

ORIGINAL

IN THE SUPREME COURT OF OHIO

Deanna Boston, et al.,	:	Case No. 2012-0088
	:	
Appellees	:	On Appeal from the Jefferson
	:	County Court of Appeals,
v.	:	Seventh Appellate District
	:	
A&B Auto Sales, Inc.	:	Court of Appeals
	:	Case No. 11 BE 2
Appellant	:	

MEMORANDUM IN RESPONSE OF APPELLEES DEANNA AND STARLING BOSTON
OPPOSING JURISDICTION

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APPELLEES' POSITION AS TO WHY THIS CASE
IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

Appellant claims that the lower court's decision is in conflict with decisions from other appellate districts and "threatens to turn all Ohio landowners into insurers of the absolute safety of their guests."

Actually, the decision by the Court of Appeals is *not* in conflict with any of the appellate decisions cited by appellant. It does *not* depart from existing law. It sets *no* new precedents. It threatens *no* Ohio landowners. The court simply held that, under the limited evidence available to the trial judge, whether or not the hazard that caused plaintiff's injuries was open and obvious was a question of disputed fact and could not properly be resolved by summary judgment.

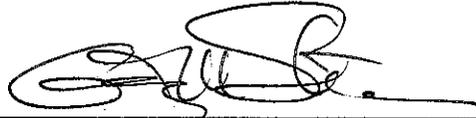
ARGUMENT

Appellant's proposition of law is inaccurate, if not downright misleading. The case does not declare that "darkened lighting conditions" negate an open and obvious hazard. Rather, the Court of Appeals was diligent in pointing out that under Ohio law, an open and obvious hazard negates a landowner's duty of care as a matter of law.

But the Court of Appeals also followed prevailing Ohio law in holding that, under some circumstances, whether a hazard is open and obvious may involve a genuine issue of material fact which a only a trier of fact can resolve. The court relied on numerous similar rulings from its own and other appellate districts, including *Henry v. Dollar Gen. Store*, 2003-Ohio-206 (2nd Dist.); *Hissong v. Miller*, 2010-Ohio-961 (2nd Dist.); *Louderback v. McDonald's Restaurant*, 2005-3926 (4th Dist.); *Kraft v. Dolgencorp*, 2007-Ohio-4997 (7th Dist.); and *Schmitt v. Duke Realty, LP*, 2005-Ohio 4245 (10th Dist.).

The present case involved a motion for summary judgment. The only evidence before the trial court was a deposition containing ambiguous testimony by the plaintiff and an affidavit by an eyewitness. The burden was on appellant to establish that there were no genuine issues of fact as to whether the hazard was open and obvious. Appellant failed to satisfy this burden. The court of appeals properly held that, in light of the scant evidence before the trial court, and construing that evidence in favor of the non-moving party, “a question of fact exists as to whether the bright sunlight and dim hallway distracted Boston from observing the hazard” (at ¶50 of the Opinion).

What appellant really seems to be aiming for with its curiously-phrased proposition of law is this: “*Whenever there is evidence that darkened lighting conditions exist, a court **must** rule as a matter of law that any hazard in the vicinity is open and obvious.*” This proposition poses far more danger to Ohio litigants – and to Article I, §5 of the Ohio Constitution (right of trial by jury) – than does anything contained in the Seventh Appellate District’s decision.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by ordinary U.S. mail to Ronald D. Gregory,
counsel for appellant, on February 10, 2012.

A handwritten signature in black ink, appearing to read "G. Stern", written over a horizontal line.

Gary M. Stern
COUNSEL FOR APPELLEES