

IN THE SUPREME COURT OF OHIO

TONY MONDI, et. al.

Plaintiffs/Appellants,

vs.

STAN HYWET HALL AND GARDENS
FOUNDATION DBA STAN HYWET HALL, et
al.

Defendants/Appellees

10-1264

ON APPEAL FROM THE SUMMIT COUNTY
COURT OF APPEALS, NINTH APPELLATE
DISTRICT

Court of Appeals
Case No. C.A. 25059

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANTS TONY MONDI AND AMY MONDI

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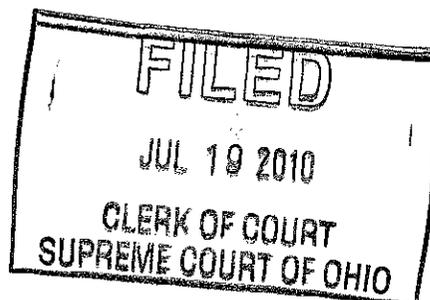


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST**

In Armstrong v. Best Buy Co., Inc., 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, this Court held in the Syllabus of the Court: “The open-and-obvious doctrine remains viable in Ohio. Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises. ...” The Court focused on the lack of duty owed if a condition was so obvious as to absolve the property owner from taking any further action to protect the plaintiff.

Since 2003, the year of the Armstrong decision, there have been 368 cases dealing with an “open and obvious” situation as reported in Westlaw. Armstrong has not clarified or simplified the approach to premises liability. Rather it has created even more confusion and disparate results with courts considering attendant circumstances and whether or not there is a duty to constantly be looking at the ground as one travels. Contrary decisions are returned even from the same Courts of Appeal, sometimes depending upon the members of the panel.

With such confusion and nuanced reasoning being applied across the State, the effect has not been to reduce the number of “slip and fall” cases going up on appeal but rather to make each court of appeals a trier of fact. A responsibility more properly suited for a jury of laymen. In every premises liability case there are questions of fact.

Summary Judgment Motions are to be resolved in light of the dictates of Civil Rule 56. The standard of review for summary judgment is the same for both a trial court and an appellate court. Lorain Natl. Bank v. Saratoga Apts. (1989), 61 Ohio App.3d 127, 572 N.E.2d 198. This rule has been reaffirmed by the Supreme Court of Ohio in State ex rel. Zimmerman v. Tompkins (1996), 75 Ohio St.3d 447, 663 N.E.2d 639.

Civil Rule 56 (C) provides that before summary judgment may be granted, it must be determined 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) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the non moving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. State ex rel. Parsons v. Fleming (1994), 68 Ohio St.3d 509, 628 N.E.2d 1377, citing Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

Since an appellate court decides on the validity of a trial court's rulings on motions for summary judgment on a de novo basis, the Appellate Judges are required to spend their time weighing facts rather than dealing with questions of law. An appellate court is not the proper forum for an examination of photographs of the scene or attempting to evaluate the credibility of witness testimony from deposition transcripts.

The public is confused and ill served when it has no rational basis to believe that a case will, or will not, survive judicial review of factual questions. A better approach would be to permit a jury to weigh the comparative fault of the parties and to abrogate the holding that if a defect is big enough there is no duty owed to the general public.

I. STATEMENT OF THE CASE AND FACTS

THE CASE

On December 5, 2008, Appellant Tony and Amy Mondi filed a Complaint against Appellees Stan Hywet Hall and Gardens Foundation dba Stan Hywet Hall, Stan Hywet Hall and Gardens, Inc. dba Stan Hywet Hall, Stan Hywet Hall, and John Does 1 – 10. The Complaint alleged that Amy Mondi sustained injuries, while a business invitee, upon Appellees premises on August 18, 2007, due to their negligent maintenance of the premises and their failure to warn of hazards of which the Appellees were aware and which were not readily observable to the Appellant. Tony Mondi claimed a loss of consortium due to the injuries to his spouse arising out of Appellees negligence. Appellees timely filed an Answer on January 21, 2009.

Written discovery was exchanged and on July 21, 2009, depositions of two representatives of Appellee, James Urban and Betty Lee Pinter, were taken and the depositions of Amy Mondi, and her mother and witness, Rosalyn J. Worthing. Transcripts of all depositions were filed with the Court.

On August 4, 2009, Stan Hywet filed a Motion for Summary Judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure. The Mondis filed their Brief in Opposition to said Motion on August 26, 2009, supported by the Affidavits of Amy Mondi and Rosalyn Worthing as well as the deposition transcripts on file with the Court. Appellees filed a Reply Brief on September 8, 2009.

The Trial Court considered the Motion upon the Briefs and on October 5, 2009, filed its Order granting the Stan Hywet's Motion for Summary Judgment. (See Order attached hereto as Appendix A). On October 23, 2009, Appellants filed their Notice of Appeal and Docketing Statement with the Ninth District Court of Appeals for Summit County. On October 27, 2009, the Clerk of Court mailed Notice of Filing of the Record pursuant to Rule 18(A) of the Rules of Appellate Procedure. (See copy of Trial Court docket attached hereto as Appendix B). Briefs were filed with the Court of Appeals and oral argument was held in said Court on April 13, 2010. The Court of Appeals issued its decision in the matter on June

16, 2010, denying the Mondis' appeal and upholding the trial court's granting of summary judgment to Appellees.

FACTS:

During the summer of 2007 Stan Hywet had a tree house display on the grounds of the hall and also had a model train exhibit in a building known as the conservatory on said grounds. One of the goals and effects of these exhibits was to bring more young families with children to Stan Hywet. They were successful in drawing Amy Mondis and her two small children, Anthony, then age 3 and Angelina then nine months old.

When the Mondis family entered the conservatory Amy was holding her daughter and pushing an empty stroller and Anthony was walking with his grandmother. There was a wide path that they followed as they entered into the exhibit where trains were displayed; the area was sectioned off with rock ledges or walls for the train displays. The group entered on one side of the wide path and came around to the other side where the trains were closer. It was at this point that the three year old announced he had to "go potty" and turned and started walking back towards the bathrooms.

Amy handed the baby to her mother and turned to follow her son when she almost immediately hit the toes of her right foot upon a rock that was part of the rock wall but was sticking out into the path farther than the other rocks in the wall, approximately five inches. If Amy had been looking down at the ground rather than watching where she was walking and trying to keep an eye on her son, she would have been able to see the rock projecting out into the pathway. However, due to a mother having to observe and take care of her children, and the projecting rock being at ground level and not in the line of sight of an average person, Amy struck her foot upon the rock and broke the two smallest toes on her right foot.

There is no dispute regarding the fact that a rock was jutting out into the pathway that guests were to use to walk through and observe the train exhibit, or that the rock walls were in a serpentine construction so if a person started to walk forward they could walk into it. Appellant was injured by a single rock extending out from the base of a rock wall a distance of five (5) into the walkway provided for

business invitees. While the “wall” may have been open and obvious that does not equate to Appellant being well aware of a hazard extending out into the pathway that would only be discernable to one looking down – a responsibility Appellant did not have. A pedestrian using a public sidewalk is under a duty to use care reasonably proportioned to the danger likely to be encountered but is not, as a matter of law, required to look constantly downward under all circumstances even where she has prior knowledge of a potential hazard. Grossnickle v. Germantown, (1965), 3 Ohio St.2d 96, 209 N.E.2d 442. In this instant case while it is certain that Amy had prior knowledge of a rock wall; there is no evidence that she had knowledge of the protruding rock.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1. Disputed facts regarding whether a defective condition in business premises was Open and Obvious should be resolved by the trier of fact and are not appropriate for resolution by Summary Judgment.

The question of whether something is open and obvious cannot always be decided as a matter of law simply because it may have been visible. Frano v. Red Robin International, Inc., 181 Ohio App.3d 13 (Lake Cty.), 2009-Ohio-685. To quote from Texler v. D.O. Summers Cleaners & Shirt Laundry Co., (1998) 81 Ohio St.3d 677, 693 N.E.2d 217:

The legal issue presented here is whether a reasonably prudent person would have anticipated that an injury would result from walking normally on that sidewalk. This court has held that “[a] pedestrian using a public sidewalk is under a duty to use care reasonably proportioned to the danger likely to be encountered but is not, as a matter of law, required to look constantly downward *681 * * *.” Grossnickle v. Germantown, (1965), 3 Ohio St.2d 96, 209 N.e2d 442, paragraph two of the syllabus. This care requires a pedestrian “to use his senses to avoid injury while walking on a sidewalk, but this does not mean that he is required as a matter of law to keep his eyes upon the sidewalk at all times. It may be necessary to keep a lookout for traffic and other pedestrians to avoid collision.” Griffin v. Cincinnati, (1954), 162 Ohio St. 232, 238, 123 N.E.2d 11, 15. See, also, Cash v. Cincinnati, (1981), 66 Ohio St.2d 319, 325-326, 421 N.E.2d 1275, 1279; Burge v. Pepsi-Cola Bottling Co. of Cincinnati, (1971), 26 Ohio St.2d 237, 271 N.E.2d 273.

In the case of Lovejoy v EMH Regional Med. Ctr., (9th Dist. No.07CA009145), (Lorain Cty), 2008-Ohio-3205, the Ninth District Court of Appeals overturned the granting of a motion for summary judgment on a defense claim of “open and obvious”, the Court ruled that there was a genuine issue of material fact regarding whether the condition of the walkway was observable to an ordinary person. The Court’s rationale, quoting Grossnickle (supra) and Klosterman v. Medina, (9th Dist. No. 04CA0052-M), 2005-Ohio-1134 was:

The only way a person could be absolutely certain about the cause of her fall is if the person looked down and observed the object or condition before or at the exact time that she collided with it. Reason dictates that if a person observes an object or condition in her pathway, she will avoid the hazard. Moreover, the Ohio Supreme Court has held that “(a) pedestrian using a public sidewalk is under a duty to use care reasonably proportioned to the danger likely to be encountered but is not, as a matter of law, required to look constantly downward under all circumstances even where she has prior knowledge of a potential

hazard.” ... Appellant was not, as a matter of law, required to look downward as she walked.

Appellant, Amy Mondì testified in her deposition that if she had been looking down at the ground rather than watching where she was walking and trying to keep an eye on her son, she would have been able to see the rock projecting out into the pathway. This is not the conduct that the law and the Courts require. She was not “as a matter of law, required to look downward as she walked” Lovejoy (supra).

In the case of Ray v. Wal-Mart, 2009 WL 2783231 (Ohio App. 4 Dist.), 2009 -Ohio- 4542, the court quoted Klauss v. Marc Glassman, Inc., Cuyahoga App. No. 84799, 2005-Ohio-1306, and stated:

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. (1977), 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. (“ ‘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).

Amy was injured by a single rock extending out from the base of a rock wall a distance of five (5) into the walkway provided for business invitees. The trial court and the Appellate Court below talk about the “wall” being open and obvious. The Court of Appeals state that “Nothing in the facts suggests that Ms. Mondì’s ability to see the wall was obstructed.” That does not equate to her being aware of and able to observe a hazard extending out into the pathway that would only be discernable to one looking down – a responsibility Appellant did not have. A pedestrian using a public sidewalk is under a duty to use care reasonably proportioned to the danger likely to be encountered but is not, as a matter of law, required to look constantly downward under all circumstances even where she has prior knowledge of a potential hazard. Grossnickle v. Germantown, (1965), 3 Ohio St.2d 96, 209 N.E.2d 442. In this instant case while it is certain that Amy had prior knowledge of a rock wall; there is no evidence that she had knowledge of the protruding rock.

An appellate panel should not be placed in the position of having to determine disputed issues of fact. This is a responsibility properly falling to a jury of lay persons. In its decision the panel below discusses photographs introduced as exhibits by the parties. However, the testimony at deposition regarding the photographs was that none of the photos showed the area where the injury took place and were not taken at the time of the incident.

Proposition of Law No. 2. Issues regarding the nature and effect of attendant circumstances should be resolved by the trier of fact and are not appropriate for resolution by Summary Judgment.

“Attendant circumstances” may also create a genuine issue of material fact as to whether a hazard is open and obvious. Cummin v. Image Mart, Inc., Franklin App. No. 03AP1284, 2004-Ohio-2840 citing McGuire v. Sears, Roebuck & Co. (1966), 118 Ohio App.3d 494, 498, 694 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, (Supra) citing Cash v. Cincinnati (1981), 66 Ohio St.2d 319, 324, 421 N.E.2d 1275.

While there is no precise definition of attendant circumstances, they generally include any distraction that would come to the attention of an invitee in the same circumstances and reduce the degree of care an ordinary person would exercise at the time. McGuire (Supra). Attendant circumstances may create a genuine issue of material fact as to whether a danger was open and obvious and prevent the application of the open and obvious doctrine.

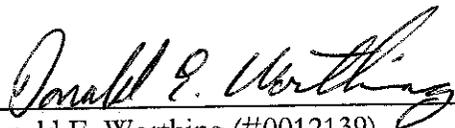
The Ninth District Appellate Court in its discussing the material fact of attendant circumstances, announced that it has adopted the view that “attendant circumstances” is merely a generalized version of the reasonableness test subsumed by the open and obvious doctrine. That being the case, it is even clearer that the consideration of a reasonableness test should require the consideration of the “reasonable man”, that is a jury of laypersons who can consider all of the circumstances, including Appellant’s

attempting to watch her child, while dealing with the projecting rock and the serpentine nature of the walls in an area designed to lure families. It could be determined by reasonable minds as sufficient attendant circumstances to create a genuine issue of material fact as to whether the danger was open and obvious. Once again this should be in the province of a jury.

CONCLUSION

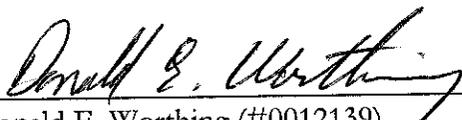
For the reasons discussed above, this case involves matters of public and great general interest. There is a lack of certainty of resolution of premises liability cases where the questions of whether a defect is open and obvious and the consideration of attendant circumstances. These issues are clearly questions of fact that should be resolved by a jury and which are not appropriate for summary judgment. The appellants request that this court accept jurisdiction in this case so that the important issues presented will be reviewed.

Respectfully submitted,

By: 
Donald E. Worthing (#0012139)
Counsel for Appellants Tony Mond
and Amy Mond

CERTIFICATE OF SERVICE

I Certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees, Ann Marie O'Brien, Esq., One Cascade Plaza, Suite 800, Akron, Ohio 44308 on July 17, 2010.


Donald E. Worthing (#0012139)
Counsel for Appellants Tony Mond
and Amy Mond

APPENDIX

STATE OF OHIO) COURT OF APPEALS
) DANIEL M. HERRIGAN IN THE COURT OF APPEALS
)ss: NINTH JUDICIAL DISTRICT
 COUNTY OF SUMMIT) 2010 JUN 16 AM 7:42

TONY MONDI, et al. SUMMIT COUNTY C. A. No. 25059
 CLERK OF COURTS

Appellants

v.

STAN HYWET HALL & GARDENS,
INC., et al.

Appellees

APPEAL FROM JUDGMENT
 ENTERED IN THE
 COURT OF COMMON PLEAS
 COUNTY OF SUMMIT, OHIO
 CASE No. CV 2008-12-8407

DECISION AND JOURNAL ENTRY

Dated: June 16, 2010

CARR, Presiding Judge.

{¶1} Appellants, Tony and Amy MondI, appeal the judgment of the Summit County Court of Common Pleas granting summary judgment in favor of appellees, Stan Hywet Hall and Gardens Foundation, et al. This Court affirms.

I.

{¶2} This case stems out of an incident which occurred on August 18, 2007, at Stan Hywet Hall in Akron, Ohio. Stan Hywet Hall is a facility that holds itself out to the public for tours, displays, and other activities for which it charges an admission fee. The Stan Hywet Hall and Gardens Foundation and Stan Hywet Hall and Gardens, Inc. are corporations organized to operate and maintain Stan Hywet Hall. While walking through a train display at Stan Hywet Hall with several members of her family, Amy MondI's foot struck a portion of a wall which was constructed of rocks. Ms. MondI suffered two broken toes as a result of the incident.

{¶3} On December 5, 2008, Amy Mondi and her husband, Tony Mondi, filed a complaint against Stan Hywet Hall, Stan Hywet Hall and Gardens Foundation, and Stan Hywet Hall and Gardens, Inc. (hereinafter collectively referred to as "Stan Hywet"). In the complaint, Ms. Mondi alleged that, as a business invitee, she sustained injuries while visiting the Stan Hywet premises on August 18, 2007, due to their negligent maintenance of the premises. Tony Mondi claimed loss of consortium due to the injuries to his spouse arising out of Stan Hywet's negligence. Stan Hywet filed a timely answer to the complaint on January 21, 2009.

{¶4} The parties subsequently engaged in discovery. On July 21, 2009, the depositions of Ms. Mondi and her mother, Rosalyn Joyce Worthing, were taken. On the same day, the deposition of two Stan Hywet representatives, Betty Lee Pinter and James Urban, were also taken. On August 4, 2009, Stan Hywet filed a motion for summary judgment. The Mondis filed a brief in opposition on August 26, 2009. Stan Hywet filed a reply brief on September 8, 2009. On October 5, 2009, the trial court granted Stan Hywet's motion for summary judgment.

{¶5} The Mondis appeal from that order, raising one assignment of error.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT[.]"

{¶6} In their sole assignment of error, the Mondis contend the trial court erred in granting Stan Hywet's motion for summary judgment. This Court disagrees.

{¶7} The Mondis make three arguments in support of their assignment of error. First, the Mondis argue the trial court misconstrued the facts before it in ruling on Stan Hywet's motion for summary judgment. The Mondis further argue there was a genuine issue of material fact regarding whether the defective condition was open and obvious. Finally, the Mondis argue

there was a genuine issue of material fact regarding the nature and effect of attendant circumstances.

{¶8} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶9} Pursuant to Civ.R. 56(C), summary judgment is proper if:

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

{¶10} In order to prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that 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. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party’s pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a “genuine triable issue” exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶11} Furthermore, in order to prevail on a claim of negligence, appellants must establish the existence of a duty, a breach of that duty, and an injury proximately resulting from

the breach of duty. *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77. Whether or not a duty exists is a question of law. *Williams v. Garcias* (Feb. 7, 2001), 9th Dist. No. 20053.

{¶12} In Ohio, the scope of the legal duty owed by the premises owner is determined by the visitor's classification as either an invitee, a licensee, or trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315. "Business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68, citing *Scheibel v. Lipton* (1951), 156 Ohio St. 308. "It is the duty of the owner of the premises to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition." *Light*, 28 Ohio St.3d at 68, citing *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31. Here, the parties agree that Amy Mondt was a business invitee. This stems from the fact that Stan Hywet was charging an admission fee in order to view the various exhibits on the premises.

{¶13} The Supreme Court of Ohio has reaffirmed the viability of the open and obvious doctrine, stating that "[w]here a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at syllabus, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. Under the open and obvious doctrine, an owner owes no duty to protect business invitees from hazards which are so obvious and apparent that the invitee is reasonably expected to discover them and protect himself against them. *Humphrey*, 13 Ohio St.2d at syllabus. This Court has stated that "[a] business is not 'an insurer of the customer's safety,' nor is it duty-bound to protect its invitees from such readily apparent dangers." *Gehm v. Tri-County, Inc.*, 9th Dist. No. 09CA009693, 2010-Ohio-1080, at ¶7, citing *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. The Supreme Court has held, however, that an individual "is not, as a matter of law, required to look

constantly downward under all circumstances even where she has prior knowledge of a potential hazard.” *Grossnickle v. Germantown* (1965), 3 Ohio St.2d 96, paragraph two of the syllabus.

{¶14} In support of their assignment of error, the Mondis argue there was a genuine issue of material fact regarding the nature and effect of attendant circumstances. In applying the open and obvious doctrine, this Court considers the totality of the circumstances to determine if the individual should have reasonably known of the alleged condition. *Marock v. Barberton Liedertafel*, 9th Dist. No. 23111, 2006-Ohio-5423, at ¶14 (stating “this Court adopts the view that the consideration of attendant circumstances is merely a generalized version of the reasonableness test subsumed by the open and obvious doctrine”).

{¶15} In this case, Amy Mondis alleges that she was injured as a result of Stan Hywet’s negligence. On August 18, 2007, Ms. Mondis went to Stan Hywet with several members of her family to view a tree house exhibit. Ms. Mondis’s deposition testimony indicates that after a period of time, she entered the model train exhibit inside the Stan Hywet’s conservatory with several members of her family including her mother and her two children. Notably, the path through which the group traversed in the conservatory was wide enough for persons to pass freely going back and forth. Trains were displayed both overhead and on the ground. A rock wall separated the edge of the path from the train exhibit. Photographs introduced as exhibits by the parties show that the wall was comprised of loose rocks stacked on top of each other. The pathway was set up in a serpentine manner. As Ms. Mondis entered the exhibit, she was holding Angelina, her nine-month-old daughter, in her arms as she pushed a stroller in front of her. Ms. Mondis’s then three-year-old son, Anthony, walked with Ms. Mondis’s mother, Rosalyn Joyce Worthing. The group proceeded through the exhibit and observed the trains. After a few minutes, Anthony said, “I have to go potty.” At this point, Ms. Mondis handed Angelina to her

mother and turned to follow her son to the restroom. Ms. Mondi averred that within "a step or two," she struck a portion of the rock wall with her foot and broke two of her toes. The portion of the rock wall which Ms. Mondi struck with her foot was at ground level. Ms. Mondi stated that if she would have turned to look at the rock wall, it would have been visible.

{¶16} Betty Lee Pinter, Stan Hywet's hospitality coordinator and event manager, completed an incident report which stated Ms. Mondi "[h]ad flip-flops on and walked into a rock jutting out from train display. May have broken toes or foot."

{¶17} James Urban, a volunteer at Stan Hywet, attempted to aid Ms. Mondi on the day of the accident. Mr. Urban averred that the walkway in the exhibit was wider than a public sidewalk. Mr. Urban further averred that there was sufficient space for people to walk back and forth on the pathway while viewing the train exhibit.

{¶18} Rosalyn Joyce Worthing, Ms. Mondi's mother, was also deposed in this case. Ms. Worthing averred that the incident occurred about two minutes after the group entered the train exhibit. When Anthony indicated that he needed to use the restroom, Ms. Mondi asked her mother, "Do you want to take him or do you want me to stay with Angelina?" Ms. Worthing responded, "You go with Anthony." When asked if Amy had handed off Angelina prior to the incident, Ms. Worthing averred, "I don't remember. It was just like instant. Whatever happened, it was instantly." The rocks in question were "on the ground" as part of a barrier to the plants. The rock which Ms. Mondi struck with her foot was "jutting out." Ms. Worthing further averred that the area was not overly crowded and that there were "maybe two people there." Ms. Worthing also averred that she did not see anything, such as a hanging bush, that would have obstructed Ms. Mondi's vision.

{¶19} We hold that the trial court did not misconstrue the facts of this case, which reveal there was no genuine issue of material fact as to whether the danger of the rock wall was open and obvious. The facts indicate that the path was sufficiently wide to allow people to pass freely without coming into contact with the wall. Nothing in the facts suggests that Ms. Mondi's ability to see the wall was obstructed. By its very nature, a rock wall does not have a smooth, even texture. Rather, portions of a wall comprised of rocks will protrude in an uneven manner creating a multi-dimensional appearance. The natural texture of a rock wall, coupled with the serpentine design of the walkway, was an open and obvious hazard. Ms. Mondi injured her foot immediately after handing her daughter, then nine months old, to Ms. Worthing. While Ms. Mondi was not required to constantly look downward, a pedestrian in her position would have noticed that an abrupt change of direction near the edge of a pathway bordered by a rock wall contained an inherent risk. In light of these facts, the trial court correctly found that the rock wall was an open and obvious condition.

{¶20} The Mondis' assignment of error is overruled.

III.

{¶21} The Mondis' sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

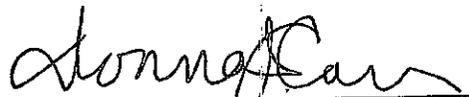
Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.


DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

MOORE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

DONALD E. WORTHING, Attorney at Law, for Appellants.

ANN MARIE O'BRIEN, Attorney at Law, for Appellees.