[Cite as *Tarlton v. Logan*, 2019-Ohio-4832.]

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

RICHARD TARLTON,	:	
Plaintiff-Appellant,	:	Case No. 19CA1
vs.	:	
CITY OF LOGAN, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

Terry V. Hummel, Columbus, Ohio for appellant.

Michael L. Morgan, Canton, Ohio, for appellees.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 11-12-19
ABELE, J.

{¶ 1} This is an appeal from a Hocking County Common Pleas Court summary judgment in favor of the City of Logan, defendant below and appellee herein. Richard Tarlton, plaintiff below and appellant herein, assigns the following error for review:

> "THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT."

{¶ 2} On September 13, 2016, appellant sustained injuries after his bicycle struck an unguarded catch basin located in an alley way that appellee maintained. Appellant later filed a

negligence complaint against appellee.[1]

{¶ 3} Appellee filed a motion for summary judgment and alleged that the condition of the catch basin was open and obvious and, thus, it did not owe appellant a duty of care. Appellee additionally argued that it is immune from liability under R.C. Chapter 2744.

{¶ 4} Appellant countered that genuine issues of material fact remained for resolution at trial as to whether the unguarded catch basin constituted an open and obvious danger when the sun's glare disrupted his vision. Appellant thus claimed that a jury should determine whether the sun's glare rendered the unguarded catch basin indiscernible. Appellant additionally argued that genuine issues of material fact remained regarding whether appellee had constructive notice of the unguarded catch basin.

{¶ 5} The parties relied upon various depositions to support their arguments. In his deposition, appellant explained that, while riding his bicycle through the alley, the sun was in his eyes and he suddenly hit a hole. Appellant described the hole as "like a big drain" and stated that it was "one heck of a hole."

{¶ 6} Logan Street Department Foreman Seth Warthman testified that approximately three months before appellant's accident, just before the city's annual Washboard Festival, the street department inspected the alley and would have repaired any damaged catch basins. Warthman explained that if any of the catch basins had been missing grates, the street department would have repaired them.

{¶ 7} Warthman also indicated that he drove through the alley two to three times each

[1] Appellant also named Eastgate Properties, Inc. as a defendant, but later dismissed his claim against that defendant.

month and that he would have noticed any issues with the catch basins. He stated that "the sole purpose of driving through is to inspect, look, make sure everything is in place that needs to be in place." Although Warthman could not recall the precise date before appellant's accident that he drove through the alley and conducted an inspection, he believes that he would have inspected the alley approximately two weeks before appellant's accident.

{¶ 8} Warthman further related that the alley "is a pretty high traffic alley." He explained that one of the business owners located along the alley reports any issues that she notices. Warthman reported that the business owner calls him, for example, "if a light bulb is busted on the street."

{¶ 9} Another city employee, Trevor Emerson, testified that the street department normally cleans catch basins once or twice per month and that the street department is in the alley a couple of times each month. Emerson observed a photograph of the catch basin without the grate and stated that the catch basin would not have been in that condition for "very long" because the brick that supports the catch basin would have collapsed.

{¶ 10} Bo Bell, another city employee, likewise stated that the street department inspects the catch basins once a week or once every other week.

{¶ 11} On December 31, 2018, the trial court granted appellee's request for summary judgment. The court determined that the unguarded catch basin was an open and obvious danger and that appellee is immune from liability. This appeal followed.

{¶ 12} In his sole assignment of error, appellant asserts that the trial court erred by entering summary judgment in appellee's favor. He contends that the court incorrectly determined that no genuine issues of material fact remain regarding whether the unguarded catch

basin constituted an open and obvious danger. Appellant argues that when he struck the unguarded catch basin, the sun had been glaring in his eyes and left him unable to discover the danger. Appellant thus alleges that the sun's glare prevented him from noticing the danger that the unguarded catch basin posed. Appellant also claims that (1) whether appellee had constructive notice of the danger remains disputed; and (2) the trial court's judgment entry does not permit meaningful appellate review.

A

STANDARD OF REVIEW

{¶ 13} Initially, we note that appellate courts conduct a de novo review of trial court summary judgment decisions. *E.g., State ex rel. Novak, L.L.P. v. Ambrose*, 156 Ohio St.3d 425, 2019-Ohio-1329, 128 N.E.3d 1329, ¶ 8; *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 13; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. *Grafton*, 77 Ohio St.3d at 105.

{¶ 14} Civ.R. 56(C) provides, in relevant part, as follows:

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

{¶ 15} Accordingly, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Pelletier* at ¶ 13; *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12; *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 16} In the case at bar, the trial court concluded that appellee is entitled to summary judgment because (1) the danger that the catch basin posed was open and obvious, and (2) appellee is statutorily-immune from liability.

{¶ 17} "Whether a party is entitled to immunity is a question of law properly determined by the court prior to trial pursuant to a motion for summary judgment." *Pelletier* at ¶ 12, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992); *see also Riscatti v. Prime Properties Ltd. Partnership*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 17 (noting the importance of deciding a political subdivision's entitlement to immunity before trial). Hence, appellate courts conduct a de novo review of a trial court's determination regarding political-subdivision immunity. *Pelletier* at ¶ 13, citing *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. De novo review means that we afford no deference to the trial court's decision and independently review whether the trial court correctly determined the political subdivision's immunity. *Dolan v. Glouster*, 4th Dist. Athens Nos. 11CA18, 11CA19, 11CA33, 12CA1, 12CA6, 2014-Ohio-2017, 2014 WL 1901133, ¶ 106.

{¶ 18} R.C. Chapter 2744 establishes a three-step analysis for determining whether a political subdivision is immune from liability. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 270, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 14. First, R.C. 2744.02(A)(1) sets forth the general rule that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision * * * in connection with a governmental or proprietary function." *Accord Cramer*; *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7; *Harp v. Cleveland Hts.*, 87 Ohio St.3d 506, 509, 721 N.E.2d 1020 (2000). Accordingly, "[t]he starting point is the general rule that political subdivisions are immune from tort liability." *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 772 N.E.2d 129, ¶ 14 (9th Dist. 2002).

{¶ 19} Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). *Cramer*; *Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St.3d 467, 470, 2002-Ohio-2584, 769 N.E.2d 372, ¶ 25. Finally, R.C. 2744.03(A) sets forth several defenses that a political subdivision may assert if R.C. 2744.02(B) imposes liability. *Cramer*; *Colbert* at ¶ 9. The R.C. 2744.03(A) defenses then re-instate immunity.

{¶ 20} In the case sub judice, appellant asserts that the R.C. 2744.02(B)(3) exception to immunity applies. The provision states:

> Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the

> municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

R.C. 2744.02(B)(3) does not mean, however, that a political subdivision "'insure[s] against all accidents upon the streets, sidewalks, or public grounds that it has a duty to maintain.'" *Quinn v. Montgomery Cty. Educational Serv. Ctr.*, 2nd Dist. Montgomery No. Civ.A. 20596, 2005-Ohio-808, 2005 WL 435214, ¶ 23, quoting *Stein v. Oakwood*, 2nd Dist. Montgomery No. 16776 (May 8, 1998), *5. A political subdivision generally must warn individuals of latent or concealed dangers if the political subdivision knows or has reason to know of the hidden dangers. *E.g., Jackson v. Kings Island*, 58 Ohio St.2d 357, 358, 390 N.E.2d 810 (1979). Individuals are expected to take reasonable precautions to avoid dangers that are patent or obvious. *Brinkman v. Ross*, 68 Ohio St.3d 82, 84, 623 N.E.2d 1175 (1993); *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the syllabus. Consequently, when "a danger is open and obvious, a [political subdivision] 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, 788 N.E.2d 1088, syllabus; *Sidle*, paragraph one of the syllabus; *accord Pozniak v. Recknagel*, 9th Dist. Lorain No. 03CA008320, 2004-Ohio-1753, 2004 WL 735349, ¶ 14 (stating that "a city is not accountable for injuries resulting from a pedestrian's failure to heed open and obvious dangers on public walkways"). For instance, "'[o]ne who voluntarily goes upon a sidewalk of a city, which is obviously, and by him known to be, in a dangerous condition, cannot recover on account of injuries which he may thereby sustain, even if the negligence of the city is admitted or shown.'" *Pozniak* at ¶ 14, quoting *Norwalk v. Tuttle*, 73 Ohio St. 242, 76 N.E. 617 (1906), paragraph two of the syllabus; *Rogers v. Wooster*, 9th Dist. No. 96CA0085 (July 30, 1997)

(determining that when condition of property constituted open and obvious danger, political subdivision did not owe plaintiff a duty and, thus, was not negligent).

{¶ 21} The underlying rationale is that "the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *Armstrong* at ¶ 5. "The fact that a plaintiff was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff." *Id.* at ¶ 13.

{¶ 22} "Open and obvious dangers are not hidden, are not concealed from view, and are discoverable upon ordinary inspection." *Zambo v. Tom–Car Foods*, 9th Dist. Lorain No. 09CA009619, 2010-Ohio-474, 2010 WL 520804, ¶ 8. "The determinative issue is whether the condition is observable." *Kirksey v. Summit Cty. Parking Deck*, 9th Dist. Summit No. 22755, 2005-Ohio-6742, 2005 WL 3481536, ¶ 11. Moreover, courts that review whether a danger is open and obvious employ "an objective, not subjective, standard." *Goode v. Mt. Gillion Baptist Church*, 8th Dist. Cuyahoga No. 87876, 2006-Ohio-6936, 2006 WL 3804534, ¶ 25; *accord Ligon v. Winton Woods Park*, 1st Dist. Hamilton No. C-180073, 2019-Ohio-1217, 2019 WL 1474210, ¶ 9; *Wyatt v. Roses Run Country Club*, 2018-Ohio-4093, 119 N.E.3d 1006, ¶ 17 (9th Dist.); *Galligan-Dent v. Tecumseh Outdoor Drama*, 4th Dist. Ross No. 16CA3534, 2016-Ohio-7907, 2016 WL 6947889, ¶ 21. Thus, simply because a particular individual may have been unaware of the danger does not mean that the danger was undiscoverable. *Goode* at ¶ 25; *accord Williams v. Strand Theatre & Cultural Arts Assn., Inc.*, 5th Dist. Delaware No. 18 CAE 06 0042,

2019-Ohio-95, 2019 WL 193654, ¶ 24. Rather, the question is whether a reasonable person would have discovered the hazard. *Galligan-Dent* at ¶ 21. Thus, in the case sub judice, we must use an objective standard to determine whether the danger associated with the catch basin was open and obvious. *Id.*

{¶ 23} In most situations, whether a danger is open and obvious presents a question of law. *See Hallowell v. Athens*, 4th Dist. Athens No. 03CA29, 2004-Ohio-4257, 2004 WL 1802042, ¶ 21; *see also Nageotte v. Cafaro Co.*, 6th Dist. Erie No. E-04-015, 160 Ohio App.3d 702, 2005-Ohio-2098, 828 N.E.2d 683. Under certain circumstances, however, disputed facts may exist regarding the openness and obviousness of a danger, thus rendering it a question of fact. As the court explained in *Klauss v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 84799, 2005-Ohio-1306, 2005 WL 678984, ¶ 17-18:

> Although the Supreme Court of Ohio has held that whether a duty exists is a question of law for the court to decide, the issue of whether a hazardous condition is open and obvious may present a genuine issue of fact for a jury to review.
>
> Where only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. *Anderson v. Hedstrom Corp.* (S.D.N.Y.1999), 76 F.Supp.2d 422, 441; *Vella v. Hyatt Corp.* (S.D. Mich. 2001), 166 F.Supp.2d 1193, 1198; *see, also, Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 566 N.E.2d 698. However, where reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. *Carpenter v. Marc Glassman, Inc.* (1997), 124 Ohio App.3d 236, 240, 705 N.E.2d 1281; *Henry v. Dollar General Store*, Greene App. No.2002-CA-47,

2003-Ohio-206 [2003 WL 139773]; [*Bumgardner] v. Wal-Mart Stores, Inc.*, Miami App. No. 2002-CA-11, 2002-Ohio-6856 [2002 WL 31778025].

{¶ 24} "Attendant circumstances," for example, may create a genuine issue of material fact as to whether a hazard is open and obvious. *See Lang v. Holly Hill Motel, Inc.*, 4th Dist. Jackson No. 06CA18, 2007-Ohio-3898, 2007 WL 2199723, ¶ 24; *Cummin v. Image Mart, Inc.*, Franklin App. No. 03AP1284, 2004–Ohio–2840, at ¶ 8, citing *McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d 494, 498, 693 N.E.2d 807 (1996). 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.*, 115 Ohio App.3d 155, 158, 684 N.E.2d 1273 (1996). "The phrase refers to all circumstances surrounding the event, such as time and place, the environment or background of the event, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event." *Cummin* at ¶ 8, citing *Cash v. Cincinnati*, 66 Ohio St.2d 319, 324, 421 N.E.2d 1275 (1981). An "attendant circumstance" also has been defined to include any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time." *McGuire*, 118 Ohio App.3d at 499, 693 N.E.2d 807. Ordinarily, "the attendant circumstance must be 'an unusual circumstance of the property owner's making.'" *Haller v. Meijer, Inc.*, 10th Dist. Franklin No. 11AP-290, 2012-Ohio-670, 2012 WL 566655, ¶ 10, quoting *McConnell v. Margello*, 10th Dist. Franklin No. 06AP-1235, 2007-Ohio-4860, 2007 WL 2729429, ¶ 17; *accord Lang* at ¶ 27.

{¶ 25} In the case at bar, we agree with the trial court's conclusion that the danger associated with the unguarded catch basin was open and obvious. A reasonable person who looked would have noticed that the catch basin was unguarded and would have taken care to

avoid riding a bicycle over the unguarded catch basin. Nothing about the danger was hidden or concealed from view. *See generally Lacey v. Lenox Creek Condominium Assn.*, 8th Dist. Cuyahoga No. 107094, 2019-Ohio-1984, 2019 WL 2225010, ¶ 28 (concluding that eight- or nine-inch-by-four-inch pothole constituted open and obvious danger); *Moyer v. McClelland J. Brown Living Tr.*, 3rd Dist. No. 13-18-37, 2019-Ohio-825, 124 N.E.3d 853, 2019 WL 1118786, ¶ 11 (determining that large pot hole open and obvious danger even though plaintiff did not see it because she was not looking at the pavement).

{¶ 26} Moreover, no attendant circumstances rendered the condition less than open and obvious. Even if the glaring sun limited appellant's vision, the glare created from the sun was not of appellee's creation. *See Gordon v. Dziak*, Cuyahoga App. No. 88882, 2008–Ohio–570, at ¶ 50 (rejecting as "beyond reasonable comprehension" the "argument that an undisclosed presence of shadows near a residence could be dangerous" and stating that "a person should not be held liable where he or she had no control over shadows caused by the sun"); *Hess v. One Americana Ltd. Partnership*, 10th Dist. Franklin No. 01AP-1200, 2002-Ohio-1076, 2002 WL 392368 (stating that defendants cannot be liable for plaintiff's injuries when defendants "had no control over shadows caused by the sun"). Consequently, we do not agree with appellant that genuine issues of material fact remain as to whether the unguarded catch basin constituted an open and obvious danger.

{¶ 27} Therefore, because the foregoing analysis completely disposes of appellant's sole assignment of error, we conclude that the remaining arguments raised within his first assignment of error are moot. We therefore do not address them. App.R. 12(A)(1)(c).

{¶ 28} Accordingly, based upon the foregoing reasons, we overrule appellant's sole

assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

The Court finds there were reasonable grounds for this appeal.

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

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

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