**[Cite as *Sheline v. Denman*, 2010-Ohio-2041.]**

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| | : | JUDGES: |
| KAREN SHELINE, et al., | : | Julie A. Edwards, P.J. |
| | : | William B. Hoffman, J. |
| Plaintiffs-Appellants | : | Sheila G. Farmer, J. |
| | : | |
| -vs- | : | Case No. CT2009-0033 |
| | : | |
| | : | |
| DON DENMAN, et al., | : | O P I N I O N |
| Defendants-Appellees | | |

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|---|---|
| CHARACTER OF PROCEEDING: | Civil Appeal from Muskingum County Court of Common Pleas Case No. CC 2007-0445 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | May 6, 2010 |

APPEARANCES:

| For Plaintiffs-Appellants | For Defendants-Appellees |
|---|---|
| MILES. D. FRIES<br>Gottlieb, Johnston, Beam<br>& Dal Ponte, PPL<br>320 Main Street<br>P.O. Box 190<br>Zanesville, Ohio 43702-0190 | JAMES D. SILLERY<br>Monica, Gall, Sloan<br>& Sillery Co., LPA<br>35 North College Street<br>P.O. Drawer 958<br>Athens, Ohio 45701 |

*Edwards, P.J.*

**{¶1}** Plaintiffs-appellants, Karen and James Sheline, appeal from the July 9, 2009, Entry of the Muskingum County Court of Common Pleas granting the Motion for Summary Judgment filed by defendants-appellees Don Denman and Denman Corporation.

STATEMENT OF THE FACTS AND CASE

**{¶2}** On or about July 5, 2005, appellant Karen Sheline was visiting a friend, who rented an apartment from appellee Don Denman. Appellant had visited her friend at the same apartment, at the most, two times before. After her friend gave appellant some clothes for her grandchildren, appellant went to put the same into her vehicle. As appellant was returning to her friend's apartment, she tripped over a cleanout/drain cap on the sidewalk leading to her friend's apartment.

**{¶3}** On June 28, 2007, appellant and her husband filed a complaint against appellees Don Denman and Denman Corporation alleging that the same were negligent. Appellants, in their complaint, alleged that appellees had created or allowed to exist a hazardous condition on the premises.

**{¶4}** Subsequently, appellees filed a Motion for Summary Judgment. Appellees, in their motion, argued that the drain cap was open and obvious. Appellees also argued that the drain cap was less than two inches in height above the level of the sidewalk and that such deviation was insubstantial as a matter of law.

**{¶5}** Pursuant to an Entry filed on July 9, 2009, the trial court granted appellees' Motion for Summary Judgment.

**{¶6}** Appellants now raise the following assignment of error on appeal:

**{¶7}** "I. SUMMARY JUDGMENT IS NOT APPROPRIATE WHEN THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER A HAZARDOUS CONDITION WAS OPEN AND OBVIOUS."

I

**{¶8}** Appellants, in their sole assignment of error, argue that the trial court erred in granting appellees' Motion for Summary Judgment because there was a genuine issue of material fact as to whether the drain cap was open and obvious. We disagree.

**{¶9}** We review appellant's Assignment of Error pursuant to the standard set forth in Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211, 663 N.E.2d 639:

**{¶10}** "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267, 274.

**{¶11}** As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

**{¶12}** Appellants, in the case sub judice, filed a complaint against appellees alleging that appellees were negligent. In order to establish a claim for negligence, a plaintiff must show: (1) a duty on the part of defendant to protect the plaintiff from injury; (2) a breach of that duty; and (3) an injury proximately resulting from the breach. *Huston v. Koncieczny* (1990), 52 Ohio St.3d 214, 217, 556 N.E.2d 505; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. If a defendant points to evidence illustrating 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. *Aycock v. Sandy Valley Church of God,* Tuscarawas App. No.2006 AP 09 0054, 2008-Ohio-105, at paragraph 20.

**{¶13}** In a premises liability case, the relationship between the owner or occupier of the premises and the injured party determines the duty owed. *Aycock,* supra at paragraph 21 citing *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287. Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 417, 1994-Ohio-427, 644 N.E.2d 291. Appellant, as a guest of her friend's, was an invitee, see *McCool v. Hillbrook* Apartments (Aug. 23, 1995), Mahoning App. No. 93 C.A. 200, 1995 WL 510027.

**{¶14}** An invitee is defined as a person who rightfully enters and remains on the premises of another at the express or implied invitation of the owner and for a purpose beneficial to the owner. *Gladon,* supra at 315. The owner or occupier of the premises owes the invitee a duty to exercise ordinary care to maintain its premises in a

reasonably safe condition, such that its invitees will not unreasonably or unnecessarily be exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474. A 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, 359, 390 N.E.2d 810. However, a premises owner is not, an insurer of its invitees' safety against all forms of accidents that may happen. *Paschal,* supra at 203-204. Invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. See *Brinkman v. Ross*, 68 Ohio St.3d 82, 84, 1993-Ohio-72, 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, 2003-Ohio-2573, 788 N.E.2d 1088; *Sidle*, supra at paragraph one of the syllabus.

**{¶15}** Open and obvious dangers are not concealed and are discoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51, 566 N.E.2d 698. The dangerous condition at issue does not actually have to be observed by the claimant to be an open and obvious condition under the law. *Lydic v. Lowe's Cos., Inc.,* Franklin App. No. 01AP-1432, 2002-Ohio-5001, at paragraph 10. Rather, the determinative issue is whether the condition is observable. *Id.* “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*, supra at paragraph 5, citing *Simmers v. Bentley Construction Co.*, 64 Ohio

St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504. "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." *Armstrong,* supra at paragraph 13. When applicable, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claim. *Id.*

**{¶16}** In most situations, whether a danger is open and obvious presents a question of law. See *Hallowell v. Athens,* Athens App. No. 03CA29, 2004-Ohio-4257, at paragraph 21. See, also, *Nageotte v. Cafaro Co.,* 160 Ohio App.3d 702, 2005-Ohio-2098, 828 N.E.2d 683. However, under certain circumstances disputed facts may exist regarding the openness and obviousness of a danger thus rendering it a question of fact. As the court explained in *Klauss v. Marc Glassman, Inc.,* Cuyahoga App. No. 84799, 2005-Ohio-1306, at paragraphs 17-18: "Although the Supreme Court of Ohio has held that whether a duty exists is a question of law for the court to decide, the issue of whether a hazardous condition is open and obvious may present a genuine issue of fact for a jury to review.

**{¶17}** "Where only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law… See *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 566 N.E.2d 698. However, 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 jury to determine. *Carpenter v. Marc Glassman, Inc.* (1997), 124 Ohio App.3d 236, 240, 705 N.E.2d 1281; *Henry v. Dollar General Store,* Greene App. No.2002-CA-47, 2003-Ohio-206; *Bumgarner v. Wal-*

*Mart Stores, Inc.,* Miami App. No.2002-CA-11, 2002-Ohio-6856." Accordingly "[t]he determination of the existence and obviousness of a danger alleged to exist on a premises requires a review of the facts of the particular case." *Miller v. Beer Barrel Saloon* (May 24, 1991), Ottawa App. No. 90-OT-050, 1991 WL 87098 at 3.

**{¶18}** "Attendant circumstances" become part of the analysis and may create a genuine issue of material fact as to whether a hazard is open and obvious. See *Cummin v. Image Mart, Inc.,* Franklin App. No. 03AP1284, 2004-Ohio-2840, at paragraph 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 paragraph 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 person in the same circumstances and reduce the degree of care an ordinary person would have exercised 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. Id. at 498.

**{¶19}** Also, 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. As the court explained in *Goode v. Mt. Gillion Baptist Church,* Cuyahoga App. No. 87876, 2006-Ohio-6936, at paragraph 25:

**{¶20}** "The law uses an objective, not subjective, standard when determining whether a danger is open and obvious. The fact that a particular appellant herself is not aware of the hazard is not dispositive of the issue. It is the objective, reasonable person that must find that the danger is not obvious or apparent."

**{¶21}** At issue in the case sub judice is whether or not the drain cap was open and obvious. Appellant maintains that, due to heavy rain and lightning, her attention was diverted and that, due to the distraction of the weather, she did not see the drain cap.

**{¶22}** Appellant, during her deposition, testified that July 5, 2007, the day of the accident, was a cloudy day and that it was pretty light outside at 2:30 p.m. or 3:00 p.m. when she first arrived to visit her friend. She also testified that she could see pretty well. She testified that the steps which she had walked down on the date of the accident were the same steps that she went down when she visited her friend prior to the accident. She further testified that when she reached the bottom of the steps on each of the occasions, she made a left onto the sidewalk toward her friend's apartment. The drain cap is on the sidewalk.

**{¶23}** Appellant testified that there was no reason why she never saw the drain cap. When asked if the drain cap was readily visible if appellant stood on the top of the steps, appellant indicated that it was. Appellant testified that she never saw the drain cap, but when asked if there was some reason why she never saw the same, she could not provide a reason. She further admitted that, "other then inattention", there was

nothing that would keep her from seeing the drain cap. Deposition of Karen Sheline at 28.

**{¶24}** The following is an excerpt from appellant's deposition testimony:

**{¶25}** "Q. I understand that, but there wasn't anything that obstructed your view of that drain cap; was there?

**{¶26}** "A. No, sir.

**{¶27}** "Q. It wasn't dark?

**{¶28}** "A. If you are asking me that way, no.

**{¶29}** "Q. It wasn't dark; was it?

**{¶30}** "A. No.

**{¶31}** "Q. So, darkness didn't keep you from seeing it.

**{¶32}** "A. No.

**{¶33}** "Q. There wasn't anything in front of you that kept you from seeing it?

**{¶34}** "A. No.

**{¶35}** "Q. There wasn't any reason why you couldn't see that drain cap; is there?

**{¶36}** "A. I didn't look for a drain cap.

**{¶37}** "Q. I understand that. There wasn't anything that kept you from seeing it, though - -

**{¶38}** "MR. FRIES: I am going to object.

**{¶39}** "Q. - - is that right?

**{¶40}** "MR. FRIES: You are asking her to speculate. She's told you she didn't see it. You are asking her to speculate as to why she didn't see it. There's any number of reasons why she didn't see it.

**{¶41}** "MR. SILLERY: Like what?

**{¶42}** "THE WITNESS: I didn't look for it." Deposition of Karen Sheline at 35-36.

**{¶43}** During her deposition, appellant also testified that the drain cap was readily visible in a photograph and that "it sticks way up." Deposition of Karen Sheline at 48. When asked if the picture was different from the way the drain cap existed that day, appellant responded "No" and indicated that the drain cap stuck way up on the day of the accident. Id. She further testified that the drain cap "probably" was visible on the day she fell. Id at 49.

**{¶44}** Based on the foregoing, we find that reasonable minds could only conclude that the drain cap was open and obvious. We find no evidence of any attendant circumstances which enhanced the danger to appellant and contributed to her fall. We find, therefore, that appellees owed no duty to appellant to warn her of the drain cap and that the trial court did not err in granting summary judgment in favor of appellees.

**{¶45}** Accordingly, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Farmer, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES

JAE/d0212

**[Cite as *Sheline v. Denman*, 2010-Ohio-2041.]**

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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| KAREN SHELINE, et al., | : | |
| Plaintiffs-Appellants | : | |
| -vs- | : | JUDGMENT ENTRY |
| DON DENMAN, et al., | : | |
| Defendants-Appellees | : | CASE NO. CT2009-0033 |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs assessed to appellants.

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES