

IN THE SUPREME COURT OF OHIO

GARY L. SZERSZEN,

Plaintiff-Appellee,

vs.

SUMMIT CHASE  
CONDOMINIUMS, et al.,

Defendants-Appellants.

CASE NO. 2010-1892

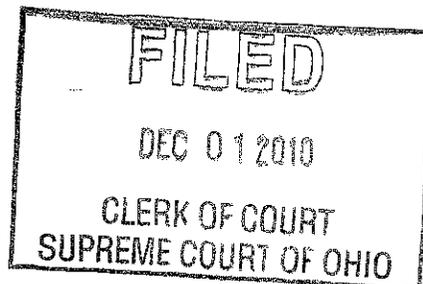
(On Appeal from Franklin County  
Court of Appeals, Tenth Appellate  
District)

Court of Appeals No. 09AP-1183  
Franklin C.P.C No. 08 CVC 12-18150

MEMORANDUM OF APPELLEE  
GARY L. SZERSZEN IN  
OPPOSITION TO JURISDICTION

Robert V. Kish, Esq. (#0075926)  
Melvin J. Davis (#0079224)  
REMINGER CO., L.P.A.  
65 East State Street, 4<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 228-1311  
Facsimile: (614) 232-2410  
*Counsel for Defendants-Appellants,  
Summit Chase Condominiums,  
Summit Chase Condominium  
Association,  
and Sterling Town Properties*

Christina L. Corl, Esq. (#0067869)  
CRABBE BROWN & JAMES, LLP  
500 S. Front Street, Suite 1200  
Columbus, Ohio 43215  
Telephone: (614) 229-4562  
Facsimile: (614) 229-4559  
Email: ccorl@cbjlawyers.com  
*Counsel for Plaintiff-Appellee,  
Gary L. Szerszen*



**TABLE OF CONTENTS**

|   | <b><u>Page</u></b> |
|---|--------------------|
| <b><u>TABLE OF CONTENTS</u></b> .....   | i                  |
| <b><u>EXPLANATION OF WHY THIS CASE IS NOT<br/>OF PUBLIC OR GREAT GENERAL INTEREST</u></b> .....   | 1                  |
| <b><u>ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW</u></b> .....  | 4                  |
| <b>A Genuine Issue Of Material Fact Is Present As To Whether A<br/>    Condition Is Open And Obvious Where An Individual Testifies<br/>    That The Condition Was Only Discoverable If The Individual<br/>    Was Paying Attention And Looking Hard Enough For That<br/>    Specific Condition.</b> ..... | 4                  |
| <b><u>CONCLUSION</u></b> .....  | 12                 |

I. **EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.**

Section 6, Article IV of the Ohio Constitution provides that judgment of the Court of Appeals of this State shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction, and cases of great general interest. *Williamson v. Rubich* (1960), 171 Ohio St. 253, 168 N.E. 2d 76. "Except in these special circumstances, it is abundantly clear that in this jurisdiction a party to litigation has a right to but one appellate review of his cause." *Id.* at 253-254. Where a party believes his cause to be one of public or great general interest, this Court has held that "*the sole issue for determination* \* \* \* is whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties." *Id.* at 254. (Emphasis original).

S.Ct. Prac. R. 3.1(B)(2) requires a "thorough explanation of... why the case is of public or great general interest" in order to justify discretionary jurisdiction. A review of Appellants' Memorandum in Support of Jurisdiction shows that the Appellants failed to explain how this is a case of public or great general interest. Appellants merely contend "the Tenth District... expanded the parameters of the open and obvious doctrine" and "it is now impossible for landowners to adequately evaluate premise liability cases." However, this contention is simply not true. The Tenth District followed well established precedent in Ohio and it did not expand the parameters of the open and obvious doctrine.

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.* (2003), 99 Ohio

St.3d 79. 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.*, 10<sup>th</sup> 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.* (1992), 64 Ohio St.3d 642, 644. "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.*

Further, "[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*, 8<sup>th</sup> 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.*

Appellants request that this Court accept jurisdiction to establish a bright line test governing the open and obvious doctrine and to adopt a definition of "ordinary inspection." However, given that the law in Ohio is well established, this Court should decline to exercise jurisdiction.

This Court's discretionary jurisdiction is reserved for cases addressing unsettled areas of law, not to apply settled law to the facts of any particular case. See *Baughman v. State Farm Mutual Automobile Ins. Co.* (2000), 88 Ohio St. 3d at 492 (Cook, J., concur). In *Armstrong*, this Court thoroughly discussed the open and obvious doctrine and continued to adhere to its application. There are neither conflicts among courts in Ohio nor unsettled areas of the open and obvious doctrine. In the last two years alone, many appellate courts in Ohio have effectively applied the open and obvious doctrine. See *Baker v. J.I.G.S. Investments, Inc.*, 2010-Ohio-5180, 2010-T-0045 (Ohio App. 11 Dist. 2010); *Sheline v. Denman*, 2010-Ohio-2041, CT2009-0033 (Ohio App. 5 Dist. 2010); *Hughes v. Forsyth-Moto, Inc.*, 2010-Ohio-1078, 09CA3118 (Ohio App. 4 Dist. 2010); *Miller v. First International Fidelity & Trust Building, Ltd.*, 2009-Ohio-6677, L-08-1187 (Ohio App. 6 Dist. 2009); *Ray v. Wal-Mart Stores, Inc.*, 2009-Ohio-4542, 08CA41 (Ohio App. 4 Dist. 2009); *Alsbury v. Dover Chemical Corp.*, 2009-Ohio3831, 2008 AP 10 0068 (Ohio App. 5 Dist. 2009); *Dynowski v. Solon*, 2009-Ohio-3297, 183 Ohio App.3d 364, 917 N.E.2d 286 (Ohio App. 8 Dist. 2009); *Furano v. Sunrise Inn of Warren, Inc.*, 2009-Ohio-3150, 2008-T-0132 (Ohio App. 11 Dist. 2009); *Barnett v. Beazer Homes Invest., L.L.C.*, 2008-Ohio-6756, 180 Ohio App.3d 272, 905 N.E.2d 226 (Ohio App. 12 Dist. 2008).

Moreover, it would be impossible to establish a bright line test to govern the open and obvious doctrine. A review of the facts of each particular case is required to determine the existence and obviousness of a danger. *Miller v. Beer Barrel Saloon*, 6<sup>th</sup> Dist. No. 90-OT-050, 1991 WL 87098. Since slip and fall cases are extremely fact intensive, it would be impossible for a bright line test to account for every nuance specific to each case. The open and obvious doctrine is an objective, reasonable person standard. A bright line test would eliminate the inherent objectivity of the doctrine.

Appellants' Memorandum simply sets forth Appellants' disagreement with the lower court's decision and reiterates their appellate arguments. Ultimately, this case is a garden variety "slip and fall." It is clear that this question is of importance only to the litigants and it does not present an issue of immediate public significance or great general interest. As such, Appellants' case is not appropriate for this Court's review.

## II. ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

### **Counter Proposition of Law: A Genuine Issue Of Material Fact Is Present As To Whether A Condition Is Open And Obvious Where An Individual Testifies That The Condition Was Only Discoverable If The Individual Was Paying Attention And Looking Hard Enough For That Specific Condition.**

On December 22, 2006, Plaintiff Gary Szerszen had just arrived home from a two-day trip to New York City when he opened the door to his condominium unit, set down his travel bags, turned to walk into the kitchen, and immediately slipped and fell in water that had accumulated on the floor, crushing his wrist. (Gary Szerszen depo, at pgs. 30-31, 34). As Appellants admit, a blockage in the "stack line" had caused water to back up into Mr. Szerszen's condo unit up through his sink, overflowing onto his kitchen floor. (Thomas

Noland depo, at pgs. 32-33). Thomas Noland, the building engineer employed by Defendant Sterling Town Properties and assigned to Appellant Summit Chase Condominiums, acknowledged that Mr. Szerszen did not do anything to cause or contribute to the water backing up into his unit and that it was the responsibility of Appellant Summit Chase Condominium Association. (*Id.*, at pg. 35).

Appellant Sterling Town Properties manages the Summit Chase Condominium property. Since November 2005, Mr. Noland has been in charge of maintenance at the property, handling minor plumbing, electric and HVAC repairs. (*Id.*, at pgs. 7, 10). For larger plumbing problems at the property, an outside plumbing contractor, typically the Waterworks, is hired. (*Id.*, at pg. 11). When the plumbing problem involves two or more condo units, it is considered a common problem to the building and, therefore, the responsibility of the condominium association. (*Id.*, at pg. 13). In addition, the condominium association is responsible for the "stack lines [vertical lines that run up the inside of the walls] and lateral lines out to the city" lines. (*Id.*, at pg. 14).

Between 2005 and 2007, Mr. Noland estimated that Waterworks had to be called once a month for large plumbing problems at Summit Chase Condominiums and that all of those plumbing problems were the responsibility of the Condominium Association. (Noland depo., at pg. 19). In 2006 alone, Waterworks was called 23 times, almost two times a month, for large plumbing problems involving the 4" stack drain lines. (*Id.*, at pgs. 19, 20). From some of the "bits and pieces" of the inside of the stack lines that he had seen, Mr. Noland noted a build-up that he described as anywhere "from not much at all to a lot." (*Id.*, at pg. 22). Incredibly, in some cases, the drain openings had been reduced

from 4" to 1". (*Id.*, at pg. 23).

Despite this knowledge of the build-up and blockage in the plumbing system, the Appellants did not perform a "clean-out project" until in or around July 2008. (*Id.*) Prior to that, they simply tried to implement a "preventative maintenance program" for "the places in the building that were getting the most complaints, where we were having some back-up issues." (*Id.*, at pg. 24). In other words, he would "pick . . . areas that were bad". (*Id.*) Mr. Noland frankly testified that he had been on the scene long enough at the building that he "got a feel for where we were having issues." (*Id.*, at pg. 25).

Following Mr. Szerszen's slip and fall, Waterworks was called to repair the back-up problem in his condo unit, and it was determined that the cause of the back-up was "sludge" in the stack line. (*Id.*, at pgs. 34-35). It was not until after Mr. Szerszen's slip and fall incident that the Appellants started the "clean-out projects" and the "laterals" under the building were cleaned out. (*Id.*, at pg. 38). The clear testimony of Appellants' employees indicate that the condition which caused Mr. Szerszen's fall was created by, and the admitted legal responsibility of, the Appellants.

Appellants' Memorandum in Support of Jurisdiction misstated and mischaracterized Mr. Szerszen's deposition testimony. Appellants, in their brief, stated that "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." (Appellants' Memorandum in Support, pg. 7). In fact, that is not how Mr. Szerszen testified. He stated under oath as follows:

BY MR. KISH:

Q. To cut to the chase on this: Had you looked at the floor, would you have been able to see the water?

A. No.

Q. Why not?

A. The water is clear.

Q. What color is your floor?

A. Blue.

Q. Could you see the water after you fell?

A. Yes.

Q. So why couldn't you have seen it when you were standing up?

A. I wasn't looking.

Q. All right. If you were looking, would you have been able to see the water on the floor?

A. Well, can you see water on floor? It's clear.

Q. All right. You just told me you could see water on the floor that was clear after you fell.

A. I'm looking at it - - how do you see water? You just - - I was in it. No, I didn't see it when I walked in. I was in the unit, looked at the plant, needed water, and two steps - - I crushed my wrist.

Q. I understand you did not look. But if you would have looked down at the floor before you walked into the kitchen, could you have seen the water?

MS. CORL: Objection; asked and answered. He has answered that question three times. His answer is no.

MR. KISH: Well, your answer was just "I don't know".

MS. CORL: No, it was not.

THE WITNESS: You asked me two or three times.

MS. CORL: Wait a second. I'm -- hang on. I'm objecting to mischaracterizing his testimony. He has answered three times that if he had looked down, no, he did not see the water because water is clear. If you want to ask him that one more time, I'll let him answer that question one more time.

BY MR. KISH:

Q. Sir, if you would have looked down at the water on the floor, would you have been able to see it?

A. No.

Q. Okay. I understand that you didn't look. But why could you not have seen it?

MS. CORL: Objection. Asked and answered.

THE WITNESS: I went through the motion so fast. I was on the floor before I saw anything. I was thinking about getting water for my plant. I looked at that, I said, I got to get water, and I went right to the kitchen. I was not paying attention to anything. And I was on the floor. I don't how else to --

BY MR. KISH:

Q. I don't think that answered the question that I asked, which is -- and I understand you didn't look, and I think we have established that.

If you would have looked, you don't believe you could have seen the water. And my question is: Why could you not see the water? Was it something to do with the lighting in the room?

MS. CORL: Objection. Asked and answered. You can tell him again.

THE WITNESS: Yes. I just -- you know, sometimes you look

at something -- you are thinking about something else, so you don't --

MS. CORL: Listen to the question. His question is: If you had looked down at the floor when you were walking in the kitchen, why is it that you couldn't have seen the water?

THE WITNESS: Well, it's clear. 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, so --

(Mr. Szerszen's depo, pgs. 34-38). (Emphasis added).

Contrary to Appellants' mischaracterization of his testimony, Mr. Szerszen repeatedly testified that had he looked down at the floor he still would not have seen the water. (*Id.*) Only if he had "looked hard enough" and been "looking for that specific thing" would he have "probably" seen the water. (*Id.*, at pgs. 37-38).

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.*, 8<sup>th</sup> Dist. No. 84700, 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. 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 App.3d 236, 240; *Henry v. Dollar Gen. Store*, 2<sup>nd</sup> Dist. No. 2002-CA-47, 2003-Ohio-206; *Bumgardner v. Wal-Mart Stores, Inc.*, 2<sup>nd</sup> 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 a particular case. *Miller v.*

*Beer Barrel Saloon*, 6<sup>th</sup> Dist. No. 90-OT-050, 1991 WL 87098.

The rationale underlying the open and obvious doctrine is that the open and obvious nature of the hazard itself serves as a warning. *Armstrong*, at ¶ 5; Citing *Simmers v. Bentley Constr. Co.* (1992) Ohio St.3d 642, 644, 597 N.E.2d 504. In the present case, Mr. Szerszen testified that, had he looked at the floor, he would not have seen the water. Mr. Szerszen then qualified his testimony and stated that he could only “probably” see the condition if he “looked hard enough” and “looked for that specific thing.” These qualifications go directly to the nature of the condition and raise genuine issue whether it was discoverable on ordinary inspection. Upon review of the facts of this particular case, reasonable minds could differ with respect to whether the puddle on Mr. Szerszen’s kitchen floor was so open and obvious that the hazard itself served as a warning.

Throughout Appellant’s Memorandum, Appellants present facts to suggest Mr. Szerszen unreasonably encountered the hazardous condition. Appellants contend “courts have held that no duty exists where the Plaintiff could have seen the condition if he or she had looked” and “the only reason Mr. Szerszen did not see the spill prior to his fall was that he was not looking.” Appellants cite several cases in support of their argument. *Sherlock v. Shelley Co.*, 2007-Ohio-4522 (Ohio App. 10 Dist.); *Lydic v. Lowe’s Cos., Inc.*, 2002-Ohio-5001 (Ohio App. 10 Dist.); *Francill v. The Andersons, Inc.*, 2001 WL 125172 (Ohio App. 10 Dist.). However, Appellants’ contention is misguided. The open and obvious doctrine is not characterized by determining the individual plaintiff’s perception of the hazard. As described in *Armstrong*, the proper focus of the doctrine is the nature of the dangerous condition itself and not the nature of a Plaintiff’s conduct in encountering it.

*Armstrong*, at ¶ 13.

Appellants also contend the Tenth District's decision failed to apply the standard set forth in *Armstrong* and focused on the Plaintiff's conduct rather than the condition itself. However, this is not true. Tenth District followed precedent in Ohio and found:

[A]lthough 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 [Defendants] 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 and obvious. A jury may interpret this evidence as demonstrating the water was not discoverable by "ordinary inspection"

\*\*\*

[T]hese 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.

(Decision, ¶ 13, 15). These qualifications go directly to the nature of the condition and raise genuine issue as to whether it is so obvious that it serves as a warning itself.

In short, there are clearly genuine issues of material fact with respect to whether the clear water on the kitchen floor was an open and obvious danger. In light of this genuine issues of material fact, reasonable minds could reach different conclusions on whether the condition and the hazard associated with Mr. Szerszen's fall were open and obvious.

### III. CONCLUSION

This case does not involve a public or great general interest. Appellants' Memorandum simply sets forth Appellants' disagreement with the lower court's decision and reiterates their appellate arguments. It is clear that this question is of importance only to the litigants and does not present an issue of immediate public significance or great general interest. The open and obvious doctrine is well settled in Ohio and this case does not present a public or great general interest warranting this Court's jurisdiction. As such, Appellants' case is not appropriate for this Court's review.

Moreover, construing the evidence of this case most favorably to Plaintiff Gary Szerszen, reasonable minds could reach different conclusions as to whether the clear water on his kitchen floor was open and obvious. Therefore, as there remain genuine issues of material fact, the court of appeals properly reversed and remanded the trial court's decision to grant summary judgment.

Respectfully submitted,

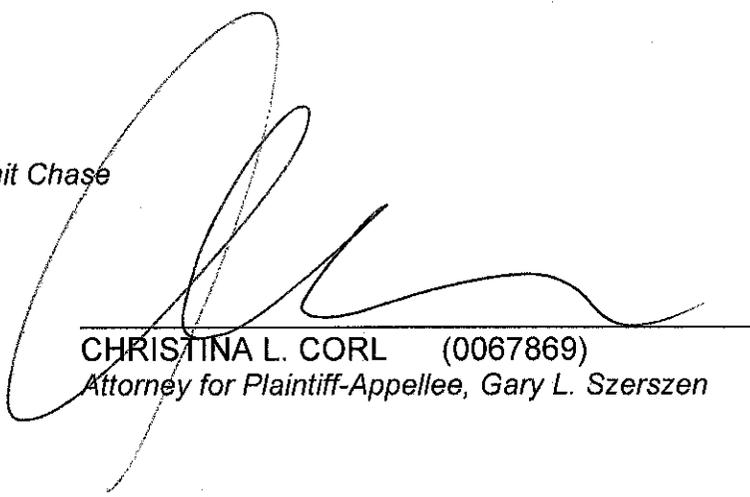


CHRISTINA L. CORL (0067869)  
Crabbe, Brown & James LLP  
500 South Front Street  
Suite 1200  
Columbus, Ohio 43215  
Telephone: (614) 229-4562  
Facsimile: (614) 229-4559  
Email: CCorl@CBJLawyers.com  
*Attorney for Plaintiff-Appellee, Gary L. Szerszen*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been forwarded by regular U.S. Mail this 2<sup>nd</sup> day of December, 2010, to the following individuals:

Robert V. Kish, Esq.  
*Reminger Co., LPA*  
Capital Square Office Building  
65 East State St. 4<sup>th</sup> Floor  
Columbus, OH 43215-4227  
*Attorney for Defendants-Appellants,  
Summit Chase Condominiums, Summit Chase  
Condominium Association and  
Sterling Town Properties*



CHRISTINA L. CORL (0067869)  
*Attorney for Plaintiff-Appellee, Gary L. Szerszen*