[Cite as *Sabella v. E. Ohio Gas Co.*, 2012-Ohio-5120.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

PATRICIA L. SABELLA,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2011-T-0085**
THE EAST OHIO GAS COMPANY, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2010 CV 2239.

Judgment: Reversed and remanded.

Mark I. Verkhlin, 839 Southwestern Run, Youngstown, OH 44514 (For Plaintiff-Appellant).

Matthew W. Oby and *Colin G. Skinner*, Oldham & Dowling, 195 South Main Street, Suite 300, Akron, OH 44038-1314 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Patricia L. Sabella, appeals the decision of the Trumbull County Court of Common Pleas granting appellee, The East Ohio Gas Company's, motion for summary judgment. For the reasons that follow, the judgment is reversed and remanded.

{¶2} On the early, sunny evening of July 13, 2009, appellant stepped into an uncapped hole in a public sidewalk while taking a walk with her sister. As a result, she stumbled onto the pavement and sustained injuries. The hole, approximately six inches

in diameter, was a utility access outlet originally installed by appellee, but missing a cap. Soon thereafter, appellant initiated a complaint against appellee and the city of Hubbard alleging theories of negligence and gross negligence. The trial court dismissed appellant's complaint against the city of Hubbard with prejudice, leaving only appellee as a defendant.

{¶3} On June 3, 2011, appellee moved for summary judgment on the ground that the hole was an open and obvious danger, thus no duty was owed to appellant as a matter of law. The trial court agreed and entered summary judgment in favor of appellee.

{¶4} Appellant now appeals and asserts a sole assignment of error:

{¶5} The trial court committed reversible error when it granted Summary Judgment to Defendant-Appellee, The East Ohio Gas Company, thereby dismissing all claims of Plaintiff-Appellant, Patricia Sabella, determining that attendant circumstances did not apply and the item causing Plaintiff-Appellant's injuries was an open and obvious hazard.

{¶6} Pursuant to Civil Rule 56(C), summary judgment is proper if:

{¶7} (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*., 50 Ohio St.2d 317, 327 (1977).

{¶8} To prevail on a motion for summary judgment, the moving party has the initial burden to affirmatively demonstrate that there is no genuine issue of material fact to be resolved in the case, relying on evidence in the record pursuant to Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If this initial burden is met, the nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E). *Id*.

{¶9} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105 (1996). Thus, the court of appeals applies "the same standard as the trial court, viewing the facts in the case in a light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Viock v. Stowe-Woodward Co*., 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶10} It is well founded that in order to establish a case for negligence, the plaintiff must show the existence of a duty, a breach of that duty, and injury resulting proximately therefrom. *Menifee v. Ohio Welding Prod. Inc.*, 15 Ohio St.3d 75, 77 (1984). The question of whether a duty exists is generally a matter of law for the trial court's consideration. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989).

{¶11} The duty of care owed to a person depends on that person's status. "The status of a passerby on a public sidewalk is that of a 'licensee.'" (Citation omitted.) *Holt v. Holmes*, 6th Dist. No. L-10-1363, 2011-Ohio-5904, ¶18. "A licensee is one who enters upon the premises of another, by permission or acquiescence, but not by invitation, for his own convenience." *Bodnar v. Hawthorn of Aurora L.P*., 11th Dist. No.

2006-P-0002, 2006-Ohio-6874, ¶39, citing *Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68 (1986). Here, neither appellant, appellee, nor the trial court addressed appellant's status as either an invitee or a licensee. Nonetheless, it is undisputed that appellant was injured while walking on a public sidewalk. Appellant was on this sidewalk not by invitation, but for her own convenience. Additionally, appellant's presence was not for any beneficial purpose to appellee. *See Light v. Ohio Univ.*, 28 Ohio St.3d 66 (1986). Instead, appellant explained that she and her sister were simply taking a walk, as they did on a regular basis. Thus, appellant's status on the public sidewalk while walking with her sister was that of a licensee.

{¶12} Ordinarily, the duty owed to a licensee is to refrain from willful or wanton conduct which is likely to injure him or her. *Fuehrer v. Bd. of Edn. of Westerville City School Dist.*, 61 Ohio St.3d 201, 204 (1991). It is unclear from this record and these facts whether appellee may owe some other duty based on its potential status as a public utility company. That issue has neither been raised nor developed in the record and therefore will not be addressed. *Otte v. Dayton Power & Light Co*., 37 Ohio St.3d 33, 38 (1988), citing *Hetrick v. Marion-Reserve Power Co*., 141 Ohio St. 347 (1943). In this case, however, the trial court concluded appellee owed *no* duty to warn appellant of the danger because it was "open and obvious." The open and obvious doctrine, when applicable, obviates the duty to warn and acts as a complete bar to a negligence claim. The doctrine states that an owner or, as here, an occupier of land owes no duty to warn individuals lawfully on the premises of open and obvious dangers on the property. *Sidle v. Humphrey*, 13 Ohio St.2d 45, paragraph one of the syllabus (1968); *Simmers v. Bentley Constr. Co*., 64 Ohio St.3d 642, 645 (1992); *Armstrong v. Best Buy Co., Inc.*, 99

Ohio St.3d 79, 2003-Ohio-2573. The Ohio Supreme Court has held that, as the doctrine applies to the threshold question of duty, it has not been abrogated by Ohio's comparative negligence statute and remains viable. *Armstrong*, ¶14. Though the open and obvious doctrine is traditionally and most commonly used in an effort to obviate the duty owed to invitees, it is also an available defense to premise-liability cases involving licensees. *See Gray v. Totterdale Bros. Supply Co*., 7th Dist. No. 07 BE 11, 2007-Ohio-4992, ¶12 & ¶14.

> **{¶13}** An open and obvious danger or hazard is, by definition, neither latent nor concealed and is discoverable upon ordinary inspection. But such a danger or hazard does not need to have been observed by the injured party in order to be obvious. The question presented is whether a reasonable person would have found the danger or condition of the property open and obvious. (Citation omitted) *Ahmad v. AK Steel Corp.*, 119 Ohio St.3d 1210, 2008-Ohio-4082, ¶25 (O'Donnell, J., dissenting).

{¶14} The rationale behind the doctrine is that the hazard itself acts as a warning such that those approaching will discover the clear danger and take appropriate measures to avoid it. *Armstrong*, *supra*, ¶5.

{¶15} Accordingly, the only issue here is whether the hole was "so obvious and apparent" that appellee could reasonably expect appellant to discover and protect herself against it. *Sidle v. Humphrey*, *supra*, paragraph one of the syllabus. In this regard, appellant has a duty to use reasonable care for her own safety, but is not

required to constantly look downward. *Texler v. D & O Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680 (1998).

{¶16} After a review of the record, a genuine issue of material fact remains with regard to whether the danger in this case was open and obvious. Reasonable minds could differ concerning the nature of the hazard. The uncapped hole existed on a section of the sidewalk in the central business district in downtown Hubbard. Though the hole was in the middle of a clean, newly-paved sidewalk, it was not necessarily plainly visible to a reasonable observer. The hole was only six inches in diameter and level with the pavement surrounding it. Appellee attached a sworn affidavit from a responding police officer, Brian Horner, averring that the hole was darkly contrasted with the fresh cement. However, when Officer Horner arrived on scene, the record indicates he was apprised of the hole, had actively sought it out, and was instructed to its precise location on the sidewalk. Under the circumstances of this case, whether a reasonable person in the position of appellant should have been alerted to this condition is a factual determination. Thus, the court erred in concluding that no duty was owed to appellee as a matter of law.

{¶17} Appellee did not argue in the alternative that summary judgment was appropriate because appellee did not violate an underlying duty to appellant. Thus, that inquiry need not be explored.

{¶18} In its motion for summary judgment, appellee failed to submit sufficient evidentiary material to shift the burden to establish a factual issue to appellant. Reasonable minds could conclude that the danger was not open and obvious such that a duty was still owed. There is a genuine issue of fact as to whether a hole of this

magnitude is “so obvious and apparent” that appellee could reasonably expect appellant to discover and protect herself against it. As such, the trial court erred by granting summary judgment in favor of appellee. Appellant’s assignment of error has merit.

{¶19} The judgment of the Trumbull County Court of Common Pleas is reversed and remanded for further proceedings consistent with this opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.