[Cite as *Galligan-Dent v. Tecumseh Outdoor Drama*, 2016-Ohio-7907.]

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

JANET K. GALLIGAN-DENT, et al.,	:	
Plaintiffs-Appellants,	:	Case No. 16CA3534
v.	:	
TECUMSEH OUTDOOR DRAMA, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	RELEASED 11/18/2016

APPEARANCES:

Charles M. Elsea and John M. Snider, Stebelton Snider LPA, Lancaster, Ohio, for plaintiffs-appellants.

Michael J. McLane, Columbus, Ohio, for defendants-appellees.

Hoover, J.

{¶ 1} Plaintiffs-appellants, Janet K. Galligan-Dent and Mark Dent, appeal from the entry of the Ross County Common Pleas Court awarding summary judgment in their personal injury action in favor of the defendants-appellees, Tecumseh Outdoor Drama and Scioto Society, Inc. The instant action arises from personal injuries appellant Galligan-Dent suffered on the premises of the Tecumseh Outdoor Drama[1]. Because we conclude that the hazard causing the injuries presented an open and obvious danger, we affirm the judgment of the trial court.

I. Facts and Procedural Posture

[1] It is undisputed that appellee Scioto Society, Inc., owns the property where the Tecumseh Outdoor Drama is performed.

{¶ 2} On June 14, 2013, appellant Galligan-Dent, her 88 year-old mother, her two sisters, and her daughter attended a "girl[s] trip" to Chillicothe, Ohio. In the evening hours the party attended a showing of the outdoor drama "Tecumseh!". The party arrived at the theater early when it was still daylight. They did some shopping in the gift shop; and then watched the show. When the show concluded near 10:00 p.m., appellant Galligan-Dent and the other women exited the theater and walked towards the parking lot. At the bottom of a metal stairway cutting through a wooded area, appellant Galligan-Dent stepped off the last stair step straight onto a flat metal landing area between the stairs and an asphalt ramp/apron. Appellant Galligan-Dent then stepped straight onto the asphalt ramp/apron with her right foot. When appellant Galligan-Dent's left foot arrived at the meeting of the ramp and gravel parking lot, she lost her balance and fell. Appellant Galligan-Dent sustained personal injuries as a result of the fall.

{¶ 3} The stairway involved in this incident cuts through a wooded area, down a hillside, and leads to a gravel parking lot. It is wide enough for two people to walk side by side comfortably. The stairway ends into a short metal landing area with an accompanying handrail. The landing area empties onto an asphalt ramp/apron that leads into the gravel parking lot. The record evidence indicates that there existed, at the time of the incident, a substantial drop-off from the top of the asphalt ramp/apron to the gravel on the left side of the ramp.

{¶ 4} Appellant Galligan-Dent had not encountered the stairway or parking lot before the incident. Rather, when arriving that evening appellant Galligan-Dent had been dropped off near the entrance of the theater. Only appellant Galligan-Dent's daughter had traversed from the parking lot to the theater earlier in the day.

{¶ 5} On October 27, 2014, appellant Galligan-Dent and her husband, appellant Mark Dent, filed a negligence and loss of consortium complaint against the appellees. After answering the complaint and conducting discovery, the appellees filed a summary judgment motion on December 7, 2015. In its summary judgment motion the appellees argued that the hazard was open and obvious, thus obviating it of a duty to warn.

{¶ 6} On December 28, 2015, appellants filed a memorandum in opposition to appellees' summary judgment motion. The appellants argued that the stairway constituted a latent hazard thus mandating that the appellees warn of its dangers. In the alternative, appellants argued that the attendant circumstances surrounding the incident gave rise to a genuine issue of material fact regarding whether the stairway constituted an open and obvious hazard.

{¶ 7} Much of the summary judgment evidence comes from appellant Galligan-Dent's deposition testimony and deposition exhibits. The deposition exhibits include photographs of the stairway, landing area, asphalt ramp/apron, and gravel parking lot. The appellants also submitted deposition testimony from Melinda Akins, appellant Galligan-Dent's daughter, and Connie Martin, appellant Galligan-Dent's sister, with their memorandum in opposition. Finally, the appellants submitted an affidavit and report from Wayne Custer, a licensed professional engineer.

{¶ 8} Appellant Galligan-Dent testified that following the show she exited the theater and walked towards the parking lot. She stated that pedestrian and vehicular traffic was heavy since all patrons exited the theater upon the conclusion of the show; however, the crowd was orderly, and there was no pushing or shoving. As she approached the stairway, she noticed that the patrons were "funneling down into" the stairs towards the parking lot below. Appellant Galligan-

Dent stated that she descended the stairs on the left side, holding the handrail, stepping slowly. While the top of the stairway was lit, the light dimmed as she went further down the stairs. Her testimony of what occurred when she reached the bottom is as follows:

> A And then I got to the bottom of the stairs, based on my foot and based on where the bend of the guardrail went parallel with the street or what I thought was the parking lot.
>
> Q Okay. So there is like a little metal platform at the bottom of the steps?
>
> A Yes.
>
> Q Kind of a landing?
>
> A Yes.
>
> Q Okay. And the handrail goes down and then straightens out –
>
> A Flat, yeah.
>
> Q – with that platform or that landing at the bottom of the steps?
>
> A Right.
>
> Q Okay.
>
> A So I felt like that was a cue that we were now flat.
>
> Q Okay.
>
> A Okay. So I took a step and then another step and –

Q Now, were you still holding on to the handrail?

A Yes. It was still flat. I thought everything was dandy.

* * *

A And then I took another step and I took another step and I thought, "oh, my god," because I stepped off the edge of something. I mean, I thought I stepped in a hole and —

Q Did you step off the metal platform or were you stepping on something else?

A No. By this time the metal platform had stopped, the handrail had stopped.

* * *

A There was nothing there. I stepped on to the asphalt and I stepped and my foot was (indicating).

Q So you took one step onto the asphalt and then it was your second step that there was nothing there?

A Well, from my memory, I would say that.

After she fell, appellant Galligan-Dent testified that she looked back to see what caused her fall, but she was unable to see because it was too dark. However, while sitting on the ground she could feel a noticeable drop from the left side of the asphalt ramp/apron to the gravel parking lot. Appellant Galligan-Dent called the drop-off "a major drop", and estimated that the drop was 10 inches. Appellant Galligan-Dent further testified that she and appellant Dent returned to the

scene of the accident in the summer of 2013 to take photographs[2] in the daylight. Photographs taken with a ruler indicate that the drop-off was between five to ten inches. Appellant Galligan-Dent stated that the photographs taken that day fairly and accurately portrayed the condition of the stairway, asphalt ramp/apron, and the gravel parking lot, as she believes they existed on the night of her fall.

{¶ 9} The affidavit and report from Custer, the licensed and professional engineer, opined that the angle of the drop-off also contributed to the dangerous condition. Custer's report indicates that the "longitudinal slope" and "cross slope" of the asphalt ramp/apron greatly exceeded the limits permitted by the Ohio Building Code. Custer opined that this design created "an unsafe and dangerous condition."

{¶ 10} After reviewing the evidentiary materials, the trial court granted appellees summary judgment and dismissed the complaint. This appeal followed.

II. Assignment of Error

{¶ 11} On appeal, appellants raise the following assignment of error for review:

Assignment of Error:

The Trial Court erred in granting Defendants' Motion for Summary Judgment.

III. Law and Analysis

{¶ 12} In their sole assignment of error, appellants contend that the trial court erred by granting appellees summary judgment because the asphalt ramp/apron at the base of the stairs presented a latent and concealed hazard, thus creating a duty that appellees warn of its danger. In

[2] These photographs make up some of the deposition exhibits mentioned above.

the alternative, appellants argue that even if the asphalt ramp/apron constituted an open and obvious danger, attendant circumstances existed to render the hazard latent.

A. Summary Judgment Standard of Review

{¶ 13} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. Accordingly, we afford no deference to the trial court's decision and independently review the record and the inferences that can be drawn from it to determine whether summary judgment is appropriate. *Harter v. Chillicothe Long-Term Care, Inc.*, 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12; *Grimes v. Grimes*, 4th Dist. Washington No. 08CA35, 2009-Ohio-3126, ¶ 16.

{¶ 14} Summary judgment is appropriate only when the following have been established: (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 only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the nonmoving party's favor. Civ.R. 56(C). The party moving for summary judgment bears the initial burden to demonstrate that no genuine issues of material fact exist and that they are entitled to judgment in their favor as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action," that affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R.

56(C); *Dresher* at 293. Moreover, the trial court may consider evidence not expressly mentioned in Civ.R. 56(C) if such evidence is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *Discover Bank v. Combs*, 4th Dist. Pickaway No. 11CA25, 2012-Ohio-3150, ¶ 17; *Wagner v. Young*, 4th Dist. Athens No. CA1435, 1990 WL 119247, *4 (Aug. 8, 1990). Once that burden is met, the nonmoving party then has a reciprocal burden to set forth specific facts to show that there is a genuine issue for trial. *Dresher* at 293; Civ.R. 56(E).

B. Negligence

{¶ 15} For their negligence claim, appellants "must show the existence of a duty, a breach of that duty, and that the breach of that duty proximately caused the plaintiff's injury." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 18, citing *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989). "If a defendant points to evidence to illustrate that the plaintiff will be unable to prove any one of the foregoing elements, and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to judgment as a matter of law." *Ray v. Wal-Mart Stores, Inc.*, 4th Dist. Washington No. 08CA41, 2009-Ohio-4542, ¶ 19, citing *Lang v. Holly Hill Motel, Inc.*, 4th Dist. Jackson No. 06CA18, 2007-Ohio-3898, ¶ 19, affirmed, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120.

C. Premises Liability and the "Open and Obvious" Doctrine

{¶ 16} The threshold question presented in this appeal is whether appellees owed a duty of care to appellant Galligan-Dent. "In a premises liability case, the relationship between the owner and occupier of the premises and the injured party determines the duty owed." *Ray* at ¶ 26. Here, the parties agree that appellant Galligan-Dent was a business invitee.

{¶ 17} This Court has previously set forth the duty of care owed to business invitees:

A premises owner or occupier possesses the duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that its business invitees will not unreasonably or unnecessarily be exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 203, 480 N.E.2d 474. A premises owner or occupier is not, however, an insurer of its invitees' safety. See *id.* While the premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers, see *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 358, 390 N.E.2d 810, invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. See *Brinkman v. Ross* (1993), 68 Ohio St.3d 82, 84, 623 N.E.2d 1175; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus.

Therefore, when a danger is open and obvious, a premises owner owes no duty of care to individuals lawfully on the premises. See *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, at ¶ 5; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus. By focusing on duty, "the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it." *Id.* at ¶ 13, 233 N.E.2d 589. 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, 788 N.E.2d 1088. Thus, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to recovery. *Id.* at ¶ 5, 788 N.E.2d 1088.

Ray at ¶¶ 27-28; *Jackson v. Pike Cty. Bd. of Commrs.*, 4th Dist. Pike No. 10CA805, 2010-Ohio-4875, ¶¶ 16-17.

{¶ 18} This Court has stated in the past that under certain circumstances whether a danger is open and obvious presents a question of fact. *Ray* at ¶ 29; *Jackson* at ¶ 20. Specifically, this Court stated that where only one conclusion can be drawn from the established facts, the issue of whether a danger was open and obvious may be decided by the court as a matter of law; but 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 trier of fact to determine. *Id*.

{¶ 19} However, in concurring opinions, this Court has also set forth the view that whether a danger is open and obvious is a part of the legal question of duty so that courts should always decide it as a matter of law. *Ray* at ¶ 43 (Harsha, J., concurring); *Jackson* at ¶ 32 (Harsha, J., concurring); *Strevel v. Fresh Encounter, Inc.*, 4th Dist. Highland No. 15CA5, 2015-Ohio-5004, ¶ 33 (Harsha, J., concurring); *Wheatley v. Marietta College*, 2016 -Ohio- 949, 48 N.E.3d 587, ¶ 129 (4th Dist.) (Harsha, J., concurring). The concurring opinions rely on Ohio Supreme Court case law that holds that duty is a question of law. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002–Ohio–4210, 773 N.E.2d 1018, ¶ 22. Moreover, a court's consideration of

evidence when deciding a question of law does not necessarily convert the issue into a question of fact. *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68, 430 N.E.2d 935 (1982).

{¶ 20} In this matter, we must determine whether the asphalt ramp/apron at the base of the stairway constituted an open and obvious hazard as a matter of law, thus obviating appellees of its duty to warn its business invitees of its potential dangers.

1. The drop-off of the asphalt ramp/apron at the base of the stairway presented an open and obvious danger.

{¶ 21} Determination of whether a hazard is latent or open and obvious depends upon the particular circumstances surrounding the hazard. These circumstances may include the lighting conditions, weather, time of day, traffic patterns, or activities engaged in at the time. *Jackson*, 2010-Ohio-4875, at ¶ 20; *Ray*, 2009-Ohio-4542, at ¶ 29. Moreover, " '[t]he law uses an objective, not subjective, standard when determining whether a danger is open and obvious. The fact that appellant herself was unaware of the hazard is not dispositive of the issue. It is the objective, reasonable person that must find that the danger is not obvious and apparent.' " *Ray* at ¶ 31, quoting *Goode v. Mt. Gillion Baptist Church*, 8th Dist. Cuyahoga No. 87876, 2006-Ohio-6936, ¶ 25.

{¶ 22} Here, we conclude that appellees owed no duty of care to appellant Galligan-Dent because the hazard associated with the asphalt ramp/apron at the base of the stairway was open and obvious. First, a reasonable person who looked would have noticed the significant drop-off on the left side of the ramp/apron, described as "a major drop" by appellant Galligan-Dent, so as to avoid its potential dangers. There was nothing hiding or concealing the danger from appellant Galligan-Dent's view. Moreover, the record evidence, specifically the photographic evidence,

clearly shows the rugged nature of the stairway and surrounding grounds so that a reasonable visitor would have been put on notice of the potential dangers.

{¶ 23} Next, to the extent that appellants argue that insufficient lighting contributed to the latent nature of the hazard, we note that this Court has previously rejected an identical argument. In *Jackson, supra*, a business invitee fell at the seam of a sidewalk and a "slowly-inclining wheelchair ramp that abuts part of the sidewalk", and alleged that "the area * * * was shadowed and inhibited her ability to see the drop off." *Id*. at ¶¶ 5, 6. This Court, in addressing the allegation, noted as follows:

> (1) [A] business owner has no affirmative duty to light walkways and public parking areas outside their buildings to accommodate invitees; and (2) darkness is always a warning of danger. See *Jeswald v. Hutt* (1968), 15 Ohio St.3d 224, 239 N.E.2d 37, paragraphs two and three of the syllabus. Thus, "[t]he amount of light in a given area is an open and obvious condition." *Swonger v. Middlefield Village Apartments*, Geauga App. No.2003-G-2547, at ¶ 12. In the case at bar, if the area was as dark and shadowed as appellee claims, then such condition itself should have served as a warning to appellee to exercise caution and was an open and obvious danger of which she should have been aware. 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"); *Swonger* ("the person who disregards a dark condition does so at his or her own peril.").

Id. at ¶ 24. Based on this precedent, we reject appellants' argument that the nighttime conditions rendered the hazard latent as opposed to open and obvious.

2. Attendant circumstances did not exist to render the hazard latent.

{¶ 24} As this Court has explained on previous occasions, "attendant circumstances" may exist at the time of the fall that renders an ordinarily obvious danger latent.

> "Attendant circumstances" may also * * * [determine] * * * whether a hazard is open and obvious. See *Lang* at ¶ 24; *Cummin v. Image Mart, Inc.*, Franklin App. No. 03AP1284, 2004-Ohio-2840, at ¶ 8, citing *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 498, 693 N.E.2d 807. 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.* (1996), 115 Ohio App.3d 155, 158, 684 N.E.2d 1273. "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* (1981), 66 Ohio St.2d 319, 324, 421 N.E.2d 1275. An "attendant circumstance" has also 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.
>
> Attendant circumstances do not include the individual's activity at the moment of the fall, unless the individual's attention was diverted by an unusual

> circumstance of the property owner's making. See *Id.* at 498, 693 N.E.2d 807. Moreover, an individual's particular sensibilities do not play a role in determining whether attendant circumstances make the individual unable to appreciate the open and obvious nature of the danger. * * *

Ray at ¶¶ 30-31; *Jackson* at ¶¶ 21-22.

{¶ 25} Appellants argue that there existed a myriad of circumstances to divert the attention of a reasonable patron exiting the "Tecumseh!" production. Specifically, the appellants cite the vehicular traffic exiting the parking lot and the distraction of the vehicle lights. The appellants also cite the "heavy" pedestrian traffic following the exodus from the theater.

{¶ 26} After reviewing the record evidence, we disagree that attendant circumstances existed that would render the condition less than open and obvious. With respect to the pedestrian traffic, we note that this is a normal condition that one would expect to encounter when walking down a stairway leading to a parking area. Simply put, "the presence of another passer-by does not constitute an 'attendant circumstance' sufficient to create an issue * * * regarding the open and obvious nature of the danger." *Jackson* at ¶ 23, citing *Stinson v. Kirk*, 6th Dist. Ottawa No. OT-06-044, 2007-Ohio-3465, ¶ 26. Furthermore, the evidence indicates that the crowd was orderly and that plenty of space existed on the stairway to safely cross the grounds. The evidence also does not indicate that the vehicular traffic or vehicular lights contributed to the fall. Appellant Galligan-Dent testified, "[c]oming down the steps, you could occasionally see probably a flashlight or you could see cars that would go by" but the lights were "headed in another direction". Later, when asked whether she remembered any vehicles passing through the gravel parking lot as she was walking down the stairway she replied: "Not really, no." Similarly,

Connie Martin, who was descending the stairway at the same time of appellant Galligan-Dent, testified that there were no vehicles leaving the parking lot when they were descending the steps and that the headlights from the vehicles were not illuminating the area where they were walking. Given this record, we conclude that the evidence does not support appellants' allegation that the vehicular traffic and vehicular lights contributed to the hazardous nature of the asphalt ramp/apron at the base of the stairway.

IV. Conclusion

{¶ 27} Based on the foregoing, reasonable minds could only conclude that the condition was open and obvious as a matter of law. Only one conclusion can be drawn from the established facts. Accordingly, the appellees did not owe a duty of care to appellant Galligan-Dent; and it cannot be liable under a negligence theory. Because appellants cannot establish a negligence claim against appellees, appellant Dent's loss of consortium claim must also fail. *Sexton v. Certified Oil Co.*, 4th Dist. Ross No. 11CA3299, 2013-Ohio-482, ¶ 7. Therefore, the trial court did not erroneously grant summary judgment in favor of the appellees; and we hereby overrule appellants' sole assignment of error. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellants shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

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

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

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, 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.