IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

THOMAS LINDSTEDT,	:	APPEAL NO. C-160512 TRIAL NO. A-1502847
and	:	
JAN LINDSTEDT,	:	*JUDGMENT ENTRY.*
Plaintiffs-Appellants,	:	
vs.	:	
TONY'S STEAK & SEAFOOD OF CINCINNATI aka TONY'S OF CINCINNATI,	:	
and	:	
DJGN LLC,	:	
Defendants-Appellees,	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiffs-appellants Thomas and Jan Lindstedt appeal the trial court's decision granting summary judgment to defendants-appellees Tony's Steak & Seafood of Cincinnati, aka Tony's of Cincinnati, and DJGN LLC (together "Tony's") on their negligence claims stemming from injuries Mr. Lindstedt sustained when he air-stepped off a 14-inch high stage and fell into the dining room of Tony's restaurant. Mrs.

Lindstedt joined in the action, claiming a loss of consortium. Tony's moved for summary judgment, arguing that they owed no duty to protect Mr. Lindstedt because the change in elevation between the dining room and stage had been open and obvious, and alternatively, that Mr. Lindstedt had surrendered the legal protections of his invitee status when he fell after pushing his way past the piano and onto the stage area, which was off-limits to restaurant patrons. The trial court granted summary judgment to Tony's on both grounds.

In their two assignments of error, the Lindstedts challenge the entry of summary judgment for Tony's arguing that genuine issues of material fact remain and that Mr. Lindstedt did not lose his legal status as a business invitee when he "inadvertently entered the stage area."

A trial court may grant summary judgment under Civ.R. 56(C) when "(1) no genuine issue of 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 favor of the party against whom the motion for summary judgment is made," the conclusion is adverse to that party. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). We review a grant of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712. ¶ 8.

Generally, a business owner 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 Pharm. Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). A premises owner, however, owes no duty to persons entering the premises regarding dangers that are open and obvious. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 80, 2003-Ohio-2573, 788 N.E.2d 1088, ¶

5 ("When applicable * * * the open and obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims.")

Construing the evidence in the record most favorably to appellant, including the photographs of the stage which were taken in similar conditions to those when Mr. Lindstedt fell, we agree with the trial court that no genuine issue of material fact remains and that the elevation change between the stage and the dining room was open and obvious and of the type that Tony's could reasonably have assumed that Mr. Lindstedt would discover and protect himself against.

We further conclude there were no attendant circumstances that would have reduced the degree of care an ordinary person would use in encountering the change in elevation. Because the elevation change constituted an open and obvious condition, defendants-appellees had no duty to warn Mr. Lindstedt about this condition, and his status when he crossed the stage, as an invitee or trespasser, was irrelevant.

And because violations of the Ohio Basic Building Code are not negligence per se, but merely evidence of negligence, and such violations do not preclude the application of the open and obvious doctrine, *Lang v. Holly Hill Motel, Inc.* 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 20, the Lindstedts' submission of an engineer's report setting forth his opinion that Tony's had violated the building code did not preclude the application of the open and obvious doctrine. *Accord Vaughn v. Firehouse Grill, LLC*, 1st Dist. Hamilton No. C-160512, 2017-Ohio-6967, ¶ 15; *Kirchner v. Shooters on the Water, Inc.*, 167 Ohio App.3d 708, 2006-Ohio-3583, 856 N.E.2d 1026, ¶ 30.

Finally, we conclude that summary judgment was appropriately granted to Tony's on Mrs. Lindstedt's loss-of-consortium claim because it was derivative of her husband's negligence claims. *See Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 585

N.E.2d 384 (1992); *Colegrove v. Fred A Nemann Co.*, 1st Dist. Hamilton No. C-140171, 2015-Ohio-533, ¶ 30.

We, therefore, overrule the assignments of error and affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., ZAYAS and **DETERS, JJ.**

To the clerk:

Enter upon the journal of the court on January 31, 2018

per order of the court _____.
Presiding Judge