[Cite as *Ratcliff v. Wyandotte Athletic Club, L.L.C.*, 2012-Ohio-1813.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lois J. Ratcliff et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-692
v.	:	(C.P.C. No. 10CVC-08-12557)
Wyandotte Athletic Club, LLC dba Wyandotte Athletic Club et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 24, 2012

Volkema Thomas Miller & Scott LPA, Michael S. Miller and *Craig P. Scott*, for appellants.

Reminger Co., LPA, and *Kevin P. Foley*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Plaintiffs-appellants, Lois J. Ratcliff ("Mrs. Ratcliff"), and her husband George Ratcliff (collectively "appellants"), appeal from the July 25, 2011 judgment of the Franklin County Court of Common Pleas, in which the court granted summary judgment in favor of defendant-appellee, Wyandotte Athletic Club, LLC ("Wyandotte Athletic Club," "the club," or "appellees"). For the following reasons, we affirm.

{¶ 2} On October 10, 2008, Mrs. Ratcliff went to Wyandotte Athletic Club with her husband and sister for a morning water aerobics class. Although this was her first time attending Wyandotte Athletic Club as a member, she had visited the club one time prior in order to tour the facility. On the tour, Mrs. Ratcliff looked at all of the aspects of the facility, including the weight room, workout room, locker room and pool. After touring the facility, she and her husband decided to become members.

{¶ 3} On the morning of October 10, 2008, Mrs. Ratcliff arrived at Wyandotte Athletic Club approximately ten minutes prior to the start of the water aerobics class. Upon arriving, she went to the locker room and chatted with her sister and a friend. She then went to the pool in order to participate in the water aerobics class. In her deposition, Mrs. Ratcliff agreed that, when she walked into the club on October 10, 2008, she did not notice anything unusual about the pool setup, either with the pools or the pool deck. In response to whether she saw any obstructions on the pool deck, Mrs. Ratcliff stated, "[n]ot when I went in to the pool, other [than] there was a bench there and an aisleway that you used to travel in and out of the pool which extended out a good little way." (Ratcliff depo., 24-25.) Mrs. Ratcliff also admitted that she did not have any trouble getting to the pool for class.

{¶ 4} During the water aerobics class, Mrs. Ratcliff noticed "a gentleman on that same end where we needed to move in and out of the pool area on a ladder working on a TV that was on the wall." (Ratcliff depo., 25.) She did not know the gentleman and could not recall if he wore a uniform. Further, Mrs. Ratcliff stated that there was music playing in the pool area but that she could still hear the aerobics trainer's instructions during class.

{¶ 5} After the water aerobics class, Mrs. Ratcliff, her sister, and friend joined some other ladies in the hot tub. She indicated that she did not have any trouble getting out of the pool and over to the hot tub. Mrs. Ratcliff estimated that she was in the hot tub for about 10 to 12 minutes and then headed to one of the locker rooms. At that time, her sister and friend split off and went to one set of locker rooms, while Mrs. Ratcliff walked to another set of locker rooms with another woman. She stated that the other woman walked to her right and that, at times, they were talking. Further, Mrs. Ratcliff stated that, as she and the other woman approached the locker room, she could still see the man on the ladder:

> Q. And as you're walking back, can you still see this man on the ladder?
>
> A. Yes.
> Q. And you can see the ladder, correct?
>
> A. Yes.

Q. Okay. At this point is the man still on the ladder?

A. At the point where I'm coming back in this direction, he comes off the ladder and begins to scoot it in its open position.

Q. Okay. And which direction is he scooting it? Is he scooting it towards you or away from you?

A. Well, he's scooting it kind of like out and like maybe he's going to approach from the other side.

Q. Okay. And you observe him doing this, correct, you observe him scooting it out?

A. Yes.

Q. And at the same time you're attempting to get to the locker room, correct?

A. Yes.

Q. Okay. At any point as you're approaching do you notice that he's going to be in your way, that he's blocking your path of travel?

A. Well, I'm concerned because I'm not sure how far he's going to move out. I just know that he's moving the ladder. And I'm on the outside edge of walking towards the door. Liz is on my right. There are people coming in. And so I'm trying to be aware of where he is. And so naturally I kind of edged more to the left to allow room for everyone.

* * *

Q. Okay. As you approach the ladder—it's my understanding as you approach he's still moving it; is that correct? He's moving at this point?

A. Yes. He's moving the ladder.

Q. Okay. And at any point did you say, you know, excuse me, could I get by?

A. Well, I don't think he would have heard me if I had.

> * * *
>
> Q. Okay. And did you say anything to Liz about the guy with the ladder?
>
> A. I don't recall that. I just recall that I kept trying to go left. And I would have been on the outside edge near the pool and she was on my right. And because of all this, I was trying to, you know, allow for everybody else to do what they were doing.
>
> * * *
>
> Q. And at any point as you approached the gentleman scooting the ladder, did you pause and wait to see where he was moving it to?
>
> A. I would look over my shoulder to see what was going on. And if I felt I needed to, I would move a little more to the left.
>
> Q. So you got around the gentleman with the ladder, is that accurate, prior to the fall?
>
> A. It seems to me that it was almost simultaneously that I'm nearing the end where he has the ladder, the bench is there, people are coming in, and I take a step, and all of a sudden I realize that my left foot has stepped on air.

(Tr. 40-44.)

{¶ 6} Mrs. Ratcliff stated that she fell into the kiddie pool and that, when her left leg hit, she heard her bone break. The squad arrived in approximately 15 to 20 minutes and took her to Mount Carmel East Hospital where she had surgery the next day on her tibia plateau to repair the break. Following surgery, Mrs. Ratcliff stated that she had a large incision, a lot of stitches, and burning blisters. Further, she stated that she was non-weight bearing for about three months and that she was at Sister Angeline McCrory in rehabilitation for about a month and a half.

{¶ 7} On August 26, 2010, Mrs. Ratcliff and her husband filed a complaint for negligence, alleging that her fall, injuries, and resulting damages are a direct and proximate result of appellees' or its agents' negligence as follows: (1) using a ladder in the

indoor pool area; (2) moving the ladder around without paying attention to the people around them; (3) blocking Mrs. Ratcliff's way and causing her to be distracted by their actions in order to avoid getting in their way or being hit by the ladder; (4) allowing a worker to use a ladder in a narrow pathway used by patrons; (5) failing to take reasonable measures to protect invitees from the dangerous and unsafe condition; and/or (6) failing to warn invitees of the unsafe and dangerous condition that they created and/or knew or should have known existed. (*See* Complaint ¶ 2-6.)

{¶ 8} On November 10, 2010, appellees filed their answer to appellants' complaint, denying all allegations.

{¶ 9} On June 1, 2011, appellees filed a motion for summary judgment; on June 16, 2011, appellants filed a memorandum contra; on June 27, 2011, appellees filed a reply.

{¶ 10} On July 25, 2011, the trial court journalized a decision and entry granting summary judgment in favor of appellees. In its decision and entry, the trial court found that the kiddie pool, even with a step ladder and maintenance worker nearby, was an open-and-obvious danger. (Decision and Entry, 9.)

{¶ 11} Appellants timely filed a notice of appeal on August 17, 2011, setting forth a single assignment of error for our consideration:

> THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFFS-APPELLANTS IN GRANTING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON THE GROUND THAT THE OPEN AND OBVIOUS DEFENSE WAS NOT DEFEATED BY THE EXISTENCE OF ATTENDANT CIRCUMSTANCES[.]

{¶ 12} We review a grant of summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103, 107 (1992) (10th Dist.); *Brown* at 711.

{¶ 13} Pursuant to Civ.R. 56(C), 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992), citing *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶ 14} In order to prevail on a negligence claim, a plaintiff must show that: (1) defendant owed him a duty; (2) defendant breached that duty; and (3) the breach proximately caused his injuries. *Coffman v. Mansfield Corr. Inst.*, 10th Dist. No. 09AP-447, 2009-Ohio-5859, citing *Strother v. Hutchinson*, 67 Ohio St.2d 282, 295 (1981).

{¶ 15} A defendant's duty to a plaintiff depends on the parties' relationship at the time the incident occurred. *McCoy v. Kroger Co.*, 10th Dist. No. 05AP-7, 2005-Ohio-6965, ¶ 7. In the present matter, the parties do not dispute that Mrs. Ratcliff is a business invitee of Wyandotte Athletic Club. (*See* Complaint, ¶ 1; *see also* Motion for Summary Judgment, 6.) A business owner owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition, including an obligation to warn invitees of latent or hidden dangers, so as not to unnecessarily and unreasonably expose its invitees to danger. *Sherlock v. Shelly Co.*, 10th Dist. No. 06AP-1303, 2007-Ohio-4522, ¶ 9, citing *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203 (1985); *Perry v. Eastgreen Realty Co.*, 53 Ohio St.2d 51, 52 (1978). A latent danger is " 'a danger which is hidden, concealed and not discoverable by ordinary inspection, that is, not appearing on the face of a thing and not discernible by examination.' " *McCoy* at ¶ 8, quoting *Potts v. Smith Constr. Co.*, 23 Ohio App.2d 144, 148 (1st Dist.1970).

{¶ 16} Nevertheless, a business owner is not an insurer of a customer's safety. *Sherlock* at ¶ 9. Here, the trial court based its decision to grant appellees' motion for summary judgment upon the open-and-obvious doctrine. (*See* Decision and Entry, 9.) The open-and-obvious doctrine eliminates a premises owner's duty to warn a business invitee of dangers on the premises either known to the invitee or so obvious and apparent to the invitee that he or she may reasonably be expected to discover them and protect against them. *Id*., citing *Simmons v. Am. Pacific Ent., L.L.C.*, 164 Ohio App.3d 763, 2005-Ohio-6957 (10th Dist.), citing *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968). The doctrine's rationale is that, because the open-and-obvious nature of the hazard itself serves as a warning, business owners may reasonably expect their invitees to discover the hazard and take appropriate measures to protect themselves against it. *Id*., citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644 (1992).

{¶ 17} Open-and-obvious dangers are those not hidden, concealed from view, or undiscoverable upon ordinary inspection. *Lydic v. Lowe's Cos., Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶ 10. A person does not need to observe the dangerous condition for it to be an "open-and-obvious" condition under the law; rather, the determinative issue is whether the condition is observable. *Sherlock* at ¶11, citing *Lydic*. Even in cases where the plaintiff did not actually notice the condition until after he or she fell, this court has found no duty where the plaintiff could have seen the condition if he or she had looked. *Id*., citing *Lydic*.

{¶ 18} It is well-settled that "[c]ertain clearly ascertainable hazards or defects may be deemed open and obvious as a matter of law for purposes of granting summary judgment." *McConnell v. Margello*, 10th Dist. No. 06AP-1235, 2007-Ohio-4860, ¶ 11. As such, "[t]his court has uniformly recognized that the existence and obviousness of an alleged danger requires a review of the underlying facts." *Id*., citing *Schmitt v. Duke Realty, LP*, 10th Dist. No. 04AP-251, 2005-Ohio-4245, ¶ 10. "However, unless the record reveals a genuine issue of material fact as to whether the danger was free from obstruction and readily appreciable by an ordinary person, it is appropriate to find that the hazard is open and obvious as a matter of law." *McConnell* at ¶ 11, citing *Freiburger v. Four Seasons Golf Ctr., L.L.C.*, 10th Dist. No. 06AP-765, 2007-Ohio-2871, ¶ 11.

{¶ 19} In their only assignment of error, appellants argue that the trial court erred in granting summary judgment in favor of appellees due to the existence of attendant circumstances. (*See* appellants' brief, 12.)

{¶ 20} As stated above, "Ohio law establishes a duty upon the pedestrian to discover and protect himself from an open and obvious hazard." *Lydic* at ¶ 16. Further, "[a] pedestrian's failure to avoid an obstruction because he or she did not look down is no excuse." *Id.* However, "[a]ttendant circumstances act as an exception to the open-and-obvious doctrine." *Cooper v. Meijer Stores Ltd. Partnership*, 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶ 15. "Even when a plaintiff admits not seeing an obstacle because he or she never looked down, a jury question may arise if attendant circumstances distracted him or her." *Id.* at ¶ 14. In order to be considered an exception to the open-and-obvious doctrine, "an attendant circumstance must be 'so abnormal that it unreasonably increased the normal risk of a harmful result or reduced the degree of care an ordinary person would exercise.' " *Mayle v. Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶ 20, quoting *Cummin v. Image Mart, Inc.*, 10th Dist. No. 03AP-1284, 2004-Ohio-2840, ¶ 10. "This doctrine applies where the attendant circumstances are such as to divert the attention of the individual and significantly enhance the danger of the hazard and thus contribute to the fall." *Mayle* citing Conrad at ¶ 11.

{¶ 21} Here, Mrs. Ratcliff specifically lists the following attendant circumstances allegedly existing at the time of her fall: (1) the narrow hallway obstructed by a bench, (2) lots of pedestrian traffic, and (3) a maintenance man moving an open stepladder around in the narrow and crowded passageway. (*See* appellants' brief, 12-13.) Further, appellants argue that the trial court's reliance upon *Cummin* and *Conrad v. Sears, Roebuck and Co.*, 10th Dist. No. 04AP-479, 2005-Ohio-1626, is misplaced.

{¶ 22} In response, appellees argue that Mrs. Ratcliff acknowledged that the kiddie pool was open and obvious and that she could have seen it had she taken care to observe where she was walking. (*See* appellees' brief, 4.) Appellees also argue that Mrs. Ratcliff's " 'distraction' was not unexpected, sudden, or out of the ordinary," and that the presence of other people and a maintenance man on the pool deck did not excuse her responsibility to exercise ordinary care while walking at Wyandotte Athletic Club's indoor pool deck. (*See* appellees' brief, 4-5.) Further, appellees cite *Conrad* and *Cummin* in support of their

position that attendant circumstances did not detract Mrs. Ratcliff from the open-and-obvious nature of the kiddie pool. (*See* appellees' brief, 6.)

{¶ 23} In reaching its conclusion in the present matter, the trial court also drew from *Conrad* and *Cummin*, stating:

> Like the Plaintiff in [*Conrad*], [Mrs. Ratcliff] here had an extended period of time to observe and appreciate the alleged attendant circumstance. In [*Conrad*], Plaintiff stood next to the display stand for four minutes. In this case, Plaintiff took an hour long aerobics class and had time to see the maintenance worker who was there so long another participant wondered if he knew how to fix the TV. And, like the Plaintiff in *Cummin* who navigated around the chair, [Mrs. Ratcliff] here passed the maintenance worker and his ladder and looked over her shoulder.

(*See* July 25, 2011 Decision and Entry, 8.)

{¶ 24} In *Conrad* at ¶ 8, the appellant waited about four minutes behind another customer at Sears in order to pay for her items. After completing her transaction, she turned to leave the store and fell over a wooden displayer box. *Id*. The appellant filed a complaint alleging that Sears was liable for damages due to the negligent placement of the small box in the aisle. *Id*. at ¶ 1. Sears moved for summary judgment on the basis that the appellant's injuries were caused by an open-and-obvious condition. *Id*. at ¶ 3. The trial court granted summary judgment to Sears. *Id*. at ¶ 5. The appellant appealed, alleging that "[t]he trial court committed error in granting summary judgment and holding that the displayer box that [the appellant] fell over was open and obvious and that the attendant circumstances did not bar the application of the open and obvious rule." *Id*. at ¶ 6.

{¶ 25} In affirming the trial court's decision in *Conrad*, we held:

> In this case, none of the circumstances [the] appellant asserts significantly enhance the danger of the defect. The cashier did not prevent [the] appellant from looking down and seeing the displayer. Sears' employee was merely [doing] her job in performing the transaction with [the] appellant. In fact, the video shows that [the] appellant looked to her left several times during the transaction and could have looked to her right to see the displayer box prior to leaving the counter. While the customer in front of [the] appellant may have

> obscured her view of the box when he was purchasing his items, nothing obscured her view once he completed his transaction and left the counter.

Id. at ¶ 21.

{¶ 26} Further, in *Cummin*, the appellant purchased photographs at McAlister Camera & Imaging ("McAlister"), left the store, and began walking to a beauty shop in the same shopping center. *Id*. at ¶ 2. After turning the corner, the appellant saw a white patio chair, owned by Image Mart, approximately three to four feet in front of her on the walkway. *Id*. The appellant took one to three steps to her right in order to walk around the chair and slipped on a patch of ice. *Id*. The appellant filed a complaint alleging negligence. *Id*. at ¶ 3. The appellees filed motions for summary judgment, and the trial court granted their motions, finding that the ice was an open-and-obvious hazard. *Id*. The appellant appealed, alleging that the accumulation of ice was not open and obvious because two attendant circumstances existed: (1) the plastic chair on the walkway; and (2) the similarity of color between the dark-shaded ice and the dark-shaded wetness on the surface of the concrete surrounding the ice. *Id*. at ¶ 8-9.

{¶ 27} In affirming the trial court's decision in *Cummin*, we held that "[t]he lack of testimony regarding any sudden surprise is persuasive evidence that the placement of the chair was not so unreasonable as to heighten any risks." *Id*. at ¶ 9 Further, we stated that, "[i]mportantly, [the appellant] said her visual attention was on the chair. Therefore, [the appellant] clearly appreciated the existence of the chair." *Id*. at ¶ 10. We also found that "[t]he existence and placement of the chair was not so abnormal that it unreasonably increased the normal risk of a harmful result or reduced the degree of care an ordinary person would exercise." *Id*. Additionally, as to whether the ice constituted an attendant circumstance, we found that the appellant's admission that, "if she had been looking down at the ice, she would have seen it," belied the appellant's contention that the lack of contrast between the ice and the wet concrete caused the fall. *Id*. at ¶ 11.

{¶ 28} In the present matter, appellants claim that there were three attendant circumstances distracting her from the open-and-obvious nature of the kiddie pool: (1) the narrow hallway obstructed by a bench, (2) lots of pedestrian traffic, and (3) a maintenance man moving an open stepladder around in the narrow and crowded

passageway. (*See* appellants' brief, 12-13.) However, for the following reasons, and even in viewing the evidence in a light most favorable to appellants, we are not able to find that the alleged attendant circumstances were *so abnormal* that they unreasonably increased the normal risk of a harmful result or reduced the degree of care Mrs. Ratcliff would exercise on the morning of October 10, 2008 and obviated the open-and-obvious doctrine from being applicable in this situation.

{¶ 29} First, with respect to the alleged narrow hallway and bench, Mrs. Ratcliff testified that she did not recall any obstacles or items blocking her view of the pool, once she got around the ladder, "[o]ther than * * * the comings and goings and the ladder and the bench and trying to make sure everybody had space." (Ratcliff depo., 101.) Further, she testified that, upon walking into Wyandotte Athletic Club, she noticed that there was a bench and an aisleway used to travel "in and out of the pool which extended out a good little way." (Ratcliff depo., 25.) She then admitted that she did not have any trouble getting to the pool for her water aerobics class. (Ratcliff depo., 25.)

{¶ 30} Even in viewing the foregoing testimony in a light most favorable to appellants, we find that the hallway and bench did not act as an attendant circumstance to distract Mrs. Ratcliff from the open-and-obvious nature of the kiddie pool. There is no evidence in the record that the hallway and bench suddenly surprised Mrs. Ratcliff as she walked past the kiddie pool or that the bench blocked her view of the kiddie pool. In fact, the record indicates that she *knew* about the hallway and bench prior to her water aerobics class. Also, we do not believe that the placement of this bench at the club is so abnormal that it unreasonably increased Mrs. Ratcliff's normal risk of a harmful result or reduced the degree of care she would exercise while walking past the kiddie pool. "The breadth of the attendant circumstances exception does not encompass the common or the ordinary." *Cooper* at ¶ 17.

{¶ 31} Further, the photograph of Wyandotte Athletic Club, attached to appellees' motion for summary judgment as Exhibit 2, illustrates that appellants marked a "B" where the bench allegedly stood on October 10, 2008. (*See* Appellees' Motion for Summary Judgment, Exhibit 2.) However, in viewing this photograph, in conjunction with another photograph marked as Exhibit 3, in a light most favorable to appellants, it appears that there would be enough room for several people to safely traverse past the

kiddie pool, even if Wyandotte Athletic Club placed a bench under the smaller of the two bulletin boards. (*See* Appellees' Motion for Summary Judgment, Exhibits 2 and 3.)

{¶ 32} Therefore, based upon the record before us, we cannot find that the hallway and bench are attendant circumstances.

{¶ 33} Second, with respect to the alleged amount of pedestrian traffic, Mrs. Ratcliff testified that "[t]here were just people, you know, at different stages of walking in and out because the one class had just ended. So there's people going out and then there's people coming in." (Ratcliff depo., 41.) Further, she described the area where she fell as "kind of crowded." (Ratcliff depo., 44.) However, in response to whether she recalled how many other people were moving about, Mrs. Ratcliff answered, "[g]osh, no, they were just coming and going." (Ratcliff depo., 45.)

{¶ 34} Even in viewing the foregoing testimony in a light most favorable to appellants, we find that they failed to demonstrate that the pedestrian traffic in the club at the time that Mrs. Ratcliff fell, was any different than what a member would normally encounter. In *Cooper* at ¶ 16-19, we addressed a similar situation regarding pedestrian and automobile traffic in a Meijer parking lot. We found that the appellant did not "describe a situation where an ordinary person would be distracted from seeing potholes in a parking lot on her way to her car," because the cars, other pedestrians, and a two-inch deviation from her normal route are "commonplace in a grocery store parking lot." *Id*. at ¶ 19. Here, as in *Cooper*, we are unclear regarding the number of people in the pool area because Mrs. Ratcliff admitted she did not recall the number of people coming in and out, and that the club was "kind of crowded." Appellants provided no further testimony regarding what "kind of crowded" meant or how the pedestrian traffic distracted Mrs. Ratcliff from seeing the kiddie pool. Also, we believe it is commonplace for people to come in and out of the locker room at a fitness club, especially when a fitness class is beginning or ending. Additionally, the amount of pedestrian traffic coming in and out of the locker room prior to class beginning or after class has ended should not have surprised Mrs. Ratcliff because she testified that she belonged to other fitness clubs and had taken water aerobics classes in the past.

{¶ 35} Therefore, based upon the record before us, we cannot find that the pedestrian traffic at the club is an attendant circumstance.

{¶ 36} Third, with respect to the alleged maintenance man moving an open stepladder around in a narrow and crowded passageway, Mrs. Ratcliff testified that: (1) on the morning of the incident, she did not notice anything unusual about the pool setup, either with the pools or on the pool deck; (2) during her water aerobics class, she noticed a gentleman on a ladder working on a TV; (3) upon getting out of the pool to go to the hot tub, she still noticed the man with the ladder; (4) the man with the ladder was not blocking her path of travel; (5) as she walked from the hot tub to the locker room, she observed the man scooting the ladder in its open position; and (6) as she approached the man moving the ladder, she did not say "excuse me" or pause to see where he was moving it.

{¶ 37} Even in viewing the foregoing testimony in a light most favorable to appellants, it is evident that Mrs. Ratcliff had seen the man with the ladder on numerous occasions throughout her morning activities and, as such, his presence should not have surprised her and/or distracted her from noticing the kiddie pool. First, Mrs. Ratcliff saw the man stationary on the ladder during and after her water aerobics class, and then she observed the man scooting the ladder in an open position while walking from the hot tub to the locker room. Although the ladder went from being stationary to moving around, Mrs. Ratcliff was aware of the ladder's presence over the course of the entire morning, and stated that it was not blocking her path. Additionally, because Mrs. Ratcliff was aware of the moving ladder prior to falling into the kiddie pool, she could have reasonably paused in order to ascertain the ladder's location, in order to avoid a collision. Further, similar to the appellant in *Cummin*, Mrs. Ratcliff was not suddenly surprised by the man with the ladder. As such, we find that the man's presence, with either a stationary or moving ladder, was not so unreasonable as to heighten any risk of Mrs. Ratcliff falling into the kiddie pool. *See Cummin* at ¶ 9.

{¶ 38} Therefore, based upon the foregoing, the trial court did not err in finding that "no genuine issues of material fact preclude summary judgment," and that "[r]easonable minds can reach but one conclusion and find the kiddie pool, even with a step ladder and maintenance worker nearby, was an open and obvious danger." (*See* Decision and Entry, 9.)

{¶ 39} Appellants' only assignment of error is overruled.

{¶ 40} For the foregoing reasons, appellants' assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.
