[Cite as *Jung v. Davies*, 2011-Ohio-1134.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

PATRICIA M. JUNG, et al.	:	
	:	Appellate Case No. 24046
Plaintiff-Appellants	:	
	:	Trial Court Case No. 09-CV-5867
v.	:	
	:	
VICKI L. DAVIES, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellees	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 11th day of March, 2011.

. . . . . .

CARLO C. McGINNIS, Atty. Reg. #0019540, 130 West Second Street, Suite 800, Dayton, Ohio 45402
Attorney for Plaintiff-Appellants

JOYCE V. KIMBLER, Atty. Reg. #0033767, 50 South Main Street, Suite 502, Akron, Ohio 44308
Attorney for Defendant-Appellees

. . . . . .

HALL, J.

{¶ 1} Patricia M. Jung appeals from the trial court's entry of summary judgment in favor of appellees Vicki and Terry Davies on her negligence complaint against them related to her slip and fall at their residence.

{¶ 2} Jung advances four related assignments of error on appeal. In the first two

assignments of error, which Jung briefs and argues together, she contends the trial court erred in finding that the Davies' alleged violation of certain county and township codes did not constitute negligence per se. In her third and fourth assignments of error, she claims the trial court erred in entering summary judgment against her based on the "open-and-obvious" doctrine, particularly when attendant circumstances exist.

{¶ 3} Jung filed this premises-liability action after injuring herself while exiting the Davies' home at 755 Woodbourne Trail in Washington Township. The incident occurred in the early evening hours of July 18, 2007 as Jung, a realtor, was locking the front door and placing a key in a lock box after showing the home to prospective buyers. In a deposition, Jung explained that she was facing the front door, somewhat bent over, with the storm door resting against her backside. She testified that she was standing on the highest of several steps just below the threshold to the front door when she fell. According to Jung, the storm door extended beyond where she was standing. Her fall occurred when she attempted to step backward to allow the storm door to pass in front of her and close. In her deposition testimony, Jung alleged that the step was "too narrow." In a subsequent affidavit, she further explained her fall as follows:

{¶ 4} "* * * [A]t the time of my fall, I was required to encounter a narrow landing, without a handrail, all at the same time I was required to be in a backing out movement caused by efforts to process the lock box mechanism, as well as my efforts to clear and securely close the screen door, as was my habit, similar to my habit to check and insure the main door was locked. Further, it was at this exact same time that I was required to change direction while standing on the narrow step area, which caused me to lose my balance and fall off and down

the steps."

{¶ 5} The record reflects that Jung had traversed the steps at issue twice before her fall. First, she had ascended them to preview the home shortly before the accident. On that occasion, she exited a different way. Jung also had ascended the steps on the day of the accident, arriving before the prospective buyers to open the home. The weather was good at the time of Jung's fall, and it remained light outside.

{¶ 6} Jung filed her complaint on July 16, 2009, alleging negligence and negligence per se. The complaint included a derivative loss-of-consortium claim by her husband. The Davies moved for summary judgment in January 2010, alleging that the open-and-obvious doctrine barred Jung's claims as a matter of law. After full briefing, the trial court sustained the motion in a fifteen-page decision, order, and entry filed on April 19, 2010. This timely appeal followed.

{¶ 7} We review the trial court's summary judgment ruling de novo, which means "we apply the standards used by the trial court." *Brinkman v. Doughty* (2000), 140 Ohio App.3d 494, 497. Summary judgment is appropriate when a trial court finds "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 8} In her first two assignments of error, Jung contends the trial court erred in finding that the Davies' alleged violation of county and township codes did not constitute

negligence per se. These assignments of error concern Jung's claim that the brick entryway of the Davies' home violated two versions of Montgomery County's building code and Washington Township's exterior maintenance code.

{¶ 9} In proceedings below, the parties agreed that the entryway had been remodeled in 1998, prior to the Davies' purchase of the home, when new brick steps were added. Therefore, Jung argued that the 1998 Montgomery County residential building code applied. Alternatively, she argued that the county's 2006 building code applied because it was in effect when her fall occurred.[1]

{¶ 10} The trial court disagreed with Jung, finding that neither county code applied to the Davies' home. In reaching its conclusion, the trial court noted that the 1998 regulations had been enacted pursuant to R.C. 307.37. The 1998 version of R.C. 307.37(A) generally authorized a board of county commissioners to adopt and enforce regulations governing the construction, repair, alteration, redevelopment, and maintenance of residential homes. As the trial court noted, however, the 1998 version of R.C. 307.37(D) provided that such regulations "do not affect buildings or structures that exist * * * on or before the date the regulation or amendment is adopted by the board."

{¶ 11} Montgomery County's 2006 building code also had been enacted pursuant to R.C. 307.37. The applicable version of R.C. 307.37(B), which remains in effect, generally authorizes a board of county commissioners to adopt and enforce local residential building regulations, provided that such regulations comply with Ohio's residential building code. As

[1]The record reflects that effective January 1, 1998 the Montgomery County Board of Commissioners legislatively adopted an administrative code, the 1996 Ohio Building Officials Association model residential building code. Thereafter, in 2006, the Montgomery County Board of Commissioners legislatively adopted another administrative code, the Residential Code of Ohio, as its building code.

the trial court again noted, however, R.C. 307.37(E) provides: "Regulations or amendments adopted pursuant to this section, with the exception of an existing structures code, do not affect buildings or structures that exist * * * on or before the date the board adopts the regulation or amendment."

{¶ 12} After reviewing the foregoing provisions, the trial court held that Montgomery County's 1998 residential building code did not apply to the brick entryway modification. In support, the trial court relied on R.C. 307.37(D), which, as set forth above, precluded a regulation adopted by a board of county commissioners from applying to any building or structure that existed when the regulation was adopted. The trial court reasoned that this language unambiguously excluded the Davies' home, which had been built in 1976 and, therefore, qualified as an existing building or structure in 1998. The trial court also noted the absence of any language in R.C. 307.37(D) stating "that renovations or repairs to an existing structure (such as the brick entryway) were subject to any regulation a county commission adopted under the authority of O.R.C. §307.37."

{¶ 13} The trial court next held that Montgomery County's 2006 building code could not apply. It reasoned:

{¶ 14} "Going next to the version of R.C. 307.[3]7 in effect when Ms. Jung fell, O.R.C. §307.37(E) states that '[R]egulations * * * the board adopts pursuant to this section, with the exception of an existing structures code, do not affect buildings or structures that exist * * * before the date the board adopts the regulation * * *.' Since 755 Woodbourne Trail was built and the brick entryway was installed long before Montgomery County adopted the RCO, the home generally, and the brick entryway specifically, are excluded from RCO

requirements, except, perhaps, requirements imposed by an existing structures code. Montgomery County, however, has not adopted an existing structures code."

{¶ 15} The trial court then turned to Washington Township's maintenance code. Washington Township enacted this code in July 2001 pursuant to R.C. 505.73, which authorizes township trustees to adopt and enforce "an existing structures code pertaining to the repair and continued maintenance of structures and the premises of those structures." Article 4.02 of Washington Township's code requires a structure to comply with its terms "irrespective of when such structure has been constructed, altered, or repaired."

{¶ 16} The trial court recognized that the Washington Township code contains two potentially applicable provisions: Article 5.06(A)(3) requires stairways to have treads of uniform width and risers of uniform height; and Article 5.06(A)(4) allows an enforcement officer to require a handrail when its absence creates a hazardous condition. The trial court concluded that Article 5.06(A)(3) would not support a finding of negligence per se even if it had been violated. With regard to Article 5.06(A)(4), the trial court noted the absence of any involvement by an enforcement officer, thereby precluding the possibility of a violation.

{¶ 17} The trial court also considered the possibility that the Davies' brick entryway may have violated certain administrative codes. Even if it did, however, the trial court recognized that negligence per se could not arise from an administrative code violation, as opposed to a legislative violation. See, e.g., *Kooyman v. Staffco Constr., Inc*., 189 Ohio App.3d 48, 57, 2010-Ohio-2268, ¶21-22.

{¶ 18} On appeal, Jung first challenges the trial court's finding that neither of the Montgomery County building codes discussed above applies to the Davies' residence. She

rhetorically questions why the General Assembly, through R.C. 307.37, would authorize county commissioners to regulate the repair and alteration of homes but preclude such regulations from applying to homes that existed before the regulations took effect. Our answer to this inquiry is two-fold.

{¶ 19} First, we need not determine *why* the General Assembly worded R.C. 307.37 as it did. "'[T]he principles of statutory construction require courts to first look at the specific language contained in the statute, and, if unambiguous, to then apply the clear meaning of the words used.'" *Duvall v. United Rehab. Servs. of Greater Dayton,* Montgomery App. No. 22500, 2008-Ohio-6231, ¶36, quoting *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 127. As the trial court noted, the 1998 version of R.C. 307.37(D) unambiguously provided that regulations issued by a board of commissioners "do not affect buildings or structures that exist * * * on or before the date the regulation or amendment is adopted by the board." Similarly, R.C. 307.37(E) currently states that, with the exception of an existing structures code, the regulations adopted by a board of commissioners "do not affect buildings or structures that exist * * * before the date the board adopts the regulation * * *." The Davies' home is a building or structure that was built in 1976 and, therefore, existed before the regulations adopted by the Montgomery County Board of Commissioners.

{¶ 20} A second answer to Jung's inquiry is that the General Assembly simply may have wanted the regulations it authorized to apply only to homes built after the regulations' effective date. This seems to be the plain import of R.C. 307.37(D) and (E), and such a reading of the statute does not render it meaningless or produce absurd results. It means only that the regulations adopted by the Montgomery County Board of Commissioners apply

prospectively to homes built after their enactment.

{¶ 21} Finally, we reject Jung's argument that the language of the two building codes adopted by Montgomery County makes them applicable to the Davies' brick entryway. Jung points out that the 1996 administrative building code, which Montgomery County legislatively adopted effective January 1, 1998, required alterations or repairs to an existing structure to comply with its terms. See Appellant's Brief at 8. Although this is true, then-existing R.C. 307.37(D) *did not authorize* a board of commissioners to enact such a requirement. As set forth above, it unambiguously provided that building regulations issued by a board of commissioners "do not affect buildings or structures that exist * * * on or before the date the regulation or amendment is adopted by the board." Therefore, to the extent that Montgomery County attempted to require alterations or repairs to an existing structure to comply with its new building code in 1998, it lacked authority from the General Assembly to do so.

{¶ 22} The General Assembly apparently recognized this problem. It amended R.C. 307.37, effective May 27, 2005, to allow a board of county commissioners to adopt and enforce "local residential building regulations" *and* an "existing structures code." See R.C. 307.37(B)(1)(a) and (b). It also limited the scope of the former R.C. 307.37(D), which had prevented a board of county commissioners from applying its building regulations to any existing structure. The amended language, codified in R.C. 307.37(E), states: "Regulations or amendments the board adopts pursuant to this section, *with the exception of an existing structures code*, do not affect buildings or structures that exist or on which construction has begun on or before the date the board adopts the regulation or amendment." See Ohio Am. Sub. H.B. 175, 125th Gen. Assem. (2004) (emphasis added).

{¶ 23} Consistent with R.C. 307.37, as amended, Jung claims that the 2006 version of the Montgomery County building code (in effect at the time of her fall) required alterations or repairs to an existing structure to comply with its terms. Because the May 27, 2005 amendments to R.C. 307.37 authorized a board of county commissioners to adopt an "existing structures code" containing such a requirement, Jung claims the requirements of Montgomery County's 2006 building code *did* apply to the Davies' brick entryway. We disagree for two reasons.

{¶ 24} First, Jung expressly denied in proceedings below that Montgomery County ever had "undertaken to adopt an Existing Structures Code under R.C. 307.37(B)(1)(b)," as opposed to "local building regulations" under R.C. 307.37(B)(1)(a). See Doc. #27 at Exh. A, pg. 2. Jung cannot advocate one position in the trial court and adopt a contrary position on appeal. Assuming, arguendo, that the 2006 Montgomery County building code could be interpreted as being, or containing, an "existing structures code," Jung forfeited such an argument by taking a contrary position below. As set forth above, the trial court agreed with her, finding that Montgomery County had not adopted an existing structures code. If this was error (an issue we need not decide), Jung cannot take advantage of it because she invited it herself. *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus ("A party will not be permitted to take advantage of an error which he himself invited or induced."). Second, even if Montgomery County's 2006 building code qualified as an "existing structures code" and generally required repairs and renovations to existing homes to comply with its terms, the Davies' brick entryway was re-done in 1998, long before the 2006 version of Montgomery County's code took effect. Jung cites nothing to

suggest that it was intended to apply retroactively to renovations completed years earlier.

{¶ 25} We turn now to the trial court's analysis of Washington Township's 2001 exterior property maintenance code. Pursuant to R.C. 505.73(A), Washington Township adopted its code based on a model prepared by the Miami Valley Regional Planning Commission.[2] The parties agree that Article 4.02 of Washington Township's code requires a structure to comply with its terms "irrespective of when such structure has been constructed, altered, or repaired, or premises occupied, except as hereinafter provided."[3] They also do not dispute that the Davies' brick entryway qualified as a structure under Article 3.02, which defines a structure as "[a]nything constructed or erected, which requires location on the ground or attachment to something having location on the ground."

{¶ 26} On appeal, Jung disputes only the trial court's determination that a violation of Article 5.06, which governs exterior stairways, does not constitute negligence per se. Article 5.06(A)(3) requires all exterior stairways on residential premises to "have treads of uniform width and risers of uniform height." Jung's position is that the Davies' brick entryway contained a stairway with non-uniform treads and risers. She contends this violation of Article 5.06(A)(3) is negligence per se.[4] The issue is significant because a finding of negligence per

---

[2] R.C. 505.73(A) authorizes a board of township trustees to administer and enforce an existing structures code that an agency or organization has prepared as a model.

[3] Parenthetically, we note that the Davies have not contested the retroactive application of Washington Township's code. Nor have we found any language in the code that would preclude it from being applied retroactively here.

[4] In the proceedings below, Jung also alleged a violation of Article 5.06(A)(4), which provides that "[w]here the absence of handrails and/or railings create[s] a hazardous condition, an enforcement officer may require their installation in accordance with the provisions of the Montgomery County Building Code." Although the Davies' brick entryway lacked a handrail or railings, the trial court noted the absence of any evidence that an enforcement officer had required their installation. Jung does not appear to contest the trial court's

se precludes a defendant's assertion of an "open-and-obvious" defense. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 123-124, 2009-Ohio-2495, ¶14 (recognizing "that although the open-and-obvious doctrine can excuse a defendant's breach of a common-law duty of care, it does not override statutory duties," the violation of which constitutes negligence per se); see, also, *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 372; *Patton v. Pennsylvania R. Co.* (1939), 136 Ohio St. 159, 166 (recognizing the violation of a city ordinance as negligence per se); *Wakefield v. John Russell Const. Co.*, Jefferson App. No. 09-JE-19, 2010-Ohio-1294, ¶22-24.

{¶ 27} This court recently addressed the interplay between a legislative violation and a finding of negligence per se in *Kooyman*, supra. It recognized that "[n]ot every violation of a provision of law or ordinance constitutes negligence per se." *Kooyman* at ¶19. "Where, for the safety of others, a legislative enactment commands or prohibits the doing of a specific act, and there is a violation of such an enactment by one who has a duty to obey it, such a violation constitutes negligence per se. * * * Where, on the other hand, a legislative enactment for the safety of others sets forth a rule of conduct in general or abstract terms, liability must be determined by the application of the test of due care as exercised by a reasonably prudent person under the circumstances of the case, and negligence per se has no application." Id. (citation omitted). "In the absence of definite and specific requirements in a statute or ordinance that have been violated, the acts and conduct of the parties must be measured by the circumstances of each case." Id. (citation omitted). "'The distinction between negligence and

---

resolution of this issue on appeal, focusing instead on the alleged violation of Article 5.06(A)(3) discussed above. See Appellant's Brief at 11-14. In any event, we agree with the trial court's finding that a handrail or railing was unnecessary in the absence of such a requirement from an enforcement officer.

negligence per se is the means and method of ascertainment. The first must be found by the jury from the facts, the conditions, and circumstances disclosed by the evidence; the latter is a violation of a specific requirement of law or ordinance; the only fact for determination by the jury being the commission or omission of the specific act inhibited or required. * * * [W]here duties are undefined, or defined only in abstract or general terms, leaving to the jury the ascertainment and determination of [the] reasonableness and correctness of acts and conduct under the proven conditions and circumstances, the phrase "negligence per se" has no application.'" Id., quoting *Swoboda v. Brown* (1935), 129 Ohio St. 512, 522-523.

{¶ 28} In the present case, the trial court reasoned as follows regarding the applicability of negligence per se:

{¶ 29} "Turning next to Article 5.06(A)(3) application of negligence per se, assuming a violation of Article 5.06(A)(3), is not appropriate for three reasons. First, it is not clear that the 'step' involved in Mrs. Jung's fall is regulated by the provision. Secondly, since the Maintenance Code is, as required by O.R.C. §505.73, a standardized code, it is not the type of legislative enactment subject to application of negligence per se for its violation. Finally, the requirements imposed by Article 5.06(A)(3) are not sufficiently definite to trigger application of negligence per se.

{¶ 30} "Mrs. Jung asserts that the 'step' from which she fell is a landing, and, thus, subject to the landing requirements set forth by the 1996 OBOA, the RCO and other administrative provisions. If the location from which Mrs. Jung fell is a landing as opposed to a step, the Washington Township Maintenance Code is not applicable. This, in any event, creates a sufficient ambiguity, as will be discussed below, to make application of negligence

per se inappropriate.

{¶ 31} "The rationale for negligence per se is that a legislative enactment, as opposed to an administrative rule, represents a policy decision arrived at through the democratic process. Administrative rules, on the other hand, 'do not dictate public policy, but rather expound upon public policy already established * * *' by the legislative process. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 567, 697 N.E.2d 198.

{¶ 32} "The Washington Township Maintenance Code, given the requirements imposed by O.R.C. §505.73(A) that any township maintenance code 'shall * * * [be] any model or standard code promulgated by this state, any department, board, or agency of this state, or any private or public organization that publishes a recognized model or standard code * * *' is more akin to an administrative code than a legislative dictate. It is, accordingly, concluded that application of negligence per se for a violation of the Maintenance Code is, for this second reason, not appropriate.

{¶ 33} "It is, finally, noted that the violation of a legislative enactment triggers a negligence per se determination when the enactment sets forth a specific, detailed safety standard 'that requires no intervention of human judgment or decision making in order to comply with it.' *Zimmerman v. St. Peter's Catholic Church* (1973), 87 Ohio App.3d 752, 762, 621 N.E.2d 1184. Article 5.06(A)(3) is not such a specific, detailed provision that application of negligence per se is appropriate for its violation. This is so because, as discussed, it is not clear what 'steps' are subject to the provision's requirements. Secondly, simply indicating that risers shall be of uniform height and treads of uniform width is not sufficiently detailed to give rise to a negligence per se determination. A stairway could be constructed in technical

compliance with the provision that would, nonetheless, be quite dangerous. Application of the requirement, given this observation, requires human intervention and decision making, thus, for this third reason, making application of negligence per se inappropriate."

{¶ 34} Upon review, we diverge somewhat from the trial court's analysis but, ultimately, reach the same conclusion. The trial court first found negligence per se inapplicable because of an ambiguity about whether Jung fell from a "step" or a "landing." The precise issue before us is whether the portion of the entryway where she fell qualifies as a "stairway" under Article 5.06(A)(3) of the Washington Township Exterior Property Maintenance Code. Because we agree with the other reasons given by the trial court for why negligence per se is inapplicable, we decline to determine whether the three-tiered decorative brick entryway to the defendants' home constitutes a "stairway," and will analyze the application of the regulation to this case on other grounds.

{¶ 35} We believe that Article 5.06 of the Washington Township code is not sufficiently detailed to afford negligence per se analysis. The overall purpose of the provision is apparently to prevent a "safety hazard" (5.06 (A)(1)) and to avoid a "hazardous condition" (5.06(A)(4)). Specifically, section 5.06(A)(3) requires "treads of uniform width and risers of uniform height." Whether the risers and treads are "uniform" involves judgment and interpretation. Whether lack of uniformity constitutes negligence involves even greater judgment and interpretation. Would a uniform course of four inch treads and four inch risers be a safety hazard? What about uniform 12 inch treads but also uniform 18 inch risers? Provisions that support negligence per se analysis should be specific and detailed without the intervention of human judgment or decision making. *Zimmerman v. St. Peter's Catholic*

Church (1993), 87 Ohio App.3d 752. Moreover, regulations requiring expert testimony to prove a violation are too general to form the basis of negligence per se. Id., at 762. See also *Poiry v. Schneider (March 31, 1987)*, Lucas App. No. L-86-294 (holding that an ordinance requiring stairs and steps to "have reasonably uniform risers and treads" did not have specific measurement requirements, defined the duties only in general terms and therefore prescribed a rule of conduct and not a specific duty making negligence per se inapplicable.)

{¶ 36} Because we determine that negligence per se analysis does not apply, we overrule Jung's first and second assignments of error.

{¶ 37} In her third and fourth assignments of error, Jung claims the trial court erred in entering summary judgment against her based on the "open-and-obvious" doctrine, particularly when attendant circumstances exist. In particular, she asserts that the steps at issue did not present an open and obvious hazzard because she was required to back out of the house and then close the main door, operate a lock box, and maneuver around the storm door.

{¶ 38} When negligence per se is not applicable, "the acts and conduct of the parties must be measured by the circumstances of each case." *Kooyman*, at ¶19. In such a case, "one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom." *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. The status of a person who enters the land of another defines the scope of the legal duty owed to the entrant. *Gladon v. Greater Cleveland Reg. Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137.

{¶ 39} Here the parties agree that Jung was a business invitee on the Davies' property to show their home to a potential buyer. As it pertains to business invitees, an owner's duty is

to keep the premises in reasonably safe condition and to warn of known dangers. *James v. Cincinnati,* Hamilton App. No. C-070367, 2008-Ohio-2708, ¶24, citing *Eicher v. U.S. Steel Corp.* (1987), 32 Ohio St.3d 248. Liability arises when an owner has "superior knowledge of the particular danger which caused the injury" as an "invitee may not reasonably be expected to protect himself from a risk he cannot fully appreciate." *Uhl v. Thomas,* Butler App. No. CA2008-06-131, 2009-Ohio-196, ¶13, citing *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 210.

{¶ 40} When a danger is open and obvious, a property owner owes no duty of care to individuals lawfully on the premises. *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 78, 2003-Ohio-2573, ¶14. To be open and obvious, a hazard must not be concealed and must be discoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51. The issue is not whether an individual observes a condition, but whether the condition is capable of being observed. *Lydic v. Lowe's Cos., Inc.,* Franklin App. No. 01AP-1432, 2002-Ohio-5001, ¶10; *Larrick v. J.B.T., Ltd.,* Montgomery App. No. 21692, 2007-Ohio-1509, ¶11.

{¶ 41} We have no trouble concluding that the trial court properly applied the open-and-obvious doctrine here. The record reflects that Jung had ascended the steps twice before her fall, giving her two chances to observe their configuration and to appreciate any danger. The weather was good on the day in question, and it remained light outside. Based on the photographs before us, we believe any danger Jung faced was so open and obvious that she should have been able to avoid it on her own.

{¶ 42} Jung's argument about attendant circumstances fails to persuade us otherwise.

"As a corollary to the open-and-obvious doctrine, [this court has] recognized that there may be attendant circumstances [that] divert the individual's attention from [a] hazard and excuse her failure to observe it." *Olivier v. Leaf & Vine*, Miami App. No. 2004 CA 35, 2005-Ohio-1910, ¶22. In the present case, however, Jung twice had traversed the steps at issue without incident. Therefore, she already had observed any potential hazzard, or at least reasonably should have done so. Jung did not need to know the precise measurements and dimensions of each step to be put on notice of the nature of the entryway. That is apparent from a cursory review of the photographs.

{¶ 43} We recognize that prior use is not always dispositive of a person's awareness of a dangerous condition. Id. at ¶40. But we find nothing even remotely hidden about the configuration of the three steps leading up to the Davies' door. Nor do we find any evidence of a latent defect. Even assuming, arguendo, that the brick entryway violated some administrative regulation with which it was required to comply, the condition of the steps, as they actually existed, was apparent to anyone using or observing them. Cf. *Riehl v. Bird's Nest, Inc*., Ottawa App. No. OT-09-003, 2009-Ohio-6680, ¶47 ("Appellant's claims of liability * * * with respect to lack of a landing * * *, the varying heights of stair risers * * *, and lack of handrails * * * are subject to the open and obvious doctrine defense. It is undisputed that appellant had been up and down the stairs several times before she fell in daylight and that the view of the stairs was clear and unobstructed.").

{¶ 44} Ultimately, the fact that Jung encountered the Davies' steps the third time while standing backward and dealing with the doors and a lock box does nothing to diminish the determination that the condition was open and obvious, and she freely encountered it. The

open and obvious nature of the entryway is a complete defense. Accordingly, her third and fourth assignments of error are overruled.

{¶ 45} The judgment of the Montgomery County Common Pleas Court is affirmed.

a. . . . . .

DONOVAN and FROELICH, JJ, concur.

Copies mailed to:

Carlo C. McGinnis
Joyce V. Kimbler
Hon. Michael Tucker