[Cite as *Chovan v. DeHoff Agency, Inc.*, 2010-Ohio-1646.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MICHELLE A. CHOVAN, et al.

Plaintiffs-Appellants

-vs-

DEHOFF AGENCY, INC., et al.

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 2009 CA 00114

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 08 CV 03291
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 12, 2010

APPEARANCES:

For Plaintiffs-Appellants

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Wise, J.

{¶1} Plaintiffs-Appellants Michelle A. Chovan and Doug Chovan appeal the April 8, 2009 Judgment Entry entered by the Stark County Court of Common Pleas, which granted summary judgment in favor of Defendant-Appellee DeHoff Agency, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} In August, 2006, Michelle Chovan was employed by the Stark County Department of Job and Family Services ("the Agency"). The offices for the Agency were, and still are, located at 800 30th Street, NW, in Canton, Ohio. Appellee DeHoff Agency owns the premises.

{¶3} After working five hours during the morning of August 4, 2006, moving tables, chairs, and easels as well as carrying boxes of paperwork and handouts, Michelle Chovan took her lunch hour. Michelle Chovan signed out, walked through the lobby and out the double doors. She turned right and proceeded down the walkway next to the office building. As she stepped off the walkway, onto the handicap accessibility ramp leading from the building walkway to the parking lot, the heel of her sandal caught in a rut in the asphalt, causing her to fall. Michelle Chovan suffered an open compound fracture of her tibia and fibula.

{¶4} Michelle Chovan filed a Complaint in the Stark County Court of Common Pleas, asserting claims of negligence against Appellee DeHoff Agency and seeking damages. Doug Chovan joined the Complaint, claiming loss of consortium.

{¶5} On February 9, 2009, Appellee filed a Motion for Summary Judgment, arguing no genuine issues of material fact remained as Michelle Chovan's fall was the

result of a trivial defect in the pavement, and any defect in said pavement was open and obvious.

{¶6} Appellants filed a Brief in Opposition on March 12, 200, followed by Appellee's Reply Brief on March 19, 2009.

{¶7} Via Judgment Entry filed April 8, 2009, the trial court granted summary judgment in favor of Appellee. The trial court reviewed the legal status of an injured person and found Appellants offered no evidence of willful, wanton and/or malicious conduct to establish Appellee breached its duty of care to Michelle Chovan as a licensee. The trial court further found, assuming Michelle Chovan was an invitee, Appellants failed to establish the existence of a genuine issue of material fact showing Appellee breached its duty of ordinary care. The trial court also concurred with Appellee's assertions any defect in the ramp was a less than two inch variation; therefore, minor or trivial; and any defect was open and obvious.

{¶8} It is from this judgment entry Appellants appeal, raising the following assignments of error:

ASSIGNMENTS OF ERROR

{¶9} "I. THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT BASED ON COMMON LAW DOCTRINES WHEN THE APPELLEE'S DUTIES ARE CREATED BY CODIFIED ORDINANCE.

{¶10} "II. SUMMARY JUDGMENT COULD NOT BE GRANTED ON THE 'TRIVIAL DEFECT' DEFENSE BECAUSE APPELLEE SUBMITTED NO EVIDENCE TO SUPPORT IT.

{¶11} "III. THE TRIAL COURT WAS INCORRECT TO FIND THAT THE 'OPEN AND OBVIOUS' DOCTRINE APPLIES."

Standard of Review

{¶12} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ. R. 56(C) provides, in pertinent part:

{¶13} "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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Id.

{¶14} Pursuant to the above rule, a trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Houndshell v. American States Ins. Co.*

(1981), 67 Ohio St.2d 427. The court may not resolve ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301.

{¶15} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt* (1996), 75 Ohio St.3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732.

{¶16} It is based upon this standard we review Appellants' assignments of error.

I, II, III

{¶17} Because our analysis of each of Appellants' assignments of error overlap, we shall address said assignments of error together. In their first assignment of error, Appellants maintain the trial court erred in granting summary judgment based upon common law doctrine because Appellee's duties were created by codified ordinances. In their second assignment of error, Appellants assert the trial court erred in granting summary judgment to Appellee based upon the defense of trivial defect as Appellee failed to submit any evidence to support such defense. In their final assignment of error,

Appellants contend the trial court's application of the open and obvious doctrine was erroneous.

{¶18} "[I]n order to establish actionable negligence, 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.

{¶19} In premises liability situations, the duty owed by a landowner to individuals visiting the property is determined by the relationship between the parties. *Light v. Ohio University* (1986), 28 Ohio St.3d 66. Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability which determines the standard of care owed to the individual. *Shump v. First Continental-Robinwood Assoc.* (1994), 71 Ohio St.3d 414, 417, 1994-Ohio-427; *Boydston v. Norfolk S. Corp.* (1991), 73 Ohio App.3d 727, 733; *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315.

{¶20} Under Ohio law, "a person who enters the premises of another by permission or acquiescence, for his *own* pleasure or benefit, and not by invitation, is a licensee." *Light v. Ohio Univ.,* (1986) 28 Ohio St.3d 66, 68. The only duty an owner owes a licensee is to "refrain from wantonly or willfully causing injury." Id. (citing *Hannan v. Ehrlich,* 102 Ohio St. 176, paragraph four of the syllabus (1921)).

{¶21} In contrast, "business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 68. The duty of care owed by a landowner to a business invitee is to exercise ordinary care to keep the premises in a reasonably safe condition so as to not expose the individual to any unnecessary or

unreasonable risks of harm. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, citing *Campbell v. Hughes Provision Co.* (1950), 153 Ohio St. 9.

{¶22} Appellants argue that Michelle Chovan's status was that of an invitee, not a licensee, and as such, was owed a higher standard of care.

{¶23} In the instant case, Appellant receives a direct benefit from being on the premises in the form of her employment with Job and Family Services. Appellee receives a benefit from its tenant, Job and Family Services, in the form of rent. This does not automatically make Appellant a licensee. As stated above, what determines whether a person is an invitee rather than a licensee, however, is whether the owner of the premises benefits by the person being on the premises. While Appellee does receive a benefit from its tenant, Job & Family Services, in the form of rent, we can discern no direct benefit to Appellee from Appellant being on the premises. We therefore find that Appellant is a licensee in the case sub judice and that as such the only duty Appellee owed her was to "refrain from wantonly or willfully causing injury." *Ehrlich,* supra.

{¶24} However, even assuming arguendo, that Appellant was an invitee and that the higher standard of care applied, Appellee was nonetheless entitled to summary judgment.

{¶25} The Supreme Court of Ohio, in *Armstrong v. Best Buy,* 99 Ohio St.3d 79, 2003-Ohio-2573, held as follows: "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong,* syllabus. "The rationale underlying this doctrine 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.' " *Id.* at paragraph 5, quoting *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644.

{¶26} A hazard is "open and obvious" when in plain view and readily discoverable upon ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 51.

{¶27} Appellants argue that the open and obvious doctrine does not apply in this case, arguing that Appellee breached a statutory duty created by the City of Canton's Codified Ordinance 521.04 and 905.01.

{¶28} We have reviewed the ordinances cited by Appellants and find such do not apply in this case. These ordinances are limited to sidewalks and curbs adjacent to streets. Herein, Appellant fell when she stepped off a walkway adjacent to the Job & Family Services building and began walking down a sloped asphalt handicap accessibility ramp into the parking lot; therefore, it does not fall within the definition of "sidewalk". Because the handicap accessibility ramp is not a sidewalk, the aforementioned ordinances have no applicability to the case sub judice. Accordingly, we find Appellee's duty to Appellants arises from common law.

{¶29} We have examined the exhibits and the record before this Court and find there were grooves, depressions, and/or ruts in the ramp and that such posed an open and obvious danger which Michelle Chovan should reasonably have been expected to discover.

{¶30} Based upon the foregoing, we find Appellee was entitled to summary judgment.

{¶31} Appellants' first, second, and third assignments of error are overruled.

{¶32} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Gwin, P.J. concurs.

Hoffman, J. dissents

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

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JWW/d 0324

Hoffman, J., dissenting

{¶33} I respectfully dissent from the majority opinion.

{¶34} While I agree with the majority City of Canton Codified Ordinances 521.04 and 905.01 do not have any applicability to the instant action, I respectfully dissent from the majority's opinion the danger was open and obvious, and Appellant should reasonably have been expected to discover such danger.[1]

{¶35} Whether a hazard is open and obvious must be determined on the facts in each case. *Navarette v. Pertoria, Inc.,* 6th Dist. No. WD-02-070, 2003-Ohio-4222, ¶ 19. A hazard is considered to be open and obvious when it is in plain view and readily discoverable upon ordinary inspection. See *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 51.

{¶36} The trial court and the majority found the handicap accessibility ramp posed an open and obvious danger which Michelle Chovan should reasonably have been expected to discover. However, we must also determine whether there existed any attendant circumstances surrounding Michelle Chovan's fall, thereby negating application of the open and obvious defense.

{¶37} Attendant circumstances may present a dispute of material fact as to whether a defect is open and obvious. "[T]here is no precise definition of 'attendant circumstances' but they generally include " 'any distraction that would come to the

[1] The majority concludes Appellant's status was that of a licensee. If so, I would agree Appellant's evidence was insufficient to demonstrate Appellee wantonly or willingly caused her injuries; therefore, granting summary judgment in favor of Appellee would have been appropriate.

However, I find Appellant was an invitee. While Appellee may have received no direct benefit from Appellant being on the premises, Appellee did receive an indirect benefit via Appellant's employer paying rent. The "benefit" in the case sub judice seems mutual.

attention of a pedestrian in the same circumstances and reduce[d] the degree of care an ordinary person would exercise at the time." ' " (Citations omitted.) *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 499, 693 N.E.2d 807. Attendant circumstances "must significantly enhance the danger of the defect, and contribute to the fall." Id, quoting *Stockhauser v. Archdiocese of Cincinnati* (1994), 97 Ohio App.3d 29, 33-34, 646 N.E.2d 198, 201.

{¶38} Construing the evidence most favorably to Appellants, I conclude there are disputed issues of material fact as to whether any attendant circumstances existed at the time of Michelle Chovan's fall, which would reduce the degree of care an ordinary person would exercise in using the handicapped accessibility ramp.

{¶39} Michelle Chovan testified, on the day of the accident, she exited her place of employment and stepped onto the walkway in front of the building. Out of the corner of her eye, she noticed a car driving alongside the walkway. Because of this moving vehicle, she traversed down the handicap accessibility ramp. Michelle Chovan indicated she walked this alternate route to her vehicle because workers were pouring asphalt in the area she typically traveled. After having examined the exhibits, and closely focusing my attention on the grooves, depressions, and/or ruts in the ramp, I find reasonable minds could come to different conclusions as to whether the defects were open and obvious and whether Michelle Chovan's attention was sufficiently diverted by attendant circumstances thereby limiting her appreciation of the alleged defects in the ramp.

{¶40} Accordingly, I would sustain Appellants' first, second, and third assignments of error, and reverse and remand the judgment of the Stark County Court of Common Pleas.

/S/ WILLIAM B. HOFFMAN
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MICHELLE A. CHOVAN, et al.	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
DEHOFF AGENCY, INC., et al.	:	
Defendants-Appellees	:	Case No. 2009 CA 00114

For the reasons stated in our accompanying Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

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