

ORIGINAL

IN THE SUPREME COURT OF OHIO

GARY L. SZERSZEN,

Plaintiff-Appellee

vs.

SUMMIT CHASE CONDOMINIUMS,
SUMMIT CHASE CONDOMINIUM
ASSOCIATION, AND STERLING
TOWN PROPERTIES,

Defendants-Appellants.

10-1892

Supreme Court Case No. _____

On Appeal from the Tenth District Court
of Appeals Case No. 09AP-1183
(Franklin C.P.C. No. 08 CVC 12-18150)

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS SUMMIT CHASE CONDOMINIUMS, SUMMIT CHASE
CONDOMINIUM ASSOCIATION, AND STERLING TOWN PROPERTIES**

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

Appellants Summit Chase Condominiums, Summit Chase Condominium Association, and Sterling Town Properties (collectively "Summit Chase") request that this Court accept jurisdiction because this case is one which will affect every landowner and business in Ohio. Premise liability causes of action are heavily litigated in Ohio and typically result in the landowner filing a motion for summary judgment based on the open and obvious doctrine. Although this Court affirmed the viability of the open and obvious doctrine in *Armstrong v. Best Buy Co. Inc.* (2003), 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, this Court has yet to expound upon the parameters of the doctrine. In particular, this Court has not set forth a bright-line test as to what constitutes an open and obvious hazard.

Instead, appellate courts, without any guidance from this Court, have determined that a hazard is open and obvious if it is observable by "ordinary inspection." It is necessary, however, that this Court defines the term "ordinary inspection." Such a ruling will prevent future decisions such as the one rendered by the Tenth District Court of Appeals in this case, which adopted a definition of "ordinary inspection" that expands the liability of landowners in premise liability cases. Specifically, despite the many appellate courts that have held that a condition is open and obvious if the plaintiff admits that he would have seen the condition if he would have looked down prior to his fall, the Tenth District's decision allows plaintiffs to avoid summary judgment by simply stating the hazard was observable if he looked "hard enough."

The most troubling aspect of the Tenth District's decision is that the court overlooked the plaintiff's admissions that the spill was, in fact, observable. There was no dispute that the plaintiff was able to take a picture of a stain in his carpet, which he admits would have put him on notice of the spill if he looked down on his carpet prior to his fall. What is more, the plaintiff

admitted that he could have observed his kitchen sink, where the spill originated from, if he looked into the kitchen before walking on the floor. Thus, there was no doubt from the plaintiff's own admissions that the spill was *observable*.

The Tenth District should have applied an objective person standard instead of focusing on the plaintiff's qualification that he would have seen the spill if he looked "hard enough." The plaintiff never provided any indication of how much effort was needed in order to observe the spill. Under the objective person standard, the plaintiff's qualifications should have been irrelevant. Rather, the focus should have been on whether the spill could have been observed, which he admitted was the case.

The Tenth District's decision creates doubt as to whether a plaintiff's admissions that he would have observed a spill are sufficient to warrant summary judgment in favor of the landowner. As a result, Ohio's landowners, including businesses, are unable to determine their liability exposure in premise liability cases. In other words, it is now impossible for landowners to adequately evaluate premise liability cases because the Tenth District's decision effectively abandoned the objective person standard.

Moreover, by allowing plaintiffs to overcome summary judgment by simply stating the buzzwords "if I looked hard enough," the Tenth District has increased the difficulty for landowners to obtain summary judgment. In essence, the Tenth District has turned landowners into insurers of invitee's safety because a plaintiff can always overcome summary judgment by qualifying their admissions that they probably would have seen the allegedly hazardous condition. This Court must now allow such a decision to continue to operate as valid law.

There is no question that the Tenth District has issued an erroneous decision that will affect thousands of landowners and businesses in Ohio. As such, this Court should accept

jurisdiction of this case to clarify the objective standard to be applied in premise liability causes of action.

STATEMENT OF FACTS AND CASE

This case was filed on December 22, 2008 by Plaintiff Gary Szerszen ("Mr. Szerszen) against Summit Chase alleging damages as a result of a slip of fall that occurred in his residence at the Summit Chase Condominiums located in Grandview Heights, Ohio. Specifically, Mr. Szerszen claims that on December 22, 2006, he returned to his condominium from a two-day trip to New York and slipped and fell on an accumulation of water that overflowed from his kitchen sink. Mr. Szerszen further claims that the accumulation of water was caused by plumbing defects that were not repaired by Summit Chase.

When Mr. Szerszen returned to his condominium it was well-lit and he did not have any problems seeing inside. After he put his luggage down, Mr. Szerszen took two steps into his kitchen and fell down. Critically, Mr. Szerszen testified that if he would have looked down prior to his fall, he probably would have seen the accumulation of water in his kitchen. Despite coaching from his counsel, Mr. Szerszen ultimately testified as follows:

I guess if I had looked hard enough—if I was paying attention and looking for that specific thing, I probably could have seen the water—looking—you know—I was not looking—I didn't—I was just focused on doing something else, which was getting water, so—.

Mr. Szerszen also testified that after his fall, he could see the water on the kitchen floor. The only reason Mr. Szerszen did not see the water prior to his fall was that he was not looking.

In addition to his concession that he probably could have observed the accumulation of water prior to his fall, Mr. Szerszen admitted that there was a large stain on the carpet leading into the kitchen caused by the overflow from the sink. Mr. Szerszen further acknowledged that

the stain in the carpet was obvious and the only reason he did not see the stain upon entering his condominium was he did not look down. Indeed, the stain on the carpet was visible enough that Mr. Szerszen was able to take pictures. Further, Mr. Szerszen admitted that if he would have looked down and saw the stain, it would have put him on notice that there was a problem with moisture being on his floor.

Mr. Szerszen's deposition testimony also established that he was unaware of what caused the pipes to back up in his condominium. Nonetheless, the problems with plumbing issues at Summit Chase were, according to Mr. Szerszen, "common knowledge." Mr. Szerszen was aware of the plumbing issues because he had resided at Summit Chase for approximately seventeen (17) years at the time of his fall on December 22, 2006. Prior to his fall, Mr. Szerszen had experienced five (5) prior incidents involving the same plumbing back-up that occurred around the time of his fall. With regards to the overflow on the day of Mr. Szerszen's fall, he admitted that he did not have any evidence that Summit Chase was aware of the water on the floor prior to his fall. In fact, Mr. Szerszen's condominium was locked while he was away on his trip to New York and nobody had permission to enter the condominium.

Therefore, based upon Mr. Szerszen's admission that the water accumulation was visible and the lack of any evidence that Summit Chase had superior knowledge of the water, Summit Chase moved for summary judgment on July 27, 2009. On November 20, 2009, the trial court properly granted Summit Chase's Motion for Summary Judgment. The trial court held that the water was an open and obvious danger and that Summit Chase did not cause or have actual or constructive knowledge of the water in Mr. Szerszen's condominium.

Mr. Szerszen appealed the trial court's decision to the Tenth Appellate District Court of Appeals on December 18, 2009. Mr. Szerszen argued that the trial court erred in granting

Summit Chase's Motion for Summary Judgment because there was a genuine issue of fact as to whether the accumulation of water was an open and obvious condition. Mr. Szerszen further argued that the trial court erred in finding that that Summit Chase did not have superior or constructive notice of the conditions that caused his fall. The Tenth District reversed the trial court's decision and held that there was an issue of fact as to the whether the water was open and obvious and whether Summit Chase had the requisite knowledge of the spill.

The Tenth District, however, should have upheld summary judgment on the open and obvious doctrine, which is an absolute bar to liability. As a result, Summit Chase now seeks discretionary jurisdiction from this Court to address an issue of great public and general interest.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

A Plaintiff's Admission That He Probably Would Have Seen A Hazardous Condition If He Looked Down Prior To His Fall, Demonstrates That The Condition Is Open And Obvious As A Matter Of Law.

The Tenth District, in reversing the decision of the trial court, expanded the parameters of the open and obvious doctrine as set forth by this Court. In *Armstrong v. Best Buy Co. Inc.* (2003), 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, this Court reaffirmed the viability of the open and obvious doctrine as an absolute defense to liability. In *Armstrong*, this Court reiterated that when courts apply the open and obvious doctrine, "they must focus on the fact that the doctrine relates to the threshold issue of duty. By focusing on the duty prong of negligence, **the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it.**" *Id.* at ¶ 13. (Emphasis added).

Following this Court's decision in *Armstrong*, appellate courts have consistently defined "open and obvious dangers" as those dangers that are not concealed and are discoverable by ordinary inspection. *Murphy v. McDonald's Restaurants of Ohio, Inc.* (Ohio App. 2 Dist.),

2010-Ohio-4761, ¶ 16; *Washington v. Ohio Dept. of Rehab. & Corr.* (Ohio App. 10 Dist.), 2010-Ohio-4323, ¶ 15; *Parson v. Lawson Co.* (Ohio App. 5th Dist. 1989), 57 Ohio App.3d 49, 50-51, 566 N.E.2d 698. More importantly, appellate courts have uniformly held that the dangerous condition at issue does not actually have to be observed by the claimant to be an “open and obvious” condition under the law. *Lydic v. Lowe’s Cos., Inc.* (Ohio App. 10 Dist.), 2002-Ohio-5001, ¶10; *Grimmer v. Rocky River* (Ohio App. 8th Dist.), 2010-Ohio-4683, ¶ 21. “Rather, the determinative issue is whether the condition is *observable*.” *Lydic*, supra at ¶ 10. (Emphasis added).

In other words, under Ohio law, an objective standard applies to determine whether a condition is open and obvious:

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.

Goode v. Mt. Gillion Baptist Church (Ohio App. 8th Dist.), 2006-Ohio-6936, ¶ 25. Thus, even in cases where the plaintiff does not notice the condition until after he or she fell, courts have held that no duty exists where the plaintiff could have seen the condition if he or she had looked. *Lydic*, 2002-Ohio-5001 at ¶ 10; *Sherlock v. Shelly Co.* (Ohio App. 10th Dist.), 2007-Ohio-4522, ¶11. As such, a plaintiff’s failure to avoid a hazard because he or she did not look down is no excuse. *Lydic*, supra at ¶16 citing *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, 239 N.E.2d 37. Pertinent to this case, the Tenth District in *Francill v. The Andersons, Inc.* (Feb. 15, 2001), 10th Dist. No. 00AP-835, 2001 WL 125172, at *3, previously held that **the plaintiff’s admission that, “if she had looked down, she probably would have seen the water,” demonstrated that the water was open and obvious by ordinary inspection.**” (Emphasis added).

Here, Mr. Szerszen acknowledged that the only reason he did not see the water was because he was not looking. Mr. Szerszen fully admitted that if he had looked down, he probably would have seen the water:

I guess if I looked hard enough—if I was paying attention and looking for that specific thing, I probably could have seen the water—looking, you know—I was not looking—I didn't—I was just focused on doing something else, which was getting water[]

(C.O.A. Decision pg. 7). Mr. Szerszen was also presented with a photograph depicting a large stain in his carpet from the overflow of sewage water that gone from his kitchen into the living room carpet. (*Id.*). Importantly, Mr. Szerszen took the photograph after his fall. Mr. Szerszen admitted that he probably would have seen the stain prior to his fall if he had looked around at the carpet. Further, Mr. Szerszen acknowledged that if he would have looked down and saw the carpet stain, he would have been on notice that there was water on the floor. As a matter of logic, the stain had to be *observable* in order for Mr. Szerszen to take the photograph. Mr. Szerszen also conceded that if he had looked into his kitchen prior to his fall, he would have observed his sink that was filled with sewage water and would have been on notice of the spill.

Based upon Mr. Szerszen's many concessions, there was no doubt that the spillage of sewer water in his kitchen was observable. The only reason Mr. Szerszen did not see the spill prior to his fall was that he was not looking—which is not an excuse under Ohio law. See *Lydic*, supra, at ¶ 10. Nonetheless, despite Mr. Szerszen's multiple admissions that the spill was observable, The Tenth District held that there was an issue of fact because Mr. Szerszen qualified his concessions by stating that he would have seen the spill if he looked "hard enough." (C.O.A. Decision pg. 8). Based upon this qualification, the Tenth District held that a jury may interpret the evidence as demonstrating the water was not discoverable by "ordinary inspection." (*Id.*).

Critically, the Tenth Appellate District's decision failed to apply the objective standard set forth by this Court in *Armstrong*. The Tenth District ignored this Court's admonition that courts must focus on the condition itself as opposed to the plaintiff's conduct in encountering it. The Tenth District's opinion sets a bad precedent for Ohio's business and will undeniably subject landowners to unwarranted liability. This is because under the Tenth District's analysis, plaintiffs can always prevail past summary judgment simply by stating that they had to look "hard enough" in order to see an otherwise observable condition. Such a result will turn landowners into insurers of patron's safety, which is contrary to the holdings of this Court. *Lang v. Holly Mill Motel, Inc.* (2009), 122 Ohio St.3d 120, 990 N.E. 2d 120, ¶ 11 (duty does not require landowners to insure the safety of invitees on their property).

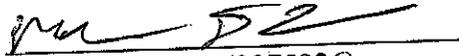
Consequently, this Court must accept jurisdiction of this case to clarify the objective standard to be applied when determining whether a hazard is open and obvious. Further, this Court must hold that under the objective standard, when a plaintiff admits that he or she would probably have seen a hazards if he or she looked, the condition is open and obvious as a matter of law. This Court's decision will affect landowners and businesses throughout this state and will allow them to better access liability exposure in slip and fall cases. Therefore, this Court's resolution of this appeal presents issues of great general and public interest.

CONCLUSION

This Court should accept jurisdiction of this case to address an issue of great general and public interest impacting landowners and business in Ohio. It is important that this Court establish a clear definition of what constitutes an open and obvious condition. This will allow landowners and businesses to adequately determine their liability exposure in premise liability cases. Further, it will give the appellate courts much needed guidance when determining

whether a condition is open and obvious. Acceptance of jurisdiction in this case is critical because the application of the open and obvious doctrine is an issue that affects thousands of individuals and businesses in this state.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was forwarded via electronic and ordinary U.S. mail, postage prepaid, on the 3rd day of November, 2010 to the following:

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APPENDIX

APPENDIX A

Court of Appeals of Ohio Tenth District, Case No. 09AP-1183,
Decision Reversing Judgment of the Court of Common Pleas
Court, Franklin County, Ohio (September 23, 2010)

APPENDIX B

Court of Appeals of Ohio Tenth District, Case No. 09AP-1183,
Judgment Entry Reversing Judgment of the Court of Common
Pleas Court, Franklin County, Ohio (September 23, 2010)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Gary L. Szerszen,

Plaintiff-Appellant,

v.

Summit Chase Condominiums et al.,

Defendants-Appellees.

No. 09AP-1183
(C.P.C. No. 08CVC-12-18150)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 23, 2010

Crabbe, Brown & James, and Christina L. Corl, for appellant.

Reminger Co., LPA, Amy S. Thomas, and Robert V. Kish, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Gary L. Szerszen, plaintiff-appellant, appeals from the judgment of the Franklin County Court of Common Pleas granting the motion for summary judgment filed by Summit Chase Condominiums (individually "Summit Chase"), Summit Chase Condominium Association (individually "the condominium association"), and Sterling Town Properties (individually "Sterling Town"), defendants-appellees.

{¶2} On December 22, 2006, appellant arrived home to his condominium from a two-day trip to New York. The condominium complex, Summit Chase Condominiums ("the condominiums"), is owned/managed/maintained by Summit Chase, the

condominium association, and Sterling Town. Appellant rented the condominium from another individual and had lived there for about 17 years. On the day in question, appellant set down his luggage and turned to walk into the kitchen when he slipped on a puddle of water that had accumulated on his kitchen floor. Appellant broke his wrist. The puddle of water had come from his sink, which had overflowed due to a sludge blockage in the stack line. There is no dispute that maintenance of the stack line under the present circumstances was the responsibility of Summit Chase and the condominium association.

{¶3} On December 22, 2008, appellant filed a negligence action against appellees. On July 27, 2009, appellees filed a motion for summary judgment on the grounds that the water puddle was an open and obvious hazard, and they had no superior or constructive knowledge of the water puddle.

{¶4} On November 30, 2009, the trial court granted appellees' motion for summary judgment, finding the puddle was an open and obvious danger, and appellees did not breach a duty because they neither caused nor had actual or constructive knowledge of the alleged hazardous condition. The court journalized the decision on December 11, 2009. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

[I.] THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANTS-APPELLEES MOTION FOR SUMMARY JUDGMENT AS THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE CONDITION AND HAZARD ASSOCIATED WITH IT THAT CAUSED MR. SZERSZEN'S FALL WERE OPEN AND OBVIOUS.

[II.] THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING DEFENDANTS-APPELLEES MOTION FOR SUMMARY JUDGMENT AS THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER DEFENDANTS-APPELLEES HAD SUPERIOR OR CONSTRUCTIVE

NOTICE OF THE CONDITIONS ASSOCIATED WITH IT
THAT CAUSED MR. SZERSZEN'S FALL.

{¶5} Appellant argues in his first assignment of error that the trial court erred in granting summary judgment to appellees. 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. Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.* The non-moving party may not rest upon the allegations or denials in the pleadings, but must affirmatively demonstrate the existence of a genuine issue of material fact to prevent the granting of a motion for summary judgment. Civ.R. 56(C); *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶6} In an action for negligence, a plaintiff must prove (1) the defendant owed her a duty of care; (2) the defendant breached that duty of care; and (3) as a direct and

proximate result of the defendant's breach, the plaintiff suffered injury. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶7} Appellant argues in his first assignment of error that the trial court erred when it found that the puddle of water in his kitchen was an open and obvious hazard, and, thus, appellees owed no duty to appellant to protect him from that danger. Appellant asserts that he had just entered his condominium, set down his luggage, and immediately turned to walk into his kitchen, at which point he fell. Appellant contends he repeatedly testified that, even if he had looked at the floor, he would not have seen the clear water on the floor.

{¶8} 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., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573. Open and obvious dangers are not concealed and are discoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51. The dangerous condition at issue does not actually have to be observed by the claimant to be an open and obvious condition under the law. *Lydic v. Lowe's Cos., Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. Rather, the determinative issue is whether the condition is observable. *Id.* "The rationale underlying this 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.'" *Armstrong* at ¶5, citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42. "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. When applicable, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claim. *Id.*

{¶9} Furthermore, "[t]he 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." *Goode v. Mt. Gillion Baptist Church*, 8th Dist. No. 87876, 2006-Ohio-6936, ¶25. Thus, "[a] dangerous condition does not actually have to be observed by the claimant to be an open-and-obvious condition under the law." *Lykins v. Fun Spot Trampolines*, 172 Ohio App.3d 226, 2007-Ohio-1800, ¶24. "Rather, the determinative issue is whether the condition is observable." *Id.*

{¶10} In most situations, whether a danger is open and obvious presents a question of law. See *Hallowell v. Athens*, 4th Dist. No. 03CA29, 2004-Ohio-4257, ¶21. However, under certain circumstances, disputed facts may exist regarding the openness and obviousness of a danger thus rendering it a question of fact. 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. *Klauss v. Marc Glassman, Inc.*, 8th Dist. No. 84799, 2005-Ohio-1306, ¶18, citing *Anderson v. Hedstrom Corp.* (S.D.N.Y.1999), 76 F.Supp.2d 422, 441; *Vella v. Hyatt Corp.* (E.D.Mich.2001), 166 F.Supp.2d 1193, 1198; *Parsons*. 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. *Id.*, citing *Carpenter v. Marc Glassman, Inc.* (1997), 124 Ohio

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App.3d 236, 240; *Henry v. Dollar Gen. Store*, 2d Dist. No. 2002-CA-47, 2003-Ohio-206; *Bumgardner v. Wal-Mart Stores, Inc.*, 2d Dist. No. 2002-CA-11, 2002-Ohio-6856. Accordingly, the determination of the existence and obviousness of a danger alleged to exist on a premises requires a review of the facts of the particular case. *Miller v. Beer Barrel Saloon* (May 24, 1991), 6th Dist. No. 90-OT-050.

{¶11} In the present case, the bulk of the evidence relied upon by the parties to support their respective positions comes from the depositions of Thomas Noland and appellant. Noland, the building engineer for Sterling Town assigned to the condominiums, testified at his deposition that the condominium association is responsible for the common plumbing system, including the stack line. He stated that the condominiums had plumbing problems that were the responsibility of the condominium association about once per month. Waterworks, a plumbing contractor, was called 23 times in 2006 for problems involving stack lines. However, he said from the period of 2005-2007, there was not what he would call an "ongoing" problem with the stack lines. He speculated that the stack lines would get clogged due to tenants putting substances in their drains that they should not. In 2008, he saw inside a stack line at the condominiums, and the build up varied from not much to a lot. In the most clogged lines on the lower floors, the four-inch line was clogged until only an inch-wide opening remained. In early 2008, Noland implemented a preventative maintenance program for places in the building that were having backup issues. Sterling Town performed a clean out of the stack lines in July 2008. Approximately every quarter, he has Waterworks clean the pipes. The problem that caused appellant's sink to back up with respect to the incident in question, Noland said, was a clogged stack line that was the responsibility of the condominium association.

{¶12} Appellant testified at his deposition that, prior to his accident, the sinks and pipes had backed up in his unit approximately five times. In each of those five instances, sewage backed up into his kitchen sink. One of those times was in the late-1990s. In two of the five incidents, sewage had overflowed onto his floor. He said backups occur "all the time" and on a "regular basis." Prior to the incident in question, he had been in New York for two days. When he walked into his condominium, he set his bags onto the floor, noticed his plant needed water, immediately turned into the kitchen, and on his second step slipped on the water. It was 5:09 p.m. and still light out when he fell. At first he testified that, if he had looked at the floor, he would not have been able to see the water because it was clear on a blue surface, but he then stated the reason he could not see the water was because he was not looking. Appellant later testified that had he looked down at the water, he would not have been able to see it. He then stated:

I guess if I looked hard enough – if I was paying attention and looking for that specific thing, I probably could have seen the water – looking, you know – I was not looking – I didn't – I was just focused on doing something else, which was getting water[.]

Appellant further said there was nothing to suggest that the condominium association or maintenance department knew about water on his floor prior to his fall. Appellant said the plumbing problems in the building have been going on "forever." There were units all over the building that had problems with backups. Although a photograph appellant took of the carpet next to the kitchen showed a large dark stain from the water, appellant said he did not see the stain before he fell. He said he could have seen it had he looked at the carpet. Another photo of his kitchen sink showed a dark liquid in it. Neither photograph is in the record before this court.

{¶13} After reviewing the evidence submitted by the parties, we find there remains a genuine issue of material fact as to whether the hazardous condition was open and obvious. The most pertinent of appellant's deposition testimony on the open and obvious issue was his statement that the water he slipped on was clear against the blue floor in his kitchen, and if he had looked down, he would not have seen the water. Although he did testify that if he had looked "hard enough" and had looked for "that specific thing" he probably could have seen the water, and appellees rely upon this statement to demonstrate the water was open and obvious, we believe this evidence militates against a finding of open and obvious. If one is able to view a condition only if he or she is looking "hard enough" and looking for "that specific thing," a genuine issue of material fact is raised as to whether the condition is open or obvious. A jury may interpret this evidence as demonstrating the water was not discoverable by "ordinary inspection." *Parsons* at 50-51. As explained above, the determinative issue is whether the condition is observable, and given appellant's deposition testimony, reasonable minds could differ with respect to the obviousness of the risk, leaving this issue best determined by a jury.

{¶14} We further find *Francill v. The Andersons, Inc.* (Feb. 15, 2001), 10th Dist. No. 00AP-835, to be inapposite to the circumstances in the present case. The trial court cited *Francill* for the proposition that this court has already determined that water on a floor that "probably" could have been seen by a plaintiff if he or she had looked is an open and obvious danger. Thus, the trial court reasoned, because appellant admitted he would have "probably" seen the water if he had been looking for that specific thing, the water was an open and obvious hazard. However, the circumstances here differ from those in *Francill*. In *Francill*, the plaintiff slipped and fell on water, leaves, and a flat-headed nail.

The trial court granted summary judgment to the premises owner. On appeal, this court affirmed the trial court's judgment. We relied upon the plaintiff's admission that, if she had looked down she "probably" would have seen the water to demonstrate that the water was open and obvious and discoverable by ordinary inspection.

{¶15} However, in the present case, appellant did not indicate merely that he would have "probably" seen the water had he looked down. Appellant's explanation was more qualified than the plaintiff's in *Francill*. Here, appellant not only limited his ability to discern the water on his kitchen floor by using the word "probably," but also by indicating that he would have "probably" been able to see the water only if he had been looking "hard enough" and looking for "that specific thing." These qualifications bring directly into question whether the water was, in fact, observable and discoverable by "ordinary" inspection. These are genuine issues of material fact that a fact finder should determine after considering the evidence, testimony, and credibility of the witnesses.

{¶16} Furthermore, if the fact that a hazard is discernable by looking "hard enough" for "that specific thing" always renders the hazard open and obvious, it would be nearly impossible to recover for premises liability under any circumstance. There exist few substances that are completely invisible when one knows to look for it and is looking directly at it. While we acknowledge that "the mere fact that water is transparent does not require the conclusion that genuine issues of material fact necessarily exist as to the obviousness of the hazard presented by the water[.]" *Caravella v. West-WHI Columbus Northwest Partners*, 10th Dist. No. 05AP-499, 2005-Ohio-6762, ¶22, the additional qualifiers that appellant placed on his statement that he "probably" would have seen the water take the present case out of the realm of cases in which the plaintiff's sole claim is

that the water was not obvious because it was clear. Additionally, many of the cases in which "clear" water is still found to be an open and obvious condition involve plaintiffs who had an expectation that they may encounter water due to additional circumstances, such as inclement weather or noticeably wet floors in the general vicinity, which are not present in the case at bar. See, e.g., *id* (that plaintiff admitted tile floor was "noticeably wet" with standing water belied contention that the water was not observable due to its transparency); *Francill* (although plaintiff claimed that water on floor was clear, it was open and obvious because plaintiff admitted that it was pouring down rain and, had she looked down, she "probably" could have seen the water); *Hect v. K-Mart Corp.* (Dec. 9, 1994), 11th Dist. No. 93-P-0119 ("transparent" water on floor was open and obvious when there was snow on the ground outside and plaintiff observed slush and water on carpet before encountering water on floor). For purposes of summary judgment here, the key issue is whether water that could be seen only by looking "hard enough" for that specific substance constitutes something that was observable by "ordinary inspection," and because reasonable minds could differ on this issue, summary judgment was inappropriate.

{¶17} We also add that it is of no consequence to our analysis that there was a water stain on the carpet in the adjoining room and water in the overflowing kitchen sink, as these do not render the water on the kitchen floor any more open or obvious when appellant did not see, and could not reasonably have been expected to have seen, either of these conditions prior to his encounter with the water on the kitchen floor. Therefore, for the foregoing reasons, we find there remain genuine issues of material fact as to whether the water on the kitchen floor was open and obvious, and the trial court erred in

granting summary judgment on this issue. Appellant's first assignment of error is sustained.

{¶18} Appellant argues in his second assignment of error that there remain genuine issues of material fact as to whether appellees had constructive notice of the conditions associated with the puddle that caused his fall. Appellant asserts that the trial court improperly found that appellees must have had constructive knowledge of the "exact" danger that caused his fall. Appellant maintains that appellees did not have to have knowledge of the specific water puddle but, instead, had to have knowledge of the history and extent of the plumbing problems throughout the condominium property. It was the improperly maintained pipes, not the water puddle, appellant contends, that was the hazard that caused his fall.

{¶19} Initially, we agree with the trial court that the hazardous condition pertinent to the present case was the puddle of water and not the faulty maintenance of the stack line. The hazard that actually caused the injury was the water on the kitchen floor. Therefore, the next issue is whether appellees created the hazard or had actual or constructive knowledge of the hazard so as to breach their duty to appellant. In order to avoid summary judgment in a "slip and fall" case, the plaintiff must present evidence showing one of the following: (1) that one or more of the defendants was responsible for placing the hazard in her path; (2) that one or more of the defendants had actual notice of the hazard and failed to give appellant adequate notice of its presence or remove it promptly; or (3) that the hazard had existed for a sufficient length of time as to warrant the imposition of constructive notice, i.e., the hazard should have been found by one or more of the defendants. *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, 589.

Without such evidence, the plaintiff cannot prove that the defendant breached the duty of ordinary care to prevent accident or injury. See *Cupp v. Zoz* (Dec. 27, 1994), 12th Dist. No. CA94-06-122.

{¶20} Here, it is undisputed that appellees had a duty to maintain, repair, restore, and replace the common property plumbing system, which included all plumbing, lines, and pipes, pursuant to the Declaration of Summit Chase Condominium and Summit Chase Rules and Regulations of Residents. Noland, the building engineer, specifically testified that the cause of the water backup into appellant's condominium was a clogged stack line, which was the responsibility of the condominium association. Therefore, it is clear that appellees owed appellant a duty to maintain the stack lines to prevent water problems.

{¶21} However, whether a duty is breached and whether the breach proximately caused an injury are normally questions of fact to be decided by the jury, or by the court in a bench trial. *Pacher v. Invisible Fence of Dayton*, 154 Ohio App.3d 744, 2003-Ohio-5333, ¶41, citing *Miller v. Paulson* (1994), 97 Ohio App.3d 217, 221. Here, appellant contends that notice was immaterial to determining breach of duty because appellees created the hazard in question. When it is the property owner himself who creates the hazardous condition that causes the plaintiff's injury, then the plaintiff need not show that the owner had knowledge or notice of the condition at issue. *Crane v. Lakewood Hosp.* (1995), 103 Ohio App.3d 129, 136.

{¶22} In the present case, although we found above that the hazardous condition relevant to our analysis was the water on the kitchen floor, appellees' maintenance of the stack lines and their knowledge of past problems is still relevant to determining whether

they created the hazardous condition that caused appellant's injury. The particular mechanism by which the hazard was created is immaterial for this analysis. The relevant issue is whether the defendants' actions or inactions brought about a hazardous condition, regardless of the means by which it did so. Here, if appellees caused the hazardous condition – that is, caused water to be spilled onto appellant's floor – by failing to maintain the stack lines, then appellees breached their duty to appellant by creating the hazardous condition.

{¶23} As already indicated above, Noland testified that the condominium association is responsible for maintaining the stack lines, and a clogged stack line was responsible for the back up of sewage into appellant's residence. He stated that the condominiums had plumbing problems that were the responsibility of the condominium association about once per month, and Waterworks was called 23 times in 2006 for problems involving stack lines. In 2008, he saw inside a stack line at the condominiums, four-inch line was clogged until only a one-inch-wide opening remained. Sterling Town did not perform a clean out of the stack lines until July 2008. Thus, it is apparent that appellees were aware the stack lines tended to clog, causing plumbing problems within the units. A reasonable fact finder could find a foreseeable consequence of clogged stacked lines is sewage water backing up into residents' condominiums. If a tenant is away from home for a period of time and is unable to manage the situation, sewage may back up until it overflows a sink, resulting in water accumulating on the floor and creating a hazardous condition. Whether appellees' lack of proper maintenance lead directly to the creation of a dangerous condition in appellant's condominium is for a fact finder to resolve. Therefore, it appears from the evidence that reasonable minds could come to

more than one conclusion as to whether appellees created the hazard causing appellant's injuries, and viewing such evidence most strongly in favor of appellant, appellant has demonstrated genuine issues of material fact remain to be litigated.

{¶24} As for actual notice and constructive notice, there is no dispute that appellees had no actual notice of the water puddle on appellant's kitchen floor. However, appellant relies upon *Jordan v. Simon Property Group, L.P.*, 11th Dist. No. 2004-L-060, 2005-Ohio-4480, and *Lopez ex rel. v. Cleveland Municipal School Dist.*, 8th Dist. No. 82438, 2003-Ohio-4665, for the proposition that appellees had constructive notice of the hazard because they knew there was a history of problems with the common plumbing system and failed to remedy the problems. In *Lopez*, a boy slipped and fell in a puddle at school created by a recurring leak. The trial court granted summary judgment to the school, finding that the plaintiff had failed to produce evidence showing the school had actual or constructive notice of the dangerous condition or had created the hazard. On appeal, the court found there were genuine issues of material fact based on the boy's testimony that he had seen water dripping onto the floor four to five months prior to the incident, and the boy's mother testified that she had seen maintenance workers place buckets in the area prior to the fall. The court added that the boy also testified that water dripped onto the floor after it rained or when the snow melted. The court reasoned that even though the puddle did not exist all the time, the school should have been aware that the recurring leak caused the puddle. Therefore, the court found there was sufficient evidence demonstrating a genuine issue of material fact as to whether the school had actual or constructive notice of the dangerous condition such that summary judgment should have been denied.

{¶25} In *Jordan*, the plaintiff slipped and fell on a puddle of water coming from a leaking skylight. It was raining on the date of the incident. The mall's manager indicated that leaking skylights were ongoing problems for several years, but there were no recorded leaks in the area in question. The trial court granted the defendant's motion for summary judgment due to lack of evidence as to whether defendant created the puddle, created the leak that was the source of the puddle, knew the puddle existed, or knew how long the puddle had been on the concourse.

{¶26} On appeal, the court found there remained a genuine issue of material fact on the issue of constructive notice. The court rejected the trial court's attempt to distinguish *Lopez* based upon the fact that the leak occurred in the same location, causing the hazard to form in a very specific location each time. The court in *Jordan* indicated it believed the trial court read *Lopez* too narrowly, and *Lopez* did in fact apply. Relying upon the deposition testimony that the leaking skylights had been an ongoing problem and applying the reasoning of *Lopez*, the court in *Jordan* found that, although this particular puddle did not exist all the time, the defendants' knowledge of its leaking skylight problem, especially during rain, should have made it aware that puddles were likely to form underneath skylights regardless of which particular skylight was leaking at the time. The court further explained that, although there was no evidence that any mall employee knew about the specific puddle that caused the fall, there was evidence the defendants had knowledge of faulty, leaky skylights causing puddles during wet weather. Knowing numerous skylights had leaked in the past, created a reasonable risk that any one of the skylights could leak in the future, thereby creating a hazard on the floor. Therefore, the court found, the defendants were in a better position to prevent the hazard

than its invitees, and a jury could find that the defendants failed to exercise reasonable care.

{¶27} The trial court distinguished *Jordan* and *Lopez*, finding that, in both cases, the water on which the plaintiffs slipped accumulated after it rained, which is an identifiable, known event to the defendants, while in the present case, there was no connection shown between any of the stack line backups and any other identifiable event, such as every time it rains, snows, etc. As the court in *Jordan* found with respect to the trial court's interpretation of *Lopez* in that case, we find the trial court here also interpreted *Lopez*, as well as *Jordan*, too narrowly. Neither case limited its analysis to the fact that the hazard existed only after identifiable events known to the defendants occurred. In *Lopez*, the court based its decision on evidence that water was seen dripping onto the floor four to five months prior to the incident, and maintenance workers had placed buckets in the area on a prior occasion. The court did mention that water dripped onto the floor after it rained or when the snow melted, but this was merely an additional factor in its analysis. Likewise, in *Jordan*, the court based its decision on the fact that there was a known history of leaking skylights, and that the leaks occurred "especially during rain" was only an additional factor mentioned.

{¶28} Analogous to the circumstances in *Lopez* and *Jordan*, in the present case, there existed a known history of problems with the stack lines and a known history that the clogged stack lines would sometimes cause water to back up into the sinks of individual condominium units. Similar to *Lopez*, even though the water did not exist on appellant's floor all the time, appellees should have been aware that the repeated problems with the stack lines would cause back ups and possible puddles. Furthermore,

like in *Jordan*, appellees' knowledge of its clogged stack line problem should have made it aware that backup into residents' dwellings were likely to result, regardless of which particular residents' dwelling the sewage would back up into at any time. Like facts in *Jordan*, here, although there was no evidence that appellees knew about the specific puddle that caused the fall, there is evidence appellees had knowledge of faulty stack lines causing back ups when they were clogged. Knowing residents' have experienced back ups in the past creates a reasonable risk that any one of the residential units could back up in the future, thereby creating a puddle hazard on the floor. Thus, appellees were in a better position to prevent the hazard than appellant and other residents, and a jury could find that the defendants failed to exercise reasonable care. Therefore, we find there are genuine issues of material fact with regard to whether appellees created the hazard in question or had constructive notice thereof. For all the above reasons, appellant's second assignment of error is sustained.

{¶29} Accordingly, appellant's first and second assignments of error are sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law, consistent with this decision.

Judgment reversed and cause remanded.

TYACK, P.J., and McGRATH, J., concur.

Wx

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

2010 SEP 23 PM 4:00
CLERK OF COURTS

Gary L. Szerszen,

Plaintiff-Appellant,

v.

Summit Chase Condominiums et al.,

Defendants-Appellees.

No. 09AP-1183
(C.P.C. No. 08CVC-12-18150)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 23, 2010, appellant's first and second assignments of error are sustained, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings in accordance with law, consistent with this decision. Costs are assessed against appellees.

BROWN, J., TYACK, P.J., & McGRATH, J.



Judge Susan Brown