[Cite as *Littell v. Ohio State Parks*, 2015-Ohio-5660.]

RAMONA LITTELL Plaintiff v. OHIO STATE PARKS Defendant	Case No. 2014-00691 Judge Patrick M. McGrath Magistrate Holly True Shaver ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On July 13, 2015, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On July 14, 2015, the court set a non-oral hearing on the motion for August 10, 2015. On August 13, 2015, plaintiff filed a motion for an extension of time in which to file a response, on the basis that defendant had failed to produce requested discovery, including records regarding maintenance and repairs of the shelter house in which plaintiff suffered personal injury. On August 21, 2015, defendant filed a response in opposition to plaintiff's motion for an extension of time, wherein defendant argued that plaintiff's motion should be denied because the motion was untimely filed, and was not in compliance either with Civ.R. 56(F), or the local rules of this court.

{¶2} Civ.R. 56(F) states: "Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

{¶3} The court notes that plaintiff's motion was filed after the non-oral hearing date, and did not comply with Civ.R. 56(F), inasmuch as no affidavit was attached thereto. Moreover, on March 26, 2015, the court issued an order stating that no discovery would be allowed after July 13, 2015, and set the dispositive motion deadline

for that same date. In the order, the court also stated that any dispositive motions shall be heard pursuant to L.C.C.R. 4.

{¶4} L.C.C.R. 4(C), "Submission and hearing of motions" states, in relevant part: "Each party opposing the motion shall serve and file, within fourteen days after service upon him of movant's motion, a brief written statement of reasons in opposition to the motion and the authorities upon which he relies. * * * Failure to file a written statement in opposition to the motion may be cause for the court to grant the motion as filed."

{¶5} "Mere allegations requesting a continuance or deferral of action for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment. There must be a factual basis stated and reasons given why it cannot present facts essential to its opposition to the motion." *Gates Mills Inv. Co. v. Pepper Pike*, 59 Ohio App.2d 155, 169, (8th Dist.1978). "A motion for a continuance to conduct discovery under Civ.R. 56(F) must be supported by a proper affidavit." *Silver v. Jewish Home of Cincinnati*, 190 Ohio App.3d 549, ¶ 20, 2010-Ohio-5314 (12th Dist.), quoting *St. Joseph's Hosp. v. Hoyt*, Washington App. No. 04CA20, 2005-Ohio-480, ¶ 24. Inasmuch as plaintiff's motion is not in compliance with either the civil rules or the local rules of this court, it is not well-taken and is, therefore, DENIED.

{¶6} Civ.R. 56(C) states, in part, as follows:

{¶7} "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." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317 (1977).

{¶8} On June 16, 2013, at approximately 1:00 p.m., plaintiff attended her granddaughter, Brooke's, high school graduation party at Shelter House #2 at Mt. Gilead State Park. Plaintiff had reserved the shelter house in advance by paying a $50 fee. The shelter house consisted of a roof on posts, with no walls. The floor of the shelter house was made of at least four concrete slabs. In the middle of the floor where expansion joints met, one of the four slabs sat slightly higher than the adjacent slabs. When plaintiff arrived at the shelter house, she initially sat at a picnic table with her husband. Shortly thereafter, plaintiff walked to another table to pour herself a cup of Diet Pepsi. As plaintiff walked back to the picnic table, her toe caught on the edge of one of the concrete slabs near the expansion joint, which caused her to trip and fall to the floor. Plaintiff suffered a concussion, a broken left arm and a broken tooth as a result of her fall.

{¶9} After the fall, as plaintiff remained lying on the floor, she asked her son, Bobby, to take pictures of the area. Plaintiff's step-grandson, Garret, placed one salt shaker and one pepper shaker in the expansion joint to show the scale of the difference in height between the slabs of concrete. (Defendant's Exhibits B, D.) The photos show that the difference in height measured approximately less than half way up the glass portion of the salt shaker. Plaintiff's legs are depicted in one photograph, with the salt and pepper shakers placed in the expansion joint near her right shoe. (Defendant's Exhibit D.) While plaintiff did not measure the salt and pepper shakers, she estimated that they were 4 inches tall, and that the height difference between the concrete slabs measured two and one half inches.

{¶10} Plaintiff asserts that defendant was negligent when it failed to maintain the premises in a reasonably safe condition. Defendant asserts that it is entitled to judgment as a matter of law on two bases. First, defendant asserts that the uneven portion of the floor was an open and obvious hazard, which precludes liability. Second, defendant asserts that the difference in elevation was less than two inches, which renders the defect insubstantial as a matter of law.

{¶11} In order for plaintiff to prevail upon her claim of negligence, she must prove by a preponderance of the evidence that defendant owed her a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused her injuries. *Armstrong v. Best Buy* Co., *Inc.,* 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Prods., Inc.,* 15 Ohio St.3d 75, 77 (1984).

{¶12} Under Ohio law, the duty owed by an owner or occupier of premises generally depends on whether the injured person is an invitee, licensee, or trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.,* 75 Ohio St.3d 312, 315, 1996-Ohio-137. Plaintiff was on defendant's premises for purposes that classify her as an invitee, defined as a person who comes "upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Baldauf v. Kent State Univ.,* 49 Ohio App.3d 46, 47 (10th Dist.1988). An owner or occupier of premises owes its invitees "a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers." *Armstrong, supra,* at 80. "[T]o establish that the owner or occupier failed to exercise ordinary care, the invitee must establish that: (1) the owner of the premises or his agent was responsible for the hazard of which the invitee has complained; (2) at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its existence or to remove it promptly; or (3) the hazard existed for a sufficient length of time to justify the inference that the failure to warn against it or remove it was

attributable to a lack of ordinary care." *Price v. United Dairy Farmers, Inc.,* 10th Dist. No. 04AP-83, 2004-Ohio-3392, ¶ 6.

{¶13} "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong* at syllabus. "Open-and-obvious hazards are those hazards that are neither hidden nor concealed from view and are discoverable by ordinary inspection. '[T]he dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be an "open and obvious" condition under the law. Rather, the determinative issue is whether the condition is observable.' Put another way, the crucial inquiry is whether an invitee exercising ordinary care under the circumstances would have seen and been able to guard himself against the condition. Thus, this court has found no duty in cases where the plaintiff could have seen the condition if he or she had looked even where the plaintiff did not actually notice the condition before falling." (Internal citations omitted.) *McConnell v. Margello,* 10th Dist. No. 06AP-1235, 2007-Ohio-4860, ¶10. "[U]nless 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." *Id.* at ¶11, citing *Freiburger v. Four Seasons Golf Ctr., L.L.C.,* 10th Dist. No. 06AP-765, 2007-Ohio-2871.

{¶14} The photographs taken immediately after plaintiff's fall show that the concrete floor, including the expansion joints and the difference in height between the slabs, was observable, free from obstruction, and readily appreciable by an ordinary person. Although plaintiff testified that in her opinion, the lights in the shelter house were "yellow" and dimly lit, it is not disputed that plaintiff tripped in the middle of the floor of the shelter house during daylight hours. Plaintiff also testified that nothing obscured the area and that after she fell, she noticed the hazard. Plaintiff has a duty to exercise some degree of care for her own safety while walking. See *Lydic v. Lowe's Companies,*

Inc., 10th Dist. No. 01AP-1432, 2002-Ohio-5001, at ¶ 16. "A pedestrian's failure to avoid an obstruction because he or she did not look down is no excuse." *Id.*

{¶15} Although plaintiff testified that she did not see the defect until after she fell, this does not raise an issue of material fact. "Attendant circumstances act as an exception to the open-and-obvious doctrine. An attendant circumstance is a factor that contributes to the fall and is beyond the control of the injured party. It can consist of '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.'" (Internal citations omitted.) *Cooper v. Meijer Stores, L.P.,* 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶ 15. "[A] plaintiff who claims attendant circumstances must be able to point out differences between ordinarily encountered conditions and the situation that actually confronted the plaintiff. The breadth of the attendant circumstances exception does not encompass the common or the ordinary." *Id.* at ¶ 17. Moreover, attendant circumstances do not include plaintiff's activity at the moment of the fall, unless her attention was diverted by an unusual circumstance of the property owner's making. *See McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d 494, 498 (1st Dist.1996).

{¶16} Construing the evidence most strongly in plaintiff's favor, the court finds that the only reasonable conclusion is that the defect in the concrete was free from obstruction and readily appreciable by an ordinary person; thus, it was an open and obvious condition. Plaintiff's deposition testimony establishes that her attention was not diverted by any unusual circumstance of defendant's making when she walked over the expansion joint. The photographs depict that the expansion joint and the height difference is plainly visible. Accordingly, inasmuch as no attendant circumstances existed, defendant owed no duty to plaintiff, and plaintiff's claim of negligence is barred as a matter of law.

{¶17} In addition, in Ohio, there is a rebuttable presumption that a defect of less than two inches in height is insubstantial as a matter of law and does not give rise to liability. *See Kimball v. Cincinnati*, 160 Ohio St. 370 (1953); *Cash v. Cincinnati*, 66 Ohio St.2d 319 (1981); *Shepherd v. Cincinnati*, 168 Ohio App.3d 444, 2006-Ohio-4286 (1st Dist.); *Jenkins v. Dept. of Rehab & Corr*., 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106.

{¶18} Defendant filed an affidavit of Chris Conomy with its motion, wherein Conomy avers:

{¶19} "1. I am the attorney representing the Defendant, Ohio State Parks, in this matter.

{¶20} "2. I took the deposition of Plaintiff Ramona Littell on December 18, 2014 in connection with this matter.

{¶21} "3. During her deposition I requested that she provide me with the salt and pepper shakers that were used in photographs presented as exhibits during her deposition, and she agreed to do so through her attorney. This exchange is recorded at pages 60-61 of her deposition transcript.

{¶22} "4. About a month later I received a package from Ms. Littell's attorney, Tom C. Elkin, containing salt and pepper shakers. A true and accurate copy of the package mailing label is attached to this affidavit as Exhibit 1. A true and accurate copy of the enclosure letter from Mr. Elkin is attached to this affidavit as Exhibit 2.

{¶23} "5. True and accurate photographs of the shakers are attached as Exhibits 3 and 4 to this affidavit, showing the measurements of the shakers.

{¶24} "6. The shakers are identical in design and construction. The shakers are each four inches tall. The square bases of the shakers are slightly more than 1.5 inches wide on each side." (Defendant's Exhibit C.)

{¶25} Upon review of the photos, it is clear that the difference in height between the slabs of concrete is no greater than two inches, based upon the measured height of

the salt and pepper shakers. Indeed, the photographs taken at the scene of the fall show that the height difference in the floor was no greater than half-way up the glass portion of the salt and pepper shakers, which would measure no greater than 1.5 inches. In addition, as stated previously, no attendant circumstances diverted plaintiff's attention. Accordingly, the only reasonable conclusion is that the defect in the floor was an open and obvious hazard, which was insubstantial in size as a matter of law. Accordingly, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

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Filed September 22, 2015
Sent To S.C. Reporter 2/24/16