and obvious. *Armstrong* at ¶5. Because the Cottrells failed to satisfy their reciprocal *Dresher* burden, the trial court did not err in granting summary judgment in favor of New Castle.

{¶14} To the extent New Castle has asserted in its summary judgment motion to the trial court and again in its brief to this Court that it is precluded from liability based on its status as a commercial leaseholder, we need not address this argument, given that that the trial court properly resolved the matter based on the presence of an open and obvious condition in the step. Accordingly, we overrule the Cottrells' sole assignment of error.

III

{¶15} The Cottrells' sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas 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.

BETH WHITMORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

ANTHONY N. PALOMBO, Attorney at Law, for Appellants.

MICHAEL F. FARRELL, Attorney at Law, for Appellee.

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