

IN THE
SUPREME COURT OF OHIO

DOROTHY LANG, EXECUTRIX
OF THE ESTATE OF ALBERT LANG

Plaintiff-Appellant,

v.

HOLLY HILL MOTEL, et al.

Defendants-Appellees.

07-1370

On Appeal from the
Jackson County Court of Appeals,
Fourth Appellate District

Court of Appeals
Case No. 06CA18

NOTICE OF CERTIFIED CONFLICT

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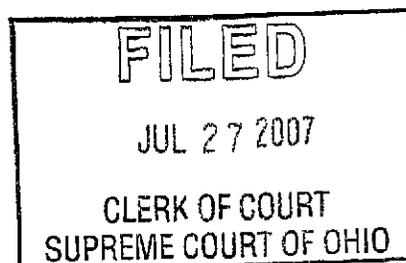
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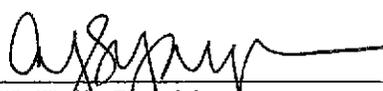
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NOTICE OF CERTIFIED CONFLICT

Appellant, Dorothy Lang, Executrix of the Estate of Albert Lang, hereby gives notice that the Jackson County Court of Appeals, Fourth Appellate District, granted Appellant's Motion to Certify Conflict in Court of Appeals Case No. 06CA18 on July 16, 2007. The order of the Fourth district Court of Appeals certifying the conflict is attached at Tab 1, and copies of the conflicting decisions are attached at Tab 2..

Respectfully submitted,

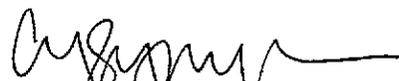


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Certified Conflict was sent to all counsel of record on this 24th day of July, 2007 by regular U.S. Mail.



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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

DOROTHY LANG,

Plaintiff-Appellant

vs.

HOLLY HILL MOTEL, et al.,

Defendants-Appellees.

FILED
COURT OF APPEALS
JACKSON CO. OHIO

Case No. 06CA18

JUL 16 2007

: ENTRY ON MOTION TO CERTIFY
CONFLICT

Appellant Dorothy Lang filed a Motion to Certify Conflict pursuant to App.R. 25. Appellant asserted that this court's Decision and Judgment Entry in Lang v. Holly Hill Motel, Jackson App. No. 06CA18, conflicts with Uddin v. Embassy Suites Hotel, 165 Ohio App.3d, 2005-Ohio-6613, appeal allowed, 109 Ohio St.3d 1455, 2006-Ohio-2226, 847 N.E.2d 5, appeal dismissed as improvidently allowed 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638; Christen v. Don Vonderhaar Market and Catering, Hamilton App. No. C-050125, 2006-Ohio-715; and Francis v. Showcase Cinema Eastgate, 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535.

Section 3(B)(4), Article IV of the Ohio Constitution permits an appellate court to certify an issue to the Ohio Supreme Court for review and final determination when "the judges of a court of appeals find that a judgment upon which they have agreed is in Conflict with a judgment pronounced upon the same question by any other court of appeals of the state."

In Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596 613 N.E.2d 1032, 1034, the Ohio Supreme Court clarified the

requirements that an appellate court must find before certifying a judgment as being in Conflict.

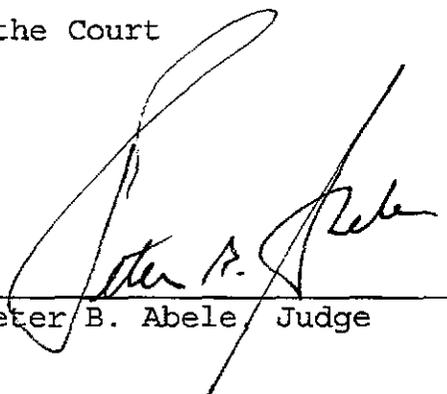
"First, the certifying court must find that its judgment is in Conflict with the judgment of a court of appeals of another district and the asserted Conflict must be 'upon the same question.' Second, the alleged Conflict must be on a rule of law--not facts. Third, the journal entry or opinion must clearly set forth that rule of law which the certifying court contends is in Conflict with the judgment on the same question by other district courts of appeals."

In the case sub judice, appellant asserts that our decision holding that an Ohio Basic Building Code violation does not negate application of the open and obvious doctrine conflicts with the holdings in Uddin, Christen, and Francis. We agree that our decision conflicts with Uddin, Christen, and Francis. We therefore certify the following question to the Ohio Supreme Court: "Whether a violation of an administrative building code provision prohibits the application of the open and obvious doctrine and precludes summary judgment on a negligence claim?"

MOTION GRANTED.

Harsha, J. & Kline, J.: Concur

For the Court

BY: 
Peter B. Abele Judge

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

FILED
COURT OF APPEALS
JACKSON CO OHIO

MAY 23 2007

ROBERT WALTON, CLERK

DEP

DOROTHY LANG, EXECUTRIX OF
THE ESTATE OF ALBERT LANG, :

Plaintiff-Appellant, :

vs. :

HOLLY HILL MOTEL, INC., et al., : DECISION AND JUDGMENT ENTRY

Defendants-Appellees. :

Case No. 06CA18

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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, J.

This is an appeal from a Jackson County Common Pleas Court summary judgment in favor of Holly Hill Motel, Inc. (Holly Hill) and Rodney McCorkle dba Rodney McCorkle Builder (McCorkle), defendants below and appellees herein.

Dorothy Lang, executrix of the estate of Albert Lang, plaintiff below and appellant herein, raises the following assignment of error for review:

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT HOLLY HILL MOTEL AND THIRD PARTY DEFENDANT ROD MCCORKLE BUILDERS."

On April 4, 1999, appellant and her husband, Albert Lang, stopped at the Holly Hill Motel. Appellant requested a handicap accessible room, but the motel advised that none was available. The motel assigned the Langs a room that required them to climb two steps to reach the motel room. Appellant assisted her husband, who suffered from emphysema and required an oxygen tank, up the steps. As they crossed the second step, her husband fell and suffered a broken hip. In July of 1999, Mr. Lang died from respiratory failure. Appellant alleges that her husband's limited mobility following his broken hip operation hastened his death.

On April 6, 2004, appellant filed a complaint against Holly Hill and alleged that her husband tripped at the Holly Hill motel while traversing unusually high steps that lacked a handrail. She further averred that he suffered a broken hip and that this injury subsequently caused respiratory failure and his ultimate demise.

Holly Hill filed a third-party complaint against McCorkle and alleged that McCorkle's negligent construction proximately resulted in Mr. Lang's injuries.

On November 5, 2004, McCorkle requested summary judgment and asserted that appellant could not identify the precise cause of her husband's fall. McCorkle further argued that any hazards associated with the step were open and obvious, which obviated him of a duty to warn. On January 19, 2005, Holly Hill also requested summary judgment and raised essentially the same arguments as McCorkle: (1) that the step presented an open and

obvious danger; and (2) that appellant could not identify what caused her husband to fall.

In response, appellant asserted that in her deposition she stated that her husband tripped on the step. She argued that she need not establish to an absolute certainty what caused the fall, but need only produce evidence so that a jury could reasonably infer that "the defect complained of caused the fall." Appellant further disputed appellees' arguments that the step presented an open and obvious danger. She contended that the riser height was not readily discoverable and that while the lack of a handrail was apparent, the need for one was not. Appellant argued that if a handrail had been in place, it may have prevented her husband's fall.

The trial court granted McCorkle and Holly Hill summary judgment. It determined that because appellant could not state with certainty what caused her husband to fall, she could not establish the cause of his fall.

On December 15, 2005, we reversed and remanded the trial court's judgment. See Lang v. Holly Hill, Jackson App. No. 05CA6, 2005-Ohio-6766. We determined that the trial court improperly concluded that appellant failed to identify the cause of her fall. We also declined, however, to address the open and obvious doctrine because the trial court did not consider it as a basis for granting summary judgment.

On remand, appellees requested summary judgment and argued that the open and obvious doctrine relieved them of the duty to warn. In particular, appellees that any defect in the stairs and

the lack of a handrail were easily observable conditions and, thus, constituted open and obvious hazards.

Appellant asserted that the condition of the stairs was not an open and obvious danger. She noted that her expert stated in an affidavit that the riser was 2.375 to 2.75 inches higher than permitted under the Ohio Basic Building Code (OBBC). She contended that the riser height was not easily discernible because (1) her husband "was an elderly gentleman who carried an oxygen tank"; (2) "the steps and sidewalk were all a uniform color"; and (3) the fall occurred in the evening. Appellant further argued that the lack of a handrail, while visually apparent, was not an open and obvious danger. She asserts that neither she nor her husband recognized the need for a handrail until her husband began climbing the step and encountered the non-compliant riser. She contends that if a handrail had been in place, her husband could have stopped his fall.

On September 7, 2006, the trial court determined that the stair presented an open and obvious danger and granted appellees summary judgment. The court explained:

" [Appellant] and her husband had several feet in which to view the step before attempting to traverse the step. [Appellant] and her husband stepped from the parking lot up onto a sidewalk which led to the step in question, which was several feet in front of them. There is no allegation that the lighting was poor or that there was any reason that [appellant] and her husband were not able to discern the step. * * * * Defendant had a step which was higher than a normal step. However, at the approach it was only a single step which [appellant] and her husband would have had ample opportunity to view and decide whether to use the step or to take whatever appropriate measures would be necessary to protect themselves."

The court also rejected appellant's argument that the OBBC violation precluded summary judgment. This appeal followed.

In her sole assignment of error, appellant contends that the trial court overruled appellees' summary judgment. She asserts that the court erroneously concluded that the danger associated with the stairs was open and obvious and argues that the dangerous nature of the stairs was not easily discoverable due to the following circumstances: (1) her husband was an elderly man who carried an oxygen tank; (2) the steps and sidewalk were a uniform color; (3) the fall occurred in the evening; and (4) her husband was tired from traveling all day. Appellant contends that these circumstances constitute "attendant circumstances" that create a jury question as to whether the danger associated with the steps was open and obvious. Appellant further asserts that because the riser height and the absence of a handrail constitute violations of the OBBC, the violations create a genuine issue of material fact as to whether the danger was open and obvious.

Initially, we note that when reviewing a trial court summary judgment decisions, appellate courts must conduct a de novo review. See, e.g., Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment was appropriate and need not defer to the trial court's decision. See Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786. Thus, in determining

whether a trial court properly granted a summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

Civ.R. 56(C) provides, in relevant part, as follows:

* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Pursuant to that rule, a trial court may not award summary judgment unless the evidence demonstrates that: (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) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

Under Civ.R. 56, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a material fact. Vahila, supra; Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 273. The moving

party cannot discharge its initial burden under the rule with a conclusory assertion that the nonmoving party has no evidence to prove its case. See Kulch v. Structural Fibers, Inc. (1997), 78 Ohio St.3d 134, 147, 677 N.E.2d 308, 318; Dresher, supra. Rather, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); Dresher, supra.

"[U]nless a movant meets its initial burden of establishing that the nonmovant has either a complete lack of evidence or has an insufficient showing of evidence to establish the existence of an essential element of its case upon which the nonmovant will have the burden of proof at trial, a trial court shall not grant a summary judgment." Pennsylvania Lumbermans Ins. Corp. v. Landmark Elec., Inc. (1996), 110 Ohio App.3d 732, 742, 675 N.E.2d 65. Once the moving party satisfies its burden, the nonmoving party bears a corresponding duty to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); Dresher, supra. A trial court may grant a properly supported summary judgment motion if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that there is a genuine issue for trial. *Id.*; Jackson v. Alert Fire & Safety Equip., Inc. (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027.

A successful negligence action requires a plaintiff to establish that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. See, e.g., Texler v. D.O. Summers Cleaners (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 217; Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614; Menifee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. If a defendant points to evidence illustrating that the plaintiff will be unable to prove any one of the foregoing elements and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to judgment as a matter of law. See Feichtner v. Cleveland (1994), 95 Ohio App.3d 388, 394, 642 N.E.2d 657; Keister v. Park Centre Lanes (1981), 3 Ohio App.3d 19, 443 N.E.2d 532-A-0015.

In a premises liability case, the relationship between the owner or occupier of the premises and the injured party determines the duty owed. See, e.g., Gladon v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287; Shump v. First Continental-Robinwood Assocs. (1994), 71 Ohio St.3d 414, 417, 644 N.E.2d 291. In the case at bar, the parties do not dispute that appellant and her husband were business invitees.

A business premises owner or occupier possesses the duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that its business invitees will not unreasonably or unnecessarily be exposed to danger. Paschal v.

Rite Aid Pharmacy, Inc. (1985), 18 Ohio St.3d 203, 203, 480 N.E.2d 474. A premises owner or occupier is not, however, an insurer of its invitees' safety. See *id.* While the premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers, see Jackson v. Kings Island (1979), 58 Ohio St.2d 357, 358, 390 N.E.2d 810, invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. See Brinkman v. Ross (1993), 68 Ohio St.3d 82, 84, 623 N.E.2d 1175; Side v. Humphrey (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus.

Therefore, when a danger is open and obvious, a premises owner owes no duty of care to individuals lawfully on the premises. See Armstrong v. Best Buy Co., 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, at ¶5; Side v. Humphrey (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus. The underlying rationale 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." Armstrong, at ¶5. "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." *Id.* at ¶13.

In most situations, whether a danger is open and obvious presents a question of law. See Hallowell v. Athens, Athens App. No. 03CA29, 2004-Ohio-4257, at ¶21; see, also, Nageotte v. Cafaro Co., Erie App. No. E-04-15, 2005-Ohio-2098. Under certain circumstances, however, disputed facts may exist regarding the openness and obviousness of a danger, thus rendering it a question of fact. As the court explained in Klauss v. Marc Glassman, Inc., Cuyahoga App. No. 84799, 2005-Ohio-1306, at ¶17-18:

“Although the Supreme Court of Ohio has held that whether a duty exists is a question of law for the court to decide, the issue of whether a hazardous condition is open and obvious may present a genuine issue of fact for a jury to review.

Where only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. Anderson v. Hedstrom Corp. (S.D.N.Y.1999), 76 F.Supp.2d 422, 441; Vella v. Hyatt Corp. (S.D. MI 2001), 166 F.Supp.2d 1193, 1198; see, also, Parsons v. Lawson Co. (1989), 57 Ohio App.3d 49, 566 N.E.2d 698. However, where reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. Carpenter v. Marc Glassman, Inc. (1997), 124 Ohio App.3d 236, 240, 705 N.E.2d 1281; Henry v. Dollar General Store, Greene App. No.2002-CA-47, 2003-Ohio-206; Bumgarner v. Wal-Mart Stores, Inc., Miami App. No.2002-CA-11, 2002-Ohio-6856.”

See, also, Oliver v. Leaf and Vine, Miami App. No.2004CA35, 2005-Ohio-1910, at ¶31 (“The determination of whether a hazard is latent or obvious depends upon the particular circumstances surrounding the hazard. In a given situation, factors may include lighting conditions, weather, time of day, traffic patterns, or activities engaged in at the time.”) (internal quotations omitted).

"Attendant circumstances" may also create a genuine issue of material fact as to whether a hazard is open and obvious. See Cummin v. Image Mart, Inc., Franklin App. No. 03AP-1284, 2004-Ohio-2840, at ¶8, citing McGuire v. Sears, Roebuck & Co. (1996), 118 Ohio App.3d 494, 498, 693 N.E.2d 807. An attendant circumstance is a factor that contributes to the fall and is beyond the injured person's control. See Backus v. Giant Eagle, Inc. (1996), 115 Ohio App.3d 155, 158, 684 N.E.2d 1273. "The phrase refers to all circumstances surrounding the event, such as time and place, the environment or background of the event, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event." Cummin, at ¶8, citing Cash v. Cincinnati (1981), 66 Ohio St.2d 319, 324, 421 N.E.2d 1275. An "attendant circumstance" has also been defined to 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." McGuire, 118 Ohio App.3d at 499.

Attendant circumstances do not include the individual's activity at the moment of the fall, unless the individual's attention was diverted by an unusual circumstance of the property owner's making. See McGuire, 118 Ohio App.3d at 498. Moreover, an individual's particular sensibilities do not play a role in determining whether attendant circumstances make the individual unable to appreciate the open and obvious nature of the danger. As the court explained in Goode v. Mt. Gillion Baptist Church, Cuyahoga App. No. 87876, 2006-Ohio-6936, at ¶25: "The law uses

an objective, not subjective, standard when determining whether a danger is open and obvious. The fact that appellant herself was unaware of the hazard is not dispositive of the issue. It is the objective, reasonable person that must find that the danger is not obvious or apparent." Thus, we use an objective standard to determine whether the danger associated with the stairs was open and obvious.

In the case sub judice, we disagree with appellant that genuine issues of material fact remain as to whether the stairs presented an open and obvious danger. The height of the stairs and the lack of a handrail were readily observable. See Early v. Damon's Restaurant, Franklin App. No. 05AP-1342, 2006-Ohio-3311 (stating that the lack of a handrail was an open and obvious hazard); Nelson v. Sound Health Alternatives, Inc. (Sept. 6, 2001), Athens App. No. 01CA24 (holding that lack of handrail, uniformity of color between steps and landing, and dimly lit stairs presented open and obvious danger). Here, the landowner did nothing to conceal the height of the stairs or the lack of a handrail, or to render those conditions unnoticeable or to otherwise distract appellant and her husband.

Further, none of the facts appellant raises as "attendant circumstances" are conditions within the landowner's control. For example, the fact that her husband was tired and required an oxygen tank were not within the landowner's control. Cf. Isaacs v. Meijer, Inc., Clermont App. No. CA2005-10-98, 2006-Ohio-1439 (stating that the fact that appellant was carrying six boxes of frozen dinners was clearly her choice and within her control and

did not prevent her from looking where she was walking).

Although appellant claims that it was "evening," she does not claim that the area was poorly lit. Even if the area had been poorly lit, we note that "darkness is always a warning of danger, and may not be disregarded." McCoy v. Kroger Co., Franklin App. No. 05AP7, 2005-Ohio-6965, at ¶14; see, also, Chaparro-Delvalle v. TSH Real Estate Invest. Co., Inc., Lorain App. No. 05CA8712, 2006-Ohio-925; Storc v. Day Drive Assocs. Ltd., Cuyahoga App. No. 86284, 2006-Ohio-561.

Appellant nevertheless asserts that the riser height of the stairs and the lack of a handrail constituted violations of the OBBC and that such violations preclude summary judgment. Ohio appellate courts are split on this issue, however. The Second, Fifth, Eighth, and Twelfth, districts hold that OBBC violations do not preclude summary judgment. See Ahmad v. AK Steel Corp., Butler App. No. CA2006-04-84, 2006-Ohio-7031; Kirchner v. Shooters on the Water, Inc., 167 Ohio App.3d 708, 2006-Ohio-3583, 856 N.E.2d 1026; Olivier v. Leaf & Vine, Miami App. No.2004 CA 35, 2005-Ohio-1910; and Ryan v. Guan, Licking App. No.2003CA00110, 2004-Ohio-4032. The First and Tenth districts hold otherwise. See Christen v. Don Vonderhaar Market & Catering, Hamilton App. No. C-050125, 2006-Ohio-715; and Uddin v. Embassy Suites Hotel, 165 Ohio App.3d 699, 2005-Ohio-6613, 848 N.E.2d 519, appeal allowed, 109 Ohio St.3d 1455, 2006-Ohio-2226, 847 N.E.2d 5, and appeal dismissed as improvidently allowed 113 Ohio St.3d 1249, 2007-Ohio-1791, 864 N.E.2d 638. The courts disagree on the interpretation of the Ohio Supreme Court's

holding in Chambers v. St. Mary's School (1998), 82 Ohio St.3d 563, 697 N.E.2d 198. In Chambers, the court held that while the violation of an administrative rule did not constitute negligence per se, it "may be admissible as evidence of negligence." Id. at syllabus.

In concluding that Chambers does not mean that an OBBC violation precludes summary judgment under the open and obvious doctrine, the Olivier court explained:

* * * * * In Chambers v. St. Mary's School, 82 Ohio St.3d 563, 1998-Ohio-184, 697 N.E.2d 198, the supreme court addressed whether a violation of the OBBC may constitute negligence per se. The court explained the difference between negligence and negligence per se, stating: "The distinction between negligence and 'negligence per se' is the means and method of ascertainment. The first must be found by the jury from the facts, the conditions and circumstances disclosed by the evidence; the latter is a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required." * * * Negligence per se is tantamount to strict liability for purposes of proving that a defendant breached a duty.' Id. at 565-66, 697 N.E.2d 198 (quoting Swoboda v. Brown (1935), 129 Ohio St. 512, 522, 245 Ind. 71, 196 N.E.2d 274). The supreme court held that violations of the OBBC do not constitute negligence per se, but that they may be admissible as evidence of negligence.

* * * *

The Chambers court was not asked to address the open and obvious doctrine, and it did not do so. Yet, the supreme court recognized that strict compliance with a multitude of administrative rules was "virtually impossible" and that treating violations as negligence per se would, in effect, make those subject to such rules the insurer of third parties who are harmed by any violation of such rules. Chambers, 82 Ohio St.3d at 568, 697 N.E.2d 198. In a footnote, the supreme court noted that it would be virtually impossible for a premise owner to strictly comply with the requirement mandating the removal of snow from steps without reference to exceptions or a reasonableness standard. In our view, the supreme court has implied that building code violations may be considered in light of

the circumstances, including whether the condition was open and obvious to an invitee. The fact that a condition violates the building code may support the conclusions that the condition was dangerous and that the landowner had breached its duty to its invitee. However, such violations may be obvious and apparent to an invitee. In our judgment, if the violation were open and obvious, the open and obvious nature would 'obviate[] the duty to warn.' See Armstrong, 99 Ohio St.3d at 80, 788 N.E.2d 1088; see Ryan v. Guan, Licking App. No. 2003CA110, 2004-Ohio-4032 [2004 WL 1728519] (the open and obvious doctrine applied, despite the fact that the plaintiff had lost her balance on a curb ramp flare that was one and one-half times steeper than allowed by the applicable building codes); Duncan v. Capitol South Comm. Urban Redev. Corp., Franklin App. No. 02AP-653, 2003-Ohio-1273 (unreasonably high curb was an open and obvious danger); see also Quinn v. Montgomery Cty. Educ. Serv. Ctr., Montgomery App. No. 20596, 2005-Ohio-808 (open and obvious doctrine applied to defect in the sidewalk, which municipality had a duty to maintain under R.C. 2744.02(B)(3)).

Id. at ¶28.

In Francis v. Showcase Cinema Eastgate, 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535, the court determined that under Chambers, an OBBC violation raises a genuine issue of material fact as to the landowner's duty and prevents a defendant from asserting the "open and obvious" defense to eliminate the existence of a duty or breach of duty. The court explained:

" [W]hile the Supreme Court of Ohio has reaffirmed the principle that a landowner owes no duty to protect an invitee from open and obvious dangers, it has also held that violations of the OBBC are evidence that the owner has breached a duty to the invitee. In this case, [defendant] suggests that this court should simply ignore the evidence of the OBBC violation, but we believe it would be improper to do so. To completely disregard the OBBC violation as a nullity under the open-and-obvious doctrine would be to ignore the holding in Chambers and to render the provisions of the OBBC without legal significance. We hold, then, that the evidence of the OBBC violation raised a genuine issue of material fact regarding [defendant's] duty and breach of duty, and that summary judgment was improperly granted."

Id. at ¶10.

In Uddin, the Tenth District explained its rationale as follows:

"When we are considering a motion for summary judgment, to ignore a party's purported violation of an administrative rule that is supported by some evidence would vitiate the legal significance of an administrative rule. For instance, in a case wherein summary judgment is sought and application of the open-and-obvious rule is disputed, if a defendant's purported violation of the administrative code that was supported by some evidence were ignored, a party could violate an administrative rule, thereby possibly endangering public safety, yet be insulated from liability because such a violation constituted an open-and-obvious condition."

As Judge Christley noted in her dissent in Uddin, the Chambers court did not explore the open and obvious doctrine.

She noted:

" * * * Chambers stands for the proposition that a violation of an administrative regulation is simply evidence that the premises owner breached his or her duty of care and that this evidence should be considered in light of the surrounding circumstances. Chambers, however, does not stand for the proposition that a possible administrative violation prohibits the application of the open-and-obvious doctrine."

Id. at ¶68. (Christley, J., concurring in part and dissenting in part).

We agree with those courts that hold an OBBC violation does not negate application of the open and obvious doctrine. As the Olivier court noted and as Judge Christley stated in her dissent, the Chambers court did not address the open and obvious doctrine. Thus, we do not believe that Chambers stands for the proposition that an OBBC violation always precludes summary judgment.

Accordingly, based upon the foregoing reasons, we overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, J., Dissenting in part.

I concur in judgment and opinion as far as the majority's opinion relates to Holly Hill's motion for summary judgment. However, I respectfully dissent to the part of the opinion that addresses McCorkle's motion for summary judgment.

Although appellant (plaintiff below) appeals the trial court's grant of summary judgment in favor of McCorkle, in my view, we cannot address that decision because appellant never directly asserted any claim against McCorkle. McCorkle was a third-party defendant in this action by virtue of the third-party complaint filed by Holly Hill. Holly Hill, instead of appellant, alleged that McCorkle negligently constructed the stair at issue.

Ohio Civ.R. 14(A) states "[a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Ohio courts state that "[i]f the plaintiff chooses not to assert a claim against the third-party defendant, the third-party defendant may be liable *only* to the original defendant * * *. (Emphasis added.) See *Delano v. Ives*, 40 F. Supp. 672, 673 (E.D. Pa. 1941)." *Bruhl v. Crispen*, Lucas App. No. L-82-043, citing *In re Herman Cantor*

Corp. Bkrtcy. Ct. E.D. Va. (1982), 17 B.R. 612, 613. Because appellant in this case never asserted a cause of action against McCorkle, her "notice of appeal is not effective as to [him]." Id. As such, the only parties properly before this court on appeal are appellant and Holly Hill. Id.

In addition, assuming the parties were properly before the court, I would find that, because McCorkle did not own or control the property at issue (the stair), he is not entitled to the benefits of the open and obvious doctrine. See *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (stating one with no property interest in the subject premises such as an "[i]ndependent contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which exonerates an owner or occupier of land from the duty to warn those entering the property concerning open and obvious dangers on the property").

Thus, I dissent in part.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

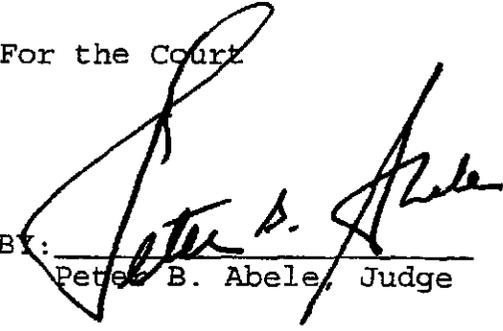
It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment Only

Kline, J.: Concurs in Judgment & Opinion and Dissents in Part with Opinion

For the Court

BY: 
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

165 Ohio App.3d 699, 848 N.E.2d 519, 2005 -Ohio- 6613
(Cite as: 165 Ohio App.3d 699, 848 N.E.2d 519)



Uddin v. Embassy Suites Hotel
Ohio App. 10 Dist., 2005.

Court of Appeals of Ohio, Tenth District, Franklin
County.

UDDIN, Admr., Appellant,

v.

EMBASSY SUITES HOTEL et al., Appellees.

No. 04AP-754.

Decided Dec. 13, 2005.

Background: Administrator of child's estate brought wrongful-death and survivorship action against hotel, seeking to recover regarding child's drowning, which occurred at hotel when child and child's family were attending birthday party. The Court of Common Pleas, Franklin County, No. 02CV03-3433, granted hotel's motion for summary judgment. Administrator appealed.

Holdings: The Court of Appeals, Petree, J., held that:

(1) genuine issues of material fact as to hotel's duty to child, as to whether hotel breached duty, and as to whether hotel's alleged breach of administrative regulation governing clarity of water in public swimming pools was proximate cause of drowning precluded summary judgment, and

(2) attractive-nuisance doctrine did not apply.

Affirmed in part, reversed in part, and remanded.

Peggy L. Bryant, J., concurred separately and filed opinion.

Christley, J., retired, sitting by assignment, concurred in part, dissented in part, and filed opinion.

West Headnotes

[1] Judgment 228 ↪ 181(33)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(33) k. Tort Cases in General.

Most Cited Cases

Genuine issues of material fact as to hotel's duty to child, who was attending birthday party at hotel, as to whether hotel breached duty to child, and as to whether hotel's alleged breach of administrative regulation governing clarity of water in public swimming pools was proximate cause of drowning of child precluded summary judgment in favor of hotel on grounds of open-and-obvious doctrine in wrongful death and survivorship action. (Per Petree, J., with one judge concurring separately.) OAC 3701-31-07(C) (2002).

[2] Death 117 ↪ 13

117 Death

117III Actions for Causing Death

117III(A) Right of Action and Defenses

117k12 Grounds of Action

117k13 k. In General. Most Cited

Cases

To maintain an action for damages for wrongful death upon the theory of negligence, a plaintiff must show (1) the existence of a duty owing to plaintiff's decedent, that is, the duty to exercise ordinary care, (2) a breach of that duty, and (3) proximate causation between the breach of duty and the death. (Per Petree, J., with one judge concurring separately.)

[3] Negligence 272 ↪ 202

272 Negligence

272I In General

272k202 k. Elements in General. Most Cited

Cases

For a party to recover under a theory of negligence, all the elements of negligence must be demonstrated. (Per Petree, J., with one judge concurring separately.)

[4] Negligence 272 ↪ 372

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272 Negligence

272XIII Proximate Cause

272k372 k. Necessity of Legal or Proximate Causation. Most Cited Cases

Negligence is without legal consequence unless it is a proximate cause of an injury. (Per Petree, J., with one judge concurring separately.)

[5] Negligence 272 ↪1692

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1692 k. Duty as Question of Fact or Law Generally. Most Cited Cases

Whether a duty exists is a question of law for a court to determine. (Per Petree, J., with one judge concurring separately.)

[6] Innkeepers 213 ↪14.1

213 Innkeepers

213k14.1 k. Injuries to Third Persons. Most Cited Cases

For purposes of premises liability, child and her family, who were attending a birthday party at the hotel, were business invitees of hotel; room was rented at hotel in which birthday party was being held, and child and family rightfully came upon hotel premises for some purpose that was beneficial to hotel. (Per Petree, J., with one judge concurring separately.)

[7] Negligence 272 ↪1036

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1036 k. Care Dependent on Status. Most Cited Cases

In cases of premises liability, Ohio adheres to common-law classifications of invitee, licensee, and trespasser. (Per Petree, J., with one judge concurring separately.)

[8] Negligence 272 ↪1036

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1036 k. Care Dependent on Status. Most Cited Cases

Status of a person who enters upon the land of another, that is, trespasser, licensee, or invitee, defines the scope of the legal duty that a landowner owes the entrant. (Per Petree, J., with one judge concurring separately.)

[9] Negligence 272 ↪1045(2)

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1045 Trespassers

272k1045(2) k. Who Are Trespassers. Most Cited Cases

For purposes of premises liability, a “trespasser” is one who, without express or implied authorization, invitation or inducement, enters private premises purely for his own purposes or convenience. (Per Petree, J., with one judge concurring separately.)

[10] Negligence 272 ↪1037(2)

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1037 Invitees

272k1037(2) k. Who Are Invitees. Most Cited Cases

For purposes of premises liability, “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. (Per Petree, J., with one judge concurring separately.)

[11] Negligence 272 ↪1040(2)

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

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272k1040 Licensees

272k1040(2) k. Who Are Li-

icensees. Most Cited Cases

For purposes of premises liability, "licensee" is one who enters upon the premises of another, by permission or acquiescence and not by invitation, for his own benefit or convenience. (Per Petree, J., with one judge concurring separately.)

[12] Appeal and Error 30 ↪ 204(4)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k202 Evidence and Witnesses

30k204 Admission of Evidence

30k204(4) k. Documents in General. Most Cited Cases

When reviewing granting of hotel's motion for summary judgment in wrongful-death and survivorship action that arose from child's drowning in hotel's pool, Court of Appeals could consider unauthenticated copy of police report that was attached to summary-judgment motion and newspaper article that was included with health department's documents, which were appended to summary-judgment motion; neither party objected to report or article in trial court. (Per Petree, J., with one judge concurring separately.)

[13] Innkeepers 213 ↪ 14.1

213 Innkeepers

213k14.1 k. Injuries to Third Persons. Most Cited Cases

Hotel, as landowner, was under legal duty to maintain premises in reasonably safe condition and to warn business invitee of latent or hidden dangers. (Per Petree, J., with one judge concurring separately.)

[14] Negligence 272 ↪ 1076

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1075 Care Required of Store and Business Proprietors

272k1076 k. In General. Most Cited Cases

Owner or occupier of business premises generally owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn invitees of latent or hidden dangers. (Per Petree, J., with one judge concurring separately.)

[15] Negligence 272 ↪ 1076

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1075 Care Required of Store and Business Proprietors

272k1076 k. In General. Most Cited Cases

Owner or occupier of a business premise is not an insurer of a business invitee's safety. (Per Petree, J., with one judge concurring separately.)

[16] Negligence 272 ↪ 379

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k379 k. "But-For" Causation; Act Without Which Event Would Not Have Occurred. Most Cited Cases

Negligence 272 ↪ 384

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k384 k. Continuous Sequence; Chain of Events. Most Cited Cases

While the term is difficult to define, "proximate cause" is generally established when an original act is wrongful or negligent and, in a natural and continuous sequence, produces a result that would not have taken place without the act. (Per Petree, J., with one judge concurring separately.)

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[17] Negligence 272 ↪ 386

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k386 k. Natural and Probable Consequences. Most Cited Cases

Negligence 272 ↪ 387

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k387 k. Foreseeability. Most Cited Cases

The rule of proximate cause requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent act. (Per Petree, J., with one judge concurring separately.)

[18] Negligence 272 ↪ 1713

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1712 Proximate Cause

272k1713 k. In General. Most Cited

Cases

Ordinarily, proximate cause is a question of fact for the jury; however, where no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the jury to decide, and, as a matter of law, judgment must be given for the defendant. (Per Petree, J., with one judge concurring separately.)

[19] Innkeepers 213 ↪ 14.1

213 Innkeepers

213k14.1 k. Injuries to Third Persons. Most

Cited Cases

Attractive-nuisance doctrine, under which possessor of land is subject to liability under certain circumstances for physical harm that is sustained by children trespassing on land and that is caused by artificial condition upon land, did not apply to drowning of child in hotel's indoor swimming pool; child, who was at hotel to attend a birthday party, was invitee, not child trespasser. Restatement (Second) of Torts § 339.

****521** Twyford & Donahey P.L.L., W. Joseph Edwards, and Mark E. Defossez, Columbus, for appellant.

Mansour, Gavin, Gerlack & Manos Co., L.P.A., William J. Muniak, and Amy L. Phillips, Cleveland, for appellees.

PETREE, Judge.

***702** {¶ 1} Plaintiff-appellant, Al Uddin, administrator of the estate of Shayla Uddin, appeals from a judgment of the Franklin County Court of Common Pleas, which granted summary judgment in favor of defendants-appellees, Embassy Suites Hotel and Hilton Hotels Corporation (collectively, "defendants"). For the following reasons, we affirm in part, reverse in part, and remand the matter to the common pleas court.

{¶ 2} On April 29, 2000, Shayla Uddin, a ten-year-old child, drowned in an indoor pool at Embassy Suites Hotel, Columbus, Ohio, while she and her family attended a birthday party at the hotel. Thereafter, on March 27, 2002, in a wrongful-death and survivorship action, plaintiff sued defendants, as well as anonymous defendants, alleging two causes of action: (1) negligence and (2) liability based upon the doctrine of attractive nuisance.

***703** {¶ 3} Defendants moved for summary judgment, claiming that (1) they complied with all safety regulations, (2) they exercised ordinary, reasonable care, and (3) they were not subject to liability under the attractive-nuisance doctrine. Thereafter, granting defendants' motion for summary judgment, the trial court rendered judgment in favor of defendants. From this judgment, plaintiff appeals and assigns a single error for our consideration:

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The trial court erred in granting appellee's motion for summary judgment since a genuine issue of material fact existed as to the negligence of Embassy Suites.

****522** {¶ 4} Appellate review of a lower court's granting of summary judgment is de novo. Mitnaul v. Fairmount Presbyterian Church, 149 Ohio App.3d 769, 2002-Ohio-5833, 778 N.E.2d 1093, at ¶ 27. "De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." Id., quoting Brewer v. Cleveland City Schools (1997), 122 Ohio App.3d 378, 701 N.E.2d 1023, citing Dupler v. Mansfield Journal (1980), 64 Ohio St.2d 116, 119-120, 18 O.O.3d 354, 413 N.E.2d 1187.

{¶ 5} Summary judgment is proper when a movant for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the movant is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; State ex rel. Grady v. State Emp. Relations Bd. (1997), 78 Ohio St.3d 181, 183, 677 N.E.2d 343.

{¶ 6} Under Civ.R. 56(C), a movant bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. Once a movant discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. Dresher, 75 Ohio St.3d at 293, 662 N.E.2d 264; Vahila v. Hall (1997), 77 Ohio St.3d 421, 430, 674 N.E.2d 1164; Civ.R. 56(E).

{¶ 7} "To maintain an action for damages for wrongful death upon the theory of negli-

gence, a plaintiff must show (1) the existence of a duty owing to plaintiff's decedent, *i.e.*, the duty to exercise ordinary care, (2) a breach of that duty, and (3) proximate causation between the breach of duty and the death." Bennison v. Stillpass Transit Co. (1966), 5 Ohio St.2d 122, 34 O.O.2d 254, 214 N.E.2d 213, paragraph one of the syllabus. For a party to recover under a theory of negligence, all the elements of negligence must be demonstrated. ***704** Whiting v. Ohio Dept. of Mental Health (2001), 141 Ohio App.3d 198, 202, 750 N.E.2d 644. Furthermore, "negligence is without legal consequence unless it is a proximate cause of an injury." Id., quoting Osler v. Lorain (1986), 28 Ohio St.3d 345, 347, 28 OBR 410, 504 N.E.2d 19.

{¶ 8} Whether a duty exists is a question of law for a court to determine. Mussivand v. David (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. "There is no formula for ascertaining whether a duty exists. Duty ' * * * is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts (4th ed.1971) pp. 325-326.)" Id., quoting Weirum v. RKO Gen., Inc. (1975), 15 Cal.3d 40, 46, 123 Cal.Rptr. 468, 539 P.2d 36.

{¶ 9} In cases of premises liability, Ohio adheres to common-law classifications of invitee, licensee, and trespasser. Gladon v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287. Under Ohio law, the status of a person who enters upon the land of another, *i.e.*, trespasser, licensee, or invitee, defines the scope of the legal duty that a landowner owes the entrant. Id., citing Shump v. First Continental-Robinwood Assoc. (1994), 71 Ohio St.3d 414, 417, 644 N.E.2d 291.

****523** [9][10][11] {¶ 10} "A trespasser is one who, without express or implied authorization, invitation or inducement, enters private premises purely for his own purposes or convenience." McKinney v. Hartz & Restle Realtors, Inc. (1987), 31 Ohio St.3d 244, 246, 31 OBR 449, 510 N.E.2d 386. Comparatively, "[i]n invitees are persons who rightfully come

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upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner,” Gladon, 75 Ohio St.3d at 315, 662 N.E.2d 287, while “a licensee is one who enters upon the premises of another, by permission or acquiescence and not by invitation, for his own benefit or convenience.” Quinn v. Montgomery Cty. Educational Serv. Ctr., Montgomery App. No. 20596, 2005-Ohio-808, 2005 WL 435214, at ¶ 12, citing Light v. Ohio Univ. (1986), 28 Ohio St.3d 66, 68, 28 OBR 165, 502 N.E.2d 611; and Richardson v. Novak (Nov. 3, 1993), Montgomery App. No. 13947, 1993 WL 452007.

[12] {¶ 11} Here, according to a police report,^{FN1} a room was rented at the hotel where the birthday party was held. Because decedent and her family rightfully *705 came upon the hotel premises for some purpose that was beneficial to defendants as a business owner, we conclude that decedent and her family were business invitees.

^{FN1} Defendants attached an unauthenticated copy of a police report to their motion for summary judgment. Also, a newspaper article about the drowning was included with documents from the Columbus Health Department that defendants appended to their motion for summary judgment. Absent objection, we find that we may consider this evidence in this appeal. See Oakley v. Reiser (Dec. 21, 2001), Athens App. No. 01CA40, 2001 WL 1646687, fn. 2 (stating that “[d]ocuments which are not sworn, certified, or authenticated by way of affidavit have no evidentiary value and generally should not be considered by the trial court. * * * Nevertheless, this court may consider unsworn, uncertified, or unauthenticated evidence if neither party objected to such evidence during the trial court proceedings. * * * ”); see, also, Churchwell v. Red Roof Inns, Inc. (Mar. 24, 1998), Franklin App. No. 97APE08-1125, 1998 WL 134329, at fn. 1.

[13][14][15] {¶ 12} “Generally, an owner or occu-

pier of business premises owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn invitees of latent or hidden dangers.” Nageotte v. Cafaro Co., 160 Ohio App.3d 702, 2005-Ohio-2098, 828 N.E.2d 683, at ¶ 26, citing Paschal v. Rite Aid Pharmacy, Inc. (1985), 18 Ohio St.3d 203, 18 OBR 267, 480 N.E.2d 474, and Jackson v. Kings Island (1979), 58 Ohio St.2d 357, 358, 12 O.O.3d 321, 390 N.E.2d 810. However, the owner or occupier of a business premise is not an insurer of a business invitee’s safety. Nageotte at ¶ 26, citing Paschal at 203-204, 18 OBR 267, 480 N.E.2d 474.

{¶ 13} Accordingly, in this case, defendants, as landowners, were under a legal duty to maintain the premises in a reasonably safe condition and to warn decedent of latent or hidden dangers.

{¶ 14} In the present case, the trial court concluded that defendants were relieved of a duty toward decedent because the indoor swimming pool constituted an open-and-obvious danger. See, generally, Armstrong v. Best Buy Co., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶ 5, citing Sidle v. Humphrey (1968), 13 Ohio St.2d 45, 42 O.O.2d 96, 233 N.E.2d 589, paragraph one of the syllabus (observing that under the open-and-obvious doctrine, “a premises-owner owes no duty to persons entering those premises regarding dangers that are open and obvious”); Armstrong at ¶ 5 (stating that “[w]hen applicable * * * the open-and-obvious doctrine**524 obviates the duty to warn and acts as a complete bar to any negligence claims”).

{¶ 15} In Armstrong, reaffirming the viability of the open-and-obvious doctrine, the Supreme Court of Ohio explained that “[t]he rationale underlying [the open-and-obvious 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.’ ” Id. at ¶ 5, quoting Simmers v. Bentley Constr. Co. (1992), 64 Ohio

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St.3d 642, 644, 597 N.E.2d 504.

{¶ 16} In Brockmeyer v. Deuer (Nov. 19, 1981), Franklin App. No. 81AP-537, 1981 WL 3605, a case involving an eight-year-old boy who drowned in an unused swimming pool, this court held that the condition of an abandoned swimming pool *706 and its potential perils were open and obvious and, as a matter of law, fell short of being hidden perils or traps. The Brockmeyer court observed that “[t]here was no disguise or concealment by the landowner of the statical condition that existed and was open and obvious to anyone contemplating using the abandoned swimming pool.” Id.

{¶ 17} However, unlike Brockmeyer, the issue in this case does not concern whether an abandoned swimming pool and its potential perils constituted hidden perils or traps.

{¶ 18} In Mullens v. Binsky (1998), 130 Ohio App.3d 64, 719 N.E.2d 599, a case involving an 18-year-old guest who drowned in a swimming pool during a graduation party at a private residence, this court observed that “‘a pool becomes unreasonably dangerous only when there is a hidden defect or dangerous condition posing a risk of death or serious bodily harm.’ ” Id. at 71, 719 N.E.2d 599, quoting Scifres v. Kraft (Ky.App.1996), 916 S.W.2d 779, 781. Mullens further stated that “as noted by the trial court, a swimming pool presents an open and obvious condition that should be appreciated by both minors and adults.” Id.

{¶ 19} However, subsequent to Mullens, this court has declined to determine whether a swimming pool constituted an open-and-obvious danger to a child under seven years of age. Bae v. Dragoo & Assoc., Inc., 156 Ohio App.3d 103, 2004-Ohio-544, 804 N.E.2d 1007, at ¶ 15. Moreover, subsequent to Mullens, this court also distinguished Mullens when it stated that “this court’s decision in [Mullens], implying that a swimming pool is open and obvious to minors involved an 18 year old, not a child under the age of seven.” Bae v. Dragoo & Assoc., Inc., Franklin App. No. 03AP-254, 2004-Ohio-1297, 2004 WL 541021, at ¶ 11.

{¶ 20} Here, unlike Mullens, this case concerns a ten-year-old child, not an 18-year-old young adult. Such an age difference is not insignificant. In Di Gildo v. Caponi (1969), 18 Ohio St.2d 125, 47 O.O.2d 282, 247 N.E.2d 732, the Supreme Court of Ohio explained:

Regardless of the precise label, the amount of care required to discharge a duty owed to a child of tender years is necessarily greater than that required to discharge a duty owed to an adult under the same circumstances. This is the approach long followed by this court and we see no reason to abandon it. “Children of tender years, and youthful persons generally, are entitled to a degree of care proportioned to their inability to foresee and avoid the perils that they may encounter * * *. The same discernment and foresight in discovering defects and dangers cannot be reasonably expected of them, that older and experienced persons habitually employ; and therefore, the greater precaution **525 should be taken, where children are exposed to them.”

*707 Id. at 127, 47 O.O.2d 282, 247 N.E.2d 732, quoting 39 Ohio Jurisprudence 2d (1959) 512, Negligence, Section 21. See, also, Bennett v. Stanley (2001), 92 Ohio St.3d 35, 39, 748 N.E.2d 41 (observing that “[t]his court has consistently held that children have a special status in tort law and that duties of care owed to children are different from duties owed to adults”).

{¶ 21} We find that Mullens is inapposite because (1) this case concerns a decedent of tender years, (2) children have a special status in tort law, Bennett, 92 Ohio St.3d at 39, 748 N.E.2d 41, and (3) duties owed to children are different from duties owed to adults, Di Gildo, 18 Ohio St.2d at 127, 47 O.O.2d 282, 247 N.E.2d 732; cf. Bennett, 92 Ohio St.3d at 39, 748 N.E.2d 41, Estate of Valesquez v. Cunningham (2000), 137 Ohio App.3d 413, 420, 738 N.E.2d 876 (stating that “it is well settled in Ohio law that a swimming pool is an open and obvious danger of which a landowner has no duty to warn” but also acknowledging that “the duty to warn a small child or a person of limited mental capacity may be different from the duty to warn a per-

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son of ordinary capabilities”).

{¶ 22} To support his claim that the trial court erred by granting summary judgment in favor of defendants, plaintiff claims that (1) defendants violated an administrative rule that required swimming pool water to be of a specified clarity and (2) in the face of this purported violation of an administrative rule, application of the open-and-obvious doctrine would render meaningless the Supreme Court of Ohio's decision in Chambers v. St. Mary's School (1998), 82 Ohio St.3d 563, 697 N.E.2d 198.

{¶ 23} In Chambers, the Supreme Court of Ohio considered whether a violation of the Ohio Basic Building Code (“OBBC”) constituted negligence *per se*. As explained by the Supreme Court, “[a]pplication of negligence *per se* in a tort action means that the plaintiff has conclusively established that the defendant breached the duty that he or she owed to the plaintiff. It is not a finding of liability *per se* because the plaintiff will also have to prove proximate cause and damages.” Id. at 565, 697 N.E.2d 198; see, also, id. at 566, 697 N.E.2d 198 (stating that “[n]egligence *per se* is tantamount to strict liability for purposes of proving that a defendant breached a duty”).

{¶ 24} Contrasting administrative rules to legislative enactments, the Chambers court also observed that, unlike members of the General Assembly who are elected to office and thus accountable to constituents, administrative agencies have no accountability as do members of the General Assembly. Id. at 566-567, 697 N.E.2d 198. The Chambers court observed that to bestow upon administrative agencies the ability to propose and adopt rules that alter the proof requirements between litigants “would be tantamount to an unconstitutional delegation of legislative authority, since administrative agencies cannot dictate public policy.” Id. at 568, 697 N.E.2d 198.

*708 {¶ 25} Accordingly, Chambers held, “The violation of an administrative rule does not constitute negligence *per se*; however, such a violation may be admissible as evidence of negligence.” Id. at syl-

labus.

{¶ 26} In the present case, plaintiff asserts that defendants violated former Ohio Adm.Code 3701-31-07(C). Under Ohio former Adm.Code 3701-31-07(C), “[t]he licensee shall ensure that the water in any public swimming pool or a special use pool has sufficient clarity when in use that a black disc, six inches in diameter, is readily visible when placed on a light field at the deepest point of the pool and is viewed **526 from the pool side.” See, also, former Ohio Adm.Code 3701-31-01(G) (defining “licensee”) and former 3701-31-01(T) (defining “special use pool”).

{¶ 27} To support a claim that the pool water at the time of drowning lacked sufficient clarity under former Ohio Adm.Code 3701-31-07(C), plaintiff relies upon affidavits of Barbara Lemming, Detective Dana Farbacher, and former police detective Tim O'Donnell.

{¶ 28} In her affidavit, Lemming, who was in the pool area when the decedent drowned, averred that “[t]he pool water was real creamy - almost milky. You could not see the bottom. I was in the pool for a short time that afternoon. When looking down, you could not see your feet.” Lemming further averred: “I was sitting in a position to see the entire pool. However, I noticed that when a child went underwater that you lost sight of them because the water was so murky and creamy.” According to Lemming, “[o]n April 29, 2000, the pool water at the Embassy Suites was so bad that you could not have seen a six inch disc at the pool bottom when looking down into the water.”

{¶ 29} According to Detective Farbacher, who arrived at the drowning scene within two hours of the drowning, “[t]he pool water was cloudy and murky upon my examination.” Furthermore, according to former police detective Tim O'Donnell, who responded to the drowning scene with Detective Farbacher, “[w]hile there, I examined the pool area and particularly the water. The pool water was very murky and cloudy - you could not see the bottom.”

{¶ 30} By contrast, according to Nate Oyelakin, an

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employee of the Columbus City Health Department, Water Protection Division, who tested the pool water two days after decedent's drowning, the water clarity at the time of the testing was "very clear," despite a finding that the chlorine level in the pool was unacceptable. In a deposition, Oyelakin testified:

[W]e wrote down water clarity was five. That means it was still very clear. And the reason why, because I saw five here, that means it was very clear. When we say it's clear, that means we can see the pool bottom from any distance from the deck, the main drain, because it's a big one, the main drain is *709 very visible from anywhere you stand, also the pool bottom, from the shallow end to the deep end. And when I give it five, that means it was clear.

{¶ 31} Construing this evidence in favor of plaintiff, the nonmoving party, we conclude that reasonable minds could conclude there is a genuine issue of fact concerning (1) whether the pool water was clear at the time of decedent's drowning and (2) whether, at the time of the drowning, defendants complied with the requirements of former Ohio Adm.Code 3701-31-07(C).

{¶ 32} However, even assuming arguendo that at the time of decedent's drowning the pool water lacked sufficient clarity as required by former Ohio Adm.Code 3701-31-07(C) and, therefore, that defendants were in violation of this administrative rule, we still must consider whether such a violation precludes application of the open-and-obvious doctrine.

{¶ 33} In Francis v. Showcase Cinema Eastgate, 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535, after depositing trash in a dumpster, the plaintiff, a cleaning-company employee, fell and sustained injuries as she was descending a flight of stairs. At the time of the employee's fall, the stairway lacked a handrail, an apparent violation of the Ohio Basic Building Code. Appealing from a grant of summary judgment in favor of the defendants, the plaintiff argued that the trial court **527 erred in holding that the open-and-obvious

doctrine precluded recovery.

{¶ 34} Reversing the trial court's grant of summary judgment in favor of the defendants, the First District Court of Appeals, construing *Chambers*, stated:

[W]hile the Supreme Court of Ohio has reaffirmed the principle that a landowner owes no duty to protect an invitee from open and obvious dangers, it has also held that violations of the OBBC are evidence that the owner has breached a duty to the invitee. In this case, [defendant] suggests that this court should simply ignore the evidence of the OBBC violation, but we believe it would be improper to do so. To completely disregard the OBBC violation as a nullity under the open-and-obvious doctrine would be to ignore the holding in *Chambers* and to render the provisions of the OBBC without legal significance. We hold, then, that the evidence of the OBBC violation raised a genuine issue of material fact regarding [defendant's] duty and breach of duty, and that summary judgment was improperly granted.

Id. at ¶ 10.

{¶ 35} However, in Olivier v. Leaf & Vine, Miami App. No. 2004 CA 35, 2005-Ohio-1910, 2005 WL 937928, the Second District Court of Appeals disagreed with the First District's application of *Chambers* in *Francis*. The *Olivier* court stated:

We disagree with the *Francis* court's application of *Chambers*. The *Chambers* court was not asked to address the open and obvious doctrine, and it did not do *710 so. Yet, the supreme court recognized that strict compliance with a multitude of administrative rules was "virtually impossible" and that treating violations as negligence per se would, in effect, make those subject to such rules the insurer of third parties who are harmed by any violation of such rules. *Chambers*, 82 Ohio St.3d at 568, 697 N.E.2d 198. In a footnote, the supreme court noted that it would be virtually impossible for a premise owner to strictly comply with the requirement mandating the removal of snow from steps without reference to exceptions or a reasonableness standard. In our view, the supreme court has implied that

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building code violations may be considered in light of the circumstances, including whether the condition was open and obvious to an invitee. The fact that a condition violates the building code may support the conclusions that the condition was dangerous and that the landowner had breached its duty to its invitee. However, such violations may be obvious and apparent to an invitee. In our judgment, if the violation were open and obvious, the open and obvious nature would "obviate [] the duty to warn." See Armstrong, 99 Ohio St.3d at 80, 788 N.E.2d 1088; see Ryan v. Guan, Licking App. No. 2003CA110, 2004-Ohio-4032 [2004 WL 1728519] (the open and obvious doctrine applied, despite the fact that the plaintiff had lost her balance on a curb ramp flare that was one and one-half times steeper than allowed by the applicable building codes); Duncan v. Capitol South Comm. Urban Redev. Corp., Franklin App. No. 02AP-653, 2003-Ohio-1273 [2003 WL 1227586] (unreasonably high curb was an open and obvious danger); see also Quinn v. Montgomery Cty. Educ. Serv. Ctr., Montgomery App. No. 20596, 2005-Ohio-808 [2005 WL 435214] (open and obvious doctrine applied to defect in the sidewalk, which municipality had a duty to maintain under R.C. 2744.02(B)(3)).

Id. at ¶ 28.

{¶ 36} Although we agree with *Olivier* that the Supreme Court in *Chambers* was not asked to consider the open-and-obvious**528 doctrine, we cannot agree in every situation with *Olivier's* conclusion that a violation of an administrative rule may constitute an open-and-obvious condition, thereby obviating a duty to warn.

{¶ 37} When we are considering a motion for summary judgment, to ignore a party's purported violation of an administrative rule that is supported by some evidence would vitiate the legal significance of an administrative rule. For instance, in a case wherein summary judgment is sought and application of the open-and-obvious rule is disputed, if a defendant's purported violation of the administrative code that was supported by some evidence were

ignored, a party could violate an administrative rule, thereby possibly endangering public safety, yet be insulated from liability because such a violation constituted an open-and-obvious condition.

*711 {¶ 38} Here, whether defendants violated former Ohio Adm.Code 3701-31-07(C) raises a genuine issue of material fact concerning defendants' duty and breach of duty toward decedent. For instance, if the pool water's clarity was diminished, thereby impairing potential rescue efforts, whether defendants violated pool-water clarity requirements under former Ohio Adm.Code 3701-31-07(C) would be material to determining whether defendants breached a duty of care toward decedent.

{¶ 39} During oral arguments, defendants contended, however, that in Mullens, 130 Ohio App.3d 64, 719 N.E.2d 599, this court has rejected as speculative an argument that poor water clarity delayed rescue efforts. *Mullens*, however, is distinguishable. In *Mullens*, the issue whether poor water clarity delayed rescue efforts did not arise from the defendant's alleged violation of an administrative rule that required the pool water to be a specific clarity.

{¶ 40} Accordingly, for the foregoing reasons, we hold that the trial court erred when it concluded that the open-and-obvious doctrine precluded recovery.

{¶ 41} Because the trial court found that defendants owed no duty to decedent under the open-and-obvious doctrine, it was not required to determine whether the pool water's clarity at the time of decedent's drowning constituted a proximate cause of decedent's drowning. However, because this court's review of a trial court's grant of summary judgment is de novo, Mitnaul, 149 Ohio App.3d 769, 2002-Ohio-5833, 778 N.E.2d 1093, at ¶ 27, we consider the issue of proximate cause here.

[16][17] {¶ 42} While the term is difficult to define, "proximate cause" is generally established when an original act is wrongful or negligent and, in a natural and continuous sequence, produces a result that would not have taken place without the act. Whiting, 141 Ohio App.3d at 202-203, 750 N.E.2d 644, citing Strother v. Hutchinson (1981).

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67 Ohio St.2d 282, 287, 21 O.O.3d 177, 423 N.E.2d 467. “The rule of proximate cause “requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligence act.” ’ ” Engle v. Salisbury Twp., Meigs App. No. 03CA11, 2004-Ohio-2029, 2004 WL 869362, at ¶ 28, quoting Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 143, 539 N.E.2d 614, quoting Ross v. Nutt (1964), 177 Ohio St. 113, 29 O.O.2d 313, 203 N.E.2d 118. See, also, Whiting, 141 Ohio App.3d at 203, 750 N.E.2d 644 (“[i]t is also well settled that because the issue of proximate cause is not open to speculation, conjecture as to whether the breach of duty caused the **529 particular damage is not sufficient as a matter of law”).

{¶ 43} In *Mussivand*, the Supreme Court of Ohio held:

*712 [T]o establish proximate cause, foreseeability must be found. In determining whether an intervening cause ‘breaks the causal connection between negligence and injury depends upon whether that intervening cause was reasonably foreseeable by the one who was guilty of the negligence. If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone.’

Id. at 321, 544 N.E.2d 265, quoting Mudrich v. Std. Oil Co. (1950), 153 Ohio St. 31, 39, 41 O.O. 117, 90 N.E.2d 859.

[18] {¶ 44} “Ordinarily, proximate cause is a question of fact for the jury. * * * However, ‘where no facts are alleged justifying any reasonable inference that the acts or failure of the defendant constitute the proximate cause of the injury, there is nothing for the jury (to decide), and, as a matter of law,

judgment must be given for the defendant.’ ” Engle, 2004-Ohio-2029, 2004 WL 869362, at ¶ 27, quoting Case v. Miami Chevrolet Co. (1930), 38 Ohio App. 41, 45-46, 175 N.E. 224.

{¶ 45} Here, visibility at the time of the drowning is a relevant issue. In her affidavit, Barbara Lemming averred: “I was about twenty feet away and looking down into the water from where the little girl was found. At this distance, and looking down, I could not see the girl at the bottom of the pool. The water was creamy and milky.”

{¶ 46} According to a police report, at the time of decedent's drowning, Lamar Reynolds, who was 18 years old at the time, was supervising approximately ten to 12 children who had been invited to the birthday party, while most of the adults were in a hotel room. According to the police report, Reynolds purportedly stated that he was in the water with the children, as well as with other children who were not invited to the birthday party, when he stepped on something in the pool. Reynolds informed the police that he was not certain of what he stepped on, but he believed that it was a body. Reynolds then purportedly announced that there was something in the water. Thereafter, according to the police report, Reynolds jumped out of the pool and ran to retrieve a metal pole to bring the body to the surface. As Reynolds was doing this, a bystander, Tony Lemming, jumped into the pool, grabbed decedent, and brought her to the surface, whereupon a hotel employee attempted to resuscitate decedent by CPR. According to the police report, Tony Lemming informed police that “there was a great deal of foam coming from the victim's mouth.”

*713 {¶ 47} According to Barbara Lemming, “[a]fter watching the children for 30-40 minutes, some screamed that a girl was missing. I looked down into the pool and saw no one.” Lemming further averred: “While everyone else exited the pool, my husband Tony jumped into the water. Tony could not see the child but was feeling into the water with his hands and feet.” According to Lemming, “I heard Tony yell that he felt and [sic] ob-

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ject and then saw him pull the little girl from the water. Her body was limp and foam was coming from her mouth.”

****530** {¶ 48} Here, we conclude that, under the facts and circumstances of this case, the facts do not preclude a reasonable inference that defendants' alleged violation of former Ohio Adm.Code 3701-31-07(C) constituted the proximate cause of decedent's drowning. Consequently, under the facts and circumstances of this case, whether defendants' alleged violation of former Ohio Adm.Code 3701-31-07(C) constituted the proximate cause of decedent's drowning is a question of fact for the fact finder.

{¶ 49} Besides alleging negligence, plaintiff also claimed that defendants were liable based upon the doctrine of attractive nuisance.

[19] {¶ 50} In *Bennett*, 92 Ohio St.3d at 47, 748 N.E.2d 41, the Supreme Court of Ohio expressly adopted the attractive-nuisance doctrine contained in Restatement of the Law 2d, Torts (1965), Section 339. *Bennett* held:

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if:

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or to otherwise protect the children.

Id. at paragraph one of the syllabus, adopting Restatement of the Law 2d, Torts (1965), Section 339.

{¶ 51} Here, however, decedent at the time of the drowning was an invitee, not a child trespasser; therefore, the attractive-nuisance doctrine is inapplicable. See ***714***Bae v. Dragoon & Assoc.*, 156 Ohio App.3d 103, 2004-Ohio-544, 804 N.E.2d 1007, at ¶ 15, fn. 3 (wherein this court observed that “the attractive-nuisance doctrine technically does not apply, because decedent was not a child trespasser”).

{¶ 52} Consequently, because the attractive-nuisance doctrine is inapplicable, we hold that the trial court correctly determined that plaintiff could not prevail on his second cause of action that was premised upon that doctrine.

{¶ 53} Therefore, to the extent that plaintiff contends that the trial court erred by granting partial summary judgment in favor of defendants concerning plaintiff's claim of liability based upon the attractive-nuisance doctrine, we find such a contention is not well taken.

{¶ 54} However, having concluded that the open-and-obvious doctrine does not preclude recovery and that there is a genuine issue of material fact as to whether defendants breached a duty of care to decedent and whether that breach proximately caused decedent's death, we hold that plaintiff's contention that the trial court erred when it granted summary judgment in favor of defendants is well taken. Therefore, we sustain plaintiff's sole assignment of error.

{¶ 55} Accordingly, plaintiff's sole assignment of error is sustained, the judgment****531** of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

PEGGY L. BRYANT, J., concurs separately.

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CHRISTLEY, J., concurs in part and dissents in part.

CHRISTLEY, J., retired of the Eleventh Appellate District, sitting by assignment. PEGGY L. BRYANT, Judge, concurring separately.

{¶ 56} Although I agree with the lead opinion's conclusion that the trial court erred in granting summary judgment in favor of defendants, the definitive issue is whether the condition of the pool is an open *715 and obvious danger that obviates the landowner's duty to warn. More specifically, the question is whether a ten-year-old child can appreciate the additional dangers associated with cloudy pool water so as to preclude the application of the open-and-obvious doctrine.

{¶ 57} The trial court concluded that defendants were relieved of a duty toward decedent because the indoor swimming pool constituted an open and obvious danger. The rationale underlying the open-and-obvious doctrine is that the open and obvious nature of the hazard serves as a warning, and thus a landowner may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves. Armstrong v. Best Buy Co., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶ 5.

{¶ 58} While this court has held that "a swimming pool presents an open and obvious condition that should be appreciated by both minors and adults," the open-and-obvious doctrine does not relieve an occupier's duty to maintain its premises in a reasonably safe condition when the pool becomes unreasonably dangerous by a hidden defect or dangerous condition that poses a risk of death or serious bodily harm. Mullens v. Binsky (1998), 130 Ohio App.3d 64, 71, 719 N.E.2d 599. As the Supreme Court has explained, "Children of tender years, and youthful persons generally, are entitled to a degree of care proportioned to their inability to foresee and avoid the perils that they may encounter * * *. The same discernment and foresight in discovering defects and dangers cannot be reasonably expected of them, that older and experienced persons habitually employ." Di Gildo v. Caponi (1969), 18 Ohio St.2d 125, 127, 47 O.O.2d 282, 247 N.E.2d 732.

{¶ 59} When I apply the open-and-obvious doctrine in conjunction with the special status Ohio courts bestow upon minors, I conclude that even if a swimming pool may not generally present a hidden danger involving an unreasonably dangerous condition, a minor may not be able to foresee or appreciate the dangers posed by failure to comply with pertinent administrative regulations. An adult may instantly recognize that cloudy water increases his or her risk of drowning because the diminished clarity impairs the vision of those supervising, thereby hindering potential rescue efforts. To a ten-year-old child, however, the danger may not be as readily apparent. Because, as the lead opinion notes, a genuine issue of material fact arises concerning application of the open-and-obvious doctrine as it relates to the condition of the pool at the time of decedent's drowning, and because the dangers associated with **532 the condition are not necessarily apparent to a ten-year-old child, I concur with the lead opinion's conclusion that a genuine issue of material fact precludes summary judgment to defendants concerning defendants' duty and breach of duty toward decedent.

CHRISTLEY, Judge, concurring in part and dissenting in part.

{¶ 60} Although I concur with the majority's conclusion regarding plaintiff's attractive-nuisance claim, I respectfully dissent from the majority's conclusion regarding plaintiff's negligence claim. The majority concludes that plaintiff presented a genuine issue of material fact as to the duty element of negligence, predicated solely upon a violation of former Ohio Adm.Code 3701-31-07(C). I disagree.

*716 {¶ 61} The initial issue is whether sufficient evidence was presented during the summary judgment exercise to establish a possible violation of former Ohio Adm.Code 3701-31-07(C). Viewing the evidence in a light most favorable to the plaintiff, the nonmoving party, the majority correctly decides that the evidence established a genuine issue of material fact regarding an administrative violation.

{¶ 62} As an aside, I would note that at trial, the trial court arguably could have difficulty in finding

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all of Barbara Lemming's testimony to be admissible. Specifically, she reaches a conclusion regarding the potential visibility of a six-inch black disk that is supported only by her stated inability to see the bottom of the pool. Being unable to see the bottom does not equate to being unable to see a six-inch black disk on the bottom. It would be more likely that only an expert could lay a foundation sufficient to reach such a conclusion.

{¶ 63} Nevertheless, the majority then proceeds to extend the Supreme Court of Ohio's ruling in *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 697 N.E.2d 198, by holding as follows: "[W]hether defendants violated former Ohio Adm.Code 3701-31-07(C) raises a genuine issue of material fact concerning defendants' duty and breach of duty toward decedent."

{¶ 64} Based upon this determination, and this determination only, the majority concludes that the trial court erred in finding that the open-and-obvious doctrine precluded recovery on the negligence claim. In doing so, the majority operates on the belief that the possibility of an administrative violation, standing alone, obviates the open-and-obvious doctrine. As a result, the majority's de novo review fails to provide any further analysis as to whether the doctrine applies. I respectfully disagree with that analysis.

{¶ 65} The First Appellate District's holding in *Francis v. Showcase Cinema Eastgate*, 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535, is analogous to the majority's holding, to wit: "We hold, then, that the evidence of the [Ohio Basic Building Code] violation raised a genuine issue of material fact regarding [defendants'] duty and breach of duty, and that summary judgment was improperly granted." Id. at ¶ 10.

{¶ 66} Like the majority, the *Francis* court held that, based upon *Chambers*, an apparent administrative violation, standing alone, was sufficient to create a genuine issue of material fact as to the duty element and, therefore, the applicability of the open-and-obvious doctrine was never explored.

{¶ 67} In *Olivier v. Leaf & Vine*, Miami App. No. 2004 CA 35, 2005-Ohio-1910, 2005 WL 937928, the Second District Court of Appeals properly determined that the **533 *Francis* court misapplied and misconstrued *Chambers*. Specifically, in examining *Chambers*, the *Olivier* court stated: "[T]he supreme court has implied that building code violations may be considered in light of the circumstances, *717 including whether the condition was open and obvious to an invitee. The fact that a condition violates the building code may support the conclusions that the condition was dangerous and that the landowner had breached its duty to its invitee. However, such violations may be obvious and apparent to an invitee." (Emphasis added.) Id. at ¶ 28.

{¶ 68} In short, contrary to *Francis*, *Chambers* stands for the proposition that a violation of an administrative regulation is simply evidence that the premises owner breached his or her duty of care and that this evidence should be considered in light of the surrounding circumstances. *Chambers*, however, does not stand for the proposition that a possible administrative violation prohibits the application of the open-and-obvious doctrine. Thus, I believe that the majority errs by failing to determine whether the condition created by the apparent violation of former Ohio Adm.Code 3701-31-07(C) was an open-and-obvious danger.

{¶ 69} That being said, I will address this issue. "The determination of whether a hazard is latent or obvious depends upon the particular circumstances surrounding the hazard." *Green v. China House* (1997), 123 Ohio App.3d 208, 212, 703 N.E.2d 872. Thus, whether a condition is open and obvious requires a fact-intensive inquiry. *Olivier*, 2005-Ohio-1910, 2005 WL 937928, at ¶ 31. In *Mul-lens v. Binsky* (1998), 130 Ohio App.3d 64, 71, 719 N.E.2d 599, this court determined that a swimming pool can present an open-and-obvious danger to either a minor child or adult. See, also, *Sharpley v. Bole*, Cuyahoga App. No. 83436, 2004-Ohio-5729, 2004 WL 2425718, at ¶ 14 ("It is generally accepted that ponds, pools, lakes, streams, and other waters embody perils that are deemed obvious to chil-

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dren of the tenderest years”).

{¶ 70} In the instant case, the evidence presented during the summary judgment exercise clearly established an open-and-obvious danger. This determination is based upon the circumstances surrounding the accident and the obvious condition of the hotel pool.

{¶ 71} At the time of the decedent's drowning, there were approximately 25 children playing in a 340-square-foot pool, with a maximum depth of five feet. Reynolds was the sole designated adult supervisor of the approximately 18 children in the birthday party and was in the pool when the accident occurred. Barbara Lemming attested that she noticed the pool water was a creamy-white color and that she could not see her feet while standing in the pool. She also stated that her husband, Tony Lemming, entered the pool in an attempt to save the decedent. Barbara Lemming attested that she could not see the decedent's body at the bottom of the pool, and that the decedent's body was visible only once it was at the water's surface.

*718 {¶ 72} Likewise, Detective Farbacher and Tim O'Donnell attested that the pool was murky and cloudy. Detective Farbacher specifically stated that the bottom of the pool was not visible. Thus, there was considerable testimony that the dangerous condition of the pool was apparent to a number of people who were present at the time the tragedy occurred. There is no testimony that the hotel was aware of the condition. Further, there was testimony that the hotel had, on previous occasions of testing and inspection, passed such tests and inspections.

**534 {¶ 73} The foregoing demonstrates that the dangerous condition of the pool would have been obvious to the swimmers, the parents, and the designated adult supervisor, Reynolds, who would have been *in loco parentis*. See, e.g., *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 737, 680 N.E.2d 161. Due to the open-and-obvious nature of the dangerous condition, the trial court properly determined that plaintiff could not establish the duty

element. In other words, despite the apparent administrative violation, the undisputed surrounding circumstances of this tragic accident establish an open-and-obvious danger that precludes plaintiff's negligence action. Hence, I would affirm the trial court's judgment denying plaintiff's negligence claim.

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Slip Copy, 2006 WL 367107 (Ohio App. 1 Dist.), 2006 -Ohio- 715

(Cite as: Slip Copy)

CChristen v. Don **Vonderhaar Market & Catering, Inc.**

Ohio App. 1 Dist., 2006.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, First District, Hamilton County.

Richard J. CHRISTEN, Jr.,
and Dona S. Christen, Plaintiffs-Appellants,
v.DON **VONDERHAAR MARKET & CATERING, INC.**, Defendant-Appellee.
No. C-050125.

Decided Feb. 17, 2006.

The Bucciare Firm, Inc., and R.L. Kent Bucciare,
for Plaintiff-Appellants.Christine D. Tailer, for Defendant-Appellee.*DECISION.*MARK P. PAINTER, Judge.

*1 Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: February 17, 2006

Please note: This case has been removed from the accelerated calendar.

{¶ 1} Plaintiff-appellant Richard Christen delivered paper goods to defendant-appellee Don **Vonderhaar Market & Catering**. As he made one delivery, Christen slipped and fell down some stairs, injuring his back. He sued Vonderhaar, alleging that its negligent maintenance and repair of the wooden stairway created unreasonably dangerous conditions. Christen argued that failing to have slip-resistant material on ordinary painted-wood stair treads was

a violation of ordinary care, OSHA regulations, and the Ohio Basic Building Code ("OBBC"). Vonderhaar retorted that Christen did not know whether he slipped or tripped, and that since he could not prove by a preponderance of the evidence that he did slip, summary judgment was appropriate. The trial court granted summary judgment on that basis.

{¶ 2} Because violations of the Ohio Basic Building Code are evidence of negligence and raised a genuine issue of material fact in this case regarding Vonderhaar's duty and breach of duty, summary judgment was improperly granted. We reverse.

I. A Slip and Fall on Wet, Wooden Steps

{¶ 3} Christen worked for Ricking Paper & Specialty Company as a delivery driver. He had delivered paper products weekly to **Vonderhaar Market & Catering** for a year before the accident. Typically, Christen entered Vonderhaar's store through the back door and pulled a two-wheeled handcart loaded with boxes. He pulled the handcart through a hallway and up the steps to a second-floor storage area. The step treads were wooden and covered with regular paint, not with any slip-resistant material. The hallway through which Christen passed had an ice machine.

{¶ 4} Vonderhaar allowed delivery persons the option of ascending the stairway by either (1) pulling the handcart loaded with products up the stairs or (2) leaving the handcart at the bottom of the stairs and carrying each box up the stairs by hand. Since Christen believed that the majority of suppliers made their deliveries by walking backwards up the stairs, he did the same. There was a handrail, but he did not use it for support because he had to use both hands to pull the handcart up the stairs.

{¶ 5} On August 4, 2005, Christen entered Vonderhaar's store as he normally did, passing through the double doors, down the hallway, to the stairs. There was water on the cement floor in front of the ice machine. Christen walked through the water and then ascended the stairs backwards, pulling the

handcart up the stairs one step at a time. When he reached the sixth or seventh step, his feet slid out from under him and he fell. Christen hit his lower back on a stair and slid down two or three steps.

{¶ 6} After the fall, Christen was unable to move, as his legs were numb and there were sharp stabbing pains in his lower back. Due to the ongoing pain, he has had two surgeries and subsequent physical therapy. Despite these procedures, Christen remains on temporary total disability from the back injury.

II. Summary-Judgment Standard

*2 {¶ 7} We review summary-judgment determinations de novo, without deference to the trial court's ruling.^{FN1} Summary judgment should be granted only when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can only come to a conclusion adverse to the nonmoving party, when viewing the evidence in the light most favorable to the nonmoving party.^{FN2} A party moving for summary judgment bears the initial burden of demonstrating that no genuine issue of material fact exists, and once it has satisfied its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.^{FN3}

FN1. See Doe v. Shaffer, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

FN2. Civ.R. 56(C); Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

FN3. See Dresher v. Burt, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

III. Negligence in a Slip-and-Fall Case

{¶ 8} To recover on a negligence claim, a plaintiff must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, and (3) that the breach of the duty proximately

caused the plaintiff's injury.^{FN4} Generally, a duty may be established either through the common law, legislative enactment, or the particular facts and circumstances of a case.^{FN5}

FN4. See Chambers v. St. Mary's School, 82 Ohio St.3d 563, 565, 1998-Ohio-184, 697 N.E.2d 198, citing Wellman v. E. Ohio Gas Co. (1953), 160 Ohio St. 103, 108-109, 113 N.E.2d 629.

FN5. Id., citing Eisenhuth v. Moneyhon (1954), 161 Ohio St. 367, 119 N.E.2d 440, paragraph one of the syllabus.

{¶ 9} In the present case, we are dealing with the duty of a premises owner in relation to a delivery person. Because a delivery person is a business invitee, a premises owner owes a duty of ordinary care so that the invitee is not unnecessarily and unreasonably exposed to danger.^{FN6} But premises owners are not insurers of the safety of invitees, and their duty is only to exercise reasonable care for an invitee's protection.^{FN7} The premises owner does have the duty to warn its invitees of latent or hidden dangers.^{FN8}

FN6. See Francis v. Showcase Cinemas, 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535, at ¶ 7, citing Paschal v. Rite Aid Pharmacy, Inc. (1985), 18 Ohio St.3d 203, 480 N.E.2d 474.

FN7. See Perry v. Eastgreen Realty Co. (1978), 53 Ohio St.2d 51, 52, 372 N.E.2d 335, citing Prosser, Handbook of the Law of Torts (4 Ed.1971), 392-393.

FN8. See Armstrong v. Best Buy Co., 99 Ohio St.3d 79, 80, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶ 5, citing Paschal, 18 Ohio St.3d at 203, 480 N.E.2d 474.

{¶ 10} Thus, premises owners owe the duty of ordinary and reasonable care for the safety of their business invitees and are required to keep their premises in a reasonably safe condition. The burden of producing sufficient proof that an owner has

failed to take safeguards that a reasonable person would take under the same or similar circumstances falls upon the invitee.^{FN9}

FN9. See Perry, 53 Ohio St.2d at 53, 372 N.E.2d 335.

{¶ 11} The Ohio Supreme Court has held that a violation of the OBBC, a set of administrative rules, is not negligence per se.^{FN10} In *Chambers v. St. Mary's School*, the court held that negligence per se occurs when there is a violation of a specific requirement of a law or ordinance, and the only fact for determination by the jury is the commission or omission of a specific act.^{FN11} The court decided that negligence per se is more appropriate for "legislative enactments" from elected officials. Because administrative agencies do not have accountability that is similar to that for members of the General Assembly, violations of administrative rules are not afforded negligence-perse status.^{FN12} But the court did hold that a violation of an administrative rule may be admissible as evidence of negligence.^{FN13}

FN10. See Chambers, 82 Ohio St.3d at 568, 1998-Ohio-184, 697 N.E.2d 198.

FN11. Id. at 565.

FN12. Id. at 566-568.

FN13. Id. at 568, citing Stephens v. A-Able Rents, Co. (1995), 101 Ohio App.3d 20, 27-28, 654 N.E.2d 1315.

{¶ 12} We have held that evidence of an OBBC violation raised a genuine issue of material fact regarding a premises owner's duty and breach of duty.^{FN14} In *Francis v. Showcase Cinemas*, a cleaning-company employee was required to remove the trash from the cinema and place it in a dumpster. There was a short flight of stairs that led to the opening of the dumpster. The employee fell one night while trying to descend the stairs from the dumpster.^{FN15} In bringing the lawsuit, the employee alleged that Showcase had failed to maintain its premises in a reasonably safe condition by fail-

ing to have a handrail on the stairway. The employee asserted that if the stairway had been equipped with a handrail, as required by the OBBC, she could have prevented her fall.^{FN16} We reversed the trial court's grant of summary judgment. We held that despite the fact that the plaintiff could not state the precise cause of her fall, the OBBC violation of failing to have a handrail raised a genuine issue of material fact.^{FN17}

FN14. See Francis, 155 Ohio App.3d 412, 2003-Ohio-6507, 801 N.E.2d 535, at ¶ 10.

FN15. Id. at ¶ 2-3.

FN16. Id. at ¶ 3.

FN17. Id. at ¶ 10-11.

IV. Subsequent Affidavits

*3 {¶ 13} We have previously held, "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of any material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."^{FN18} The logic behind this rule is based upon the lack of credibility inherent in a conflicting affidavit and the notion that a party should not be allowed to create its own issues of material fact.^{FN19}

FN18. See Bullock v. Intermodal Transp. Services, Inc. (Aug. 6, 1986), 1st Dist. No. C-850720.

FN19. See Lindner v. Am. Natl. Ins. Co., 155 Ohio App.3d 30, 2003-Ohio-5394, 798 N.E.2d 1190, at ¶ 14.

{¶ 14} We have also held that the later affidavit must explain inaccurate deposition testimony or reveal newly discovered evidence to be considered.^{FN20} In a later case, we held that an affidavit does not contradict a deposition if it supplements the earlier testimony.^{FN21}

FN20. Bulluck, supra.

FN21. See *Harmon v. Belcan Eng. Group, Inc.* (1997), 119 Ohio App 3d 435, 695 N.E.2d 783, at fn. 3.

{¶ 15} In this case, if Christen's affidavit explained, supplemented, or clarified his earlier deposition, then it was not in conflict with his deposition. If the affidavit did not conflict, then it could be considered to create genuine issues of material fact sufficient to defeat a summary-judgment motion.

{¶ 16} Christen's subsequently filed affidavit stated that he had slipped on the stairs and fell, and that he had not missed a step with his foot. His attempt at clarifying his previous testimony did not conflict and could be considered to determine whether genuine issues of material fact were sufficient to defeat a summary-judgment motion.

V. Summary Judgment was not Appropriate

{¶ 17} In the present case, we have a factual situation not all that different from *Francis*. The trial court granted summary judgment to **Vonderhaar Market & Catering**. Vonderhaar asserted that because Christen did not know whether he had slipped or tripped, and since he could not prove by a preponderance of the evidence that he did slip, summary judgment was appropriate. Vonderhaar's argument essentially posited that because Christen could not say why he slipped, having non-slip surfaces would have not prevented his fall.

{¶ 18} As we pointed out in *Francis*, an OBBC violation raises sufficient evidence of negligence to preclude summary judgment even if the plaintiff cannot point to the specific cause of the slip. "And while it is correct that a plaintiff is generally required to state what caused a slip and fall in those cases where the injuries are alleged to have resulted from the defect that *caused* the fall," FN22 the central issue in this case is whether stair treads with a slip-resistant surface would have prevented the fall and the injuries that Christen sustained.

FN22. *Francis*, 155 Ohio App 3d 412, 2003-Ohio-6507, 801 N.E.2d 535, at ¶ 11.

{¶ 19} During Christen's deposition, he was asked whether his feet were both stationary on one step prior to the slip, or whether he was in the act of stepping backwards. Christen responded that he did not know. Vonderhaar believed that this answer was a "gotcha." We disagree for exactly the same reason that Christen's engineer, Gary Nelson, provided in his affidavit: "falls occur in a fraction of a second and it is highly unusual for fall victims to see, feel, or recall the precise dynamics of their fall through kinesthetic feedback (the sense that detects bodily position, weight, or movement of the muscles, tendons, and joints)." And more importantly, when viewing the evidence in the light most favorable to the nonmoving party, Christen, we accept the premise of his subsequent affidavit that he slipped on the stairs.

VII. Genuine Issues of Material Fact

*4 {¶ 20} We now turn to whether Christen set forth specific facts showing that there was a genuine issue for trial. Engineer Nelson stated in his affidavit that Vonderhaar had failed to provide premises free of recognized hazards. In so concluding, Nelson stated that ordinary painted wood (without a non-slip additive) was inappropriate as a treatment for stairway treads when Vonderhaar knew that delivery personnel walked backwards up the stairs, pulling handcarts, thereby increasing the horizontal force applied by their feet to the stair treads and thus increasing the need for slip-resistant stair treads. Nelson further stated that Vonderhaar had violated OBBC Section 816.9, OSHA regulations, Section 1910.24(f), Title 29 C.F.R., and ordinary care, because each required stairways to be slip-resistant. Nelson thus concluded that Vonderhaar's violations created an unreasonably dangerous workplace and were the proximate cause of Christen's fall and resulting injuries.

{¶ 21} Viewing the evidence in the light most favorable to the nonmoving party, we conclude that summary judgment was inappropriate. Because genuine issues of material fact existed in this case—for example, whether delivery persons had to walk through water left on the ground near an ice ma-

chine and then walk backwards up steps with no slip-resistant material to make a delivery; and whether the stairs were in violation of OBBC administrative rules-the grant of summary judgment by the trial court was erroneous.

{¶ 22} Accordingly, we sustain Christen's assignment of error, reverse the trial court's judgment, and remand the case for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

DOAN, P.J., and GORMAN, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

Ohio App. 1 Dist., 2006.

Christen v. Don Vonderhaar Market & Catering, Inc.

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(Cite as: 155 Ohio App.3d 412, 801 N.E.2d 535)



Francis v. Showcase Cinema Eastgate
Ohio App. 1 Dist., 2003.

Court of Appeals of Ohio, First District, Hamilton
County.

FRANCIS, Appellant,

v.

SHOWCASE CINEMA EASTGATE et al., Ap-
pellees.

No. C-030268.

Decided Dec. 5, 2003.

Background: Invitee, who was an employee of contractor hired to clean movie theater, brought negligence action against movie theater after she fell and was injured on stairs that led to trash dumpster. The Court of Common Pleas, Hamilton County, No. A-0101359, granted summary judgment in favor of movie theater, and invitee appealed.

Holdings: The Court of Appeals, Hildebrandt, P.J., held that:

(1) Ohio Basic Building Code (OBBC) violation due to lack of handrail on movie theater stairway raised a genuine issue of material fact, and

(2) invitee's inability to state what caused fall was not fatal to negligence action.

Reversed and remanded.

West Headnotes

[1] Judgment 228 ↪ 185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in

Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Evidence of Ohio Basic Building Code (OBBC) violation due to lack of handrail on movie theater

stairway raised a genuine issue of material fact regarding movie theater's duty and breach of duty to invitee that precluded summary judgment on invitee's negligence claim.

[2] Negligence 272 ↪ 202

272 Negligence

272I In General

272k202 k. Elements in General. Most Cited Cases

To recover on a claim of negligence, plaintiff must prove that defendant owed plaintiff a duty, that defendant breached that duty, and that breach of duty proximately caused plaintiff's injury.

[3] Negligence 272 ↪ 1037(4)

272 Negligence

272XVII Premises Liability

272XVII(C) Standard of Care

272k1034 Status of Entrant

272k1037 Invitees

272k1037(4) k. Care Required in

General. Most Cited Cases

A premises owner generally owes an invitee a duty of ordinary care to maintain premises in a reasonably safe condition so that invitee is not unnecessarily and unreasonably exposed to danger.

[4] Public Amusement and Entertainment 315T
↪ 108

315T Public Amusement and Entertainment

315TIII Personal Injuries

315TIII(A) In General

315Tk101 Spectators and Other Non-

Participants, Injuries to

315Tk108 k. Steps, Stairs and Ramps.

Most Cited Cases

(Formerly 376k6(16) Theaters and Shows)

Invitee's inability to state what caused fall precluded recovery on her negligence claim against movie theater to extent that invitee based her claim on lack of uniformity in stairs on which she fell or other defects in stairs themselves.

[5] Public Amusement and Entertainment 315T
↪108

315T Public Amusement and Entertainment

315TIII Personal Injuries

315TIII(A) In General

315Tk101 Spectators and Other Non-Participants, Injuries to

315Tk108 k. Steps, Stairs and Ramps.

Most Cited Cases

(Formerly 376k6(16) Theaters and Shows)

Invitee's inability to state what caused fall was not fatal to her negligence claim against movie theater to extent that invitee based her claim on allegation that lack of handrail on stairway contributed to fall, since precise cause of fall was not critical to maintenance of action.

****536*413 Richard G. Ellison**, Cincinnati, for appellant.

Frost Brown Todd, L.L.C., Maureen P. Haney and Bill J. Paliobeis, Cincinnati, for appellees.

HILDEBRANDT, Presiding Judge.

{¶ 1} Plaintiff-appellant, Constance Francis, appeals the summary judgment entered by the Hamilton County Court of Common Pleas in favor of Showcase Cinema Eastgate and National Amusements, Inc. (collectively, "Showcase") in a negligence action. For the following reasons, we reverse the trial court's judgment and remand the cause for further proceedings.

*414 {¶ 2} Francis was employed by a cleaning company that had contracted with Showcase to clean one of its theaters. As part of her normal duties, Francis was required to remove trash from the theater and place it in a dumpster located in the parking lot. A short flight of stairs led to the opening of the dumpster. The stairs were not equipped with a handrail.

{¶ 3} One night, after depositing the trash in the dumpster, Francis fell and sustained injuries as she was descending the flight of stairs. She brought an action against Showcase, alleging that it had failed to maintain its premises in a reasonably safe condition. In her deposition, Francis testified that she

was unable to identify the cause of her fall. But she did state that, had the stairway been equipped with a handrail, she believed she could have prevented the fall.

{¶ 4} Showcase filed a motion for summary judgment, arguing that the lack of a handrail was an open and obvious hazard and that Francis's inability to identify the cause of her fall precluded recovery. Francis responded to the motion with an affidavit from engineer Thomas R. Huston, who stated that the lack of a handrail was unreasonably dangerous and constituted a violation of the Ohio Basic Building Code ("OBBC").

{¶ 5} The trial court granted Showcase's motion for summary judgment. In her two assignments of error, Francis now argues that the trial court erred in granting summary judgment and in holding that the open-and-obvious doctrine precluded recovery. She argues the assignments together, and we address them in the same fashion.

{¶ 6} Pursuant to Civ.R. 56(C), a motion for summary judgment may be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, ****537** and it appears from the evidence that reasonable minds can come to but one conclusion, and, with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.^{FN1} The party moving for summary judgment bears the initial burden of demonstrating that no genuine issue of material fact exists, and once it has satisfied its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.^{FN2} This court reviews the granting of summary judgment de novo.^{FN3}

^{FN1} See State ex rel. Howard v. Ferreri (1994), 70 Ohio St.3d 587, 589, 639 N.E.2d 1189.

^{FN2} See Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264.

^{FN3} Jorg v. Cincinnati Black United

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Front. 153 Ohio App.3d 258.
2003-Ohio-3668. 792 N.E.2d 781. at ¶ 6.

*415 [1][2][3] {¶ 7} To recover on a claim of negligence, the plaintiff must prove that the defendant owed the plaintiff a duty, that the defendant breached that duty, and that the breach of the duty proximately caused the plaintiff's injury.^{FN4} A premises owner generally owes an invitee a duty of ordinary care to maintain the premises in a reasonably safe condition so that the invitee is not unnecessarily and unreasonably exposed to danger.^{FN5}

FN4. Wellman v. E. Ohio Gas Co. (1953).
160 Ohio St. 103. 51 O.O. 27. 113 N.E.2d
629. paragraph three of the syllabus.

FN5. Paschal v. Rite Aid Pharmacy, Inc.
(1985). 18 Ohio St.3d 203. 203. 18 OBR
267. 480 N.E.2d 474. In the case at bar, Showcase does not dispute that Francis was an invitee.

{¶ 8} We begin with a discussion of the open-and-obvious doctrine. The Supreme Court of Ohio has recently reaffirmed the principle that a landowner owes no duty to protect an invitee from open and obvious dangers.^{FN6} In emphasizing the continued viability of the doctrine in light of the comparative-negligence statute, the court stated, "We reiterate that when courts apply the rule, they must focus on the fact that the doctrine relates to the threshold issue of duty. * * * [I]t 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."^{FN7}

FN6. Armstrong v. Best Buy Co., Inc., 99
Ohio St.3d 79. 2003-Ohio-2573. 788
N.E.2d 1088. at ¶ 13.

FN7. Id.

{¶ 9} But despite the Ohio Supreme Court's recent pronouncements concerning the open-and-obvious doctrine, the court has also held that violations of the OBBC are evidence that the owner has breached a duty to the invitee. In *Chambers v. St. Mary's*

School,^{FN8} the court held that a violation of the OBBC was evidence of negligence, although it did not constitute negligence per se.^{FN9} In stating that an OBBC violation was evidence of negligence, the court indicated that a violation showed both that the defendant had a duty toward the plaintiff and that the defendant breached that duty.^{FN10}

FN8. (1998). 82 Ohio St.3d 563. 697
N.E.2d 198.

FN9. Id., syllabus.

FN10. Id. at 565. 697 N.E.2d 198.

{¶ 10} Thus, while the Supreme Court of Ohio has reaffirmed the principle that a landowner owes no duty to protect an invitee from open and obvious dangers, it has also held that violations of the OBBC are evidence that the owner has breached a duty to the invitee. In this case, Showcase suggests that this court should simply ignore the evidence of the OBBC violation, **538 but we believe it would be improper to do so. To completely disregard the OBBC violation as a nullity *416 under the open-and-obvious doctrine would be to ignore the holding in *Chambers* and to render the provisions of the OBBC without legal significance.^{FN11} We hold, then, that the evidence of the OBBC violation raised a genuine issue of material fact regarding Showcase's duty and breach of duty, and that summary judgment was improperly granted.^{FN12}

FN11. Showcase cites *Tomaselli v. Amser*
Corp. (July 20, 2000), 8th Dist. No. 76605,
2000 WL 1010953, for the proposition that the absence of a handrail was open and obvious and that the failure of the defendant to comply with administrative regulations did not give rise to liability. In *Tomaselli*, though, the court emphasized that the Occupational Safety and Health Administration standards at issue related only to employers and did not provide a cause of action for third parties. As held in *Chambers*, that limitation is not true for violations of the OBBC, and we therefore find *Tomaselli* to be distinguishable.

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FN12. We note that Showcase has not challenged Francis's contention that the absence of a handrail was a violation of the OBBC.

[4][5] {§ 11} We turn now to Showcase's argument that Francis's inability to state what caused her fall was fatal to her negligence action. Showcase cites a number of cases for the proposition that the plaintiff must be able to identify the cause of her fall to prove the defendant's negligence. FN13 And while it is correct that a plaintiff is generally required to state what caused a slip and fall in those cases where the injuries are alleged to have resulted from the defect that *caused* the fall, the central issue in the case at bar was whether a handrail would have prevented the fall or otherwise prevented the injuries that Francis sustained. Therefore, to the extent that Francis based her claim on the lack of uniformity in the stairs or other defects in the stairs themselves, we hold that her inability to state what caused the fall precluded recovery. But regarding the handrail, the precise cause of the fall was not critical to the maintenance of the action, and summary judgment based upon the lack of evidence in that regard was erroneous.

FN13. See, e.g., Stamper v. Middletown Hosp. Assn. (1989), 65 Ohio App.3d 65, 582 N.E.2d 1040; Cleveland Athletic Assn. v. Bending (1934), 129 Ohio St. 152, 1 O.O. 447, 194 N.E. 6.

{§ 12} The assignments of error are accordingly sustained. The judgment of the trial court is reversed, and the cause is remanded for further proceedings consistent with this decision and law.

Judgment accordingly.

GORMAN and WINKLER, JJ., concur.

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