[Cite as *Miller v. Cardinal Mooney High School*, 2021-Ohio-720.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

MEGAN MILLER,

Plaintiff-Appellant,

v.

CARDINAL MOONEY HIGH SCHOOL et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0037

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2017 CV 03276

BEFORE:
Carol Ann Robb, David A. D'Apolito, Judges and Michael D. Hess,
Judge of the Fourth District Court of Appeals,
Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Charles V. Longo, *Atty Gregory B. Gipson,* Charles V. Longo, Co., L.P.A., 25550 Chagrin Boulevard, Suite 320, Beachwood, Ohio 44122, for Plaintiff-Appellant and

Atty. Robert S. Fulton, *Atty. Karly B. Johnson,* Manchester, Newman & Bennett, LLP, The Commerce Building, Atrium Level Two, 201 E. Commerce Street, Youngstown, Ohio 44503 for Defendants-Appellees.

Dated: January 21, 2021

Robb, J.

{¶1} Plaintiff-Appellant Megan Miller appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of Defendants-Appellees Cardinal Mooney High School. Applying the primary assumption of risk doctrine, which is applicable to participants and spectators of sporting events, the trial court held the school's duty was eliminated and Appellant's negligence action was thereby precluded. A cause of action for reckless or intentional conduct was found to be unsupported by the evidence. The court alternatively found the school's duty was eliminated by the open and obvious nature of the hazard. For the following reasons, we uphold these rulings and affirm the trial court's judgment.

STATEMENT OF THE CASE

{¶2} Appellant was a player on the Gilmour Academy basketball team who participated in a junior varsity game at Cardinal Mooney High School on December 12, 2015. After Appellant's game, her coach required her to stay and watch the varsity game until at least half-time. Although her game was over and she was leaving after half-time, she left her belongings in the locker room. The locker room had one windowless door which opened into the gymnasium on the wall behind the backboard. The door was more than 14 feet behind the baseline and more than 7 feet to the left of the center of the hoop (when viewing the hoop from the wall behind it).

{¶3} During half-time of the varsity game, Appellant entered the locker room to retrieve her belongings. While she was in the locker room, the varsity game resumed play. Appellant began to exit the locker room by using her left hand to push the door, which opened to her left. As she began to move through the doorway, a varsity player crashed into the door causing it to slam shut on Appellant's right hand. This resulted in a severe injury to her fingers.

{¶4} On December 11, 2017, Appellant filed a complaint against Cardinal Mooney High School. First, the complaint generally said the school breached its duty of care to a business invitee and was negligent due to: the location of the door near a basketball hoop that was in use, the failure to prevent the use of the door during play, and the failure to warn of the imminent danger. The complaint then set forth two counts: (1) a "negligence" count, which alleged Appellant was injured by the school's "negligent, reckless, and/or willful permitted use of the Door, and failure to warn [her] of the dangerous concealed hazard"; and (2) a "negligent supervision" count which

focused on the failure to warn of the imminent danger posed by the door and the failure to ensure an agent supervised the door to prevent use during the game.

{¶5} The school filed a motion for summary judgment. First, the motion pointed to the primary assumption of risk doctrine, arguing the doctrine eliminated the duty of ordinary care owed by a landowner or recreation provider to a participant or spectator at a sporting or recreational activity if the negligent action arose from a risk inherent in the activity. The school noted an exception for a defendant's reckless or intentional conduct but said the evidence failed to show reckless or intentional conduct. The school alternatively argued the duty to protect or warn was eliminated by the open and obvious doctrine.

{¶6} The school pointed to Appellant's deposition testimony stating: she was aware of the risk of players stumbling beyond the boundaries of the basketball court as she too had stumbled off the court into objects and had observed other players doing so; she noticed the padding on the wall and door at this court and knew it was there to protect players who may hit the wall; she indicated it was not typical to monitor players entering the locker room; she knew the varsity game was due to restart after half-time; and she used the locker room door numerous times that day (during her game and then when entering to retrieve her belongings during the varsity game).

{¶7} The affidavit of the school's director of facilities provided measurements and said the school was a member of the Ohio High School Athletic Association which is a member of the National Federation of State High School Associations. He said the location of the locker room door has not changed since the gymnasium was constructed in 1956. After research and inquiry, he found no prior incident involving the door. He also explained that the locker room is not for use by the public; only players, coaches, and officials are authorized to use the locker room during any athletic event being held in the gymnasium.

{¶8} The expert report submitted by the school pointed out that the buffer zone of more than 14 feet at the end of the basketball court exceeded the Federation's guidelines which suggested a minimum buffer zone of 3 feet and a preferred buffer zone of 10 feet. These guidelines also suggested padding behind the hoop extending 6 feet in both directions; the school's padding extended 10 feet in both directions, including the padding which covered the locker room door. The school's expert opined the conditions were not unsafe. The measurements which exceeded the guidelines

reasonably protected users of the court, including users of the locker room. In response to a remedial measure suggested by Appellant's expert, the school's expert opined, "a lexan window in the locker room door would create an increased risk to players by eliminating the padding over that area."

{¶9} Appellant's response in opposition to summary judgment argued the primary assumption of risk doctrine and the open and obvious doctrine did not apply and the school remained obligated to protect and warn her as a business invitee. She said the primary assumption of risk doctrine was inapplicable because the risk she encountered at the door was not inherent to the game of basketball, urging the severe injury to her fingers would not be anticipated while watching a game. Appellant believed her situation was not akin to a spectator being hit by a player who crashes out of bounds. Appellant's response also suggested she was no longer a spectator because she finished watching the game and was behind a door in a locker room intending to re-enter the gymnasium in order to leave the game.

{¶10} Appellant alternatively claimed there was a genuine issue of material fact as to whether the school was reckless by accepting the installation of the door and using it without modifying it, posting warnings, or taking other actions to prevent the danger posed by the door's design and location. She argued the acts or omissions surrounding the door increased the danger inherent in the sport of basketball. Lastly, she argued the open and obvious doctrine was inapplicable because the nature of the door hid the danger as she could not ascertain whether it was safe to exit and there was no way to avoid the danger.

{¶11} The report of Appellant's expert set forth an alternative door option, stating the school could have installed a 24-inch by 36-inch "high-impact clear Lexan panel" within the door to allow a person exiting the locker room to see into the gymnasium. (A concrete wall behind the doorway would block the view into the locker room.) Appellant's expert said the Ohio Basic Building Code does not address locker room door locations, but he paraphrased a section generally stating: "Structures or existing equipment that are unsafe or are otherwise dangerous to human life, shall be deemed a serious hazard. Where a building is found to be a serious hazard such hazard shall be eliminated." The expert believed the door presented a hazard and the incident would not have occurred if architectural standards had been met and

precautionary measures had been taken. He concluded "the door location and swing is not consistent with good architectural design and practices."

{¶12} The school's reply in support of summary judgment noted Appellant's status as a business invitee would be irrelevant if a duty-eliminating doctrine applied and there was no recklessness. The school pointed out that a person is still a spectator when they leave their seat to use the restroom, buy concessions, or wander around the event. In determining whether the risk was inherent to the game, the school said the focus should be on the foreseeability of injurious conduct inherent to the sport (such as collision with a spectator out of bounds), not the foreseeability of a particular injury.

{¶13} On February 14, 2020, the trial court granted summary judgment in favor of the school. The court concluded the primary assumption of risk doctrine precluded the claim of negligence as Appellant was a spectator and remained a spectator when she left her seat and went to the locker room. The court found no evidence suggesting the school's conduct was reckless or intentional, noting the design was compliant with relevant guidelines and no prior incidents put the school on notice of a serious danger. The court alternatively held the action was barred by the open and obvious doctrine as the location of the locker room door in relation to the basketball court was readily observable and Appellant was familiar with the door from her use of it before the injury. Appellant filed a timely notice of appeal.

ASSIGNMENT OF ERROR 1: SUMMARY JUDGMENT

{¶14} Appellant sets forth four assignments of error. The first assignment of error generally alleges:

"THE TRIAL COURT ERRED IN FINDING THAT ISSUES OF MATERIAL FACT DID NOT EXIST."

{¶15} We review the granting of summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. We therefore apply the same standard as the trial court to ascertain if summary judgment was warranted. Pursuant to Civ.R. 56(C), summary judgment shall be granted when the evidence shows there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Summary judgment is appropriate if reasonable minds can only find in favor of the movant after considering the evidence in the light most favorable to the non-movant. Civ.R. 56(C).

{¶16} A summary judgment movant has the initial burden of stating why the movant is entitled to judgment as a matter of law and showing there is no genuine issue of material fact. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-294, 662 N.E.2d 264 (1996). The non-movant then has a reciprocal burden. *Id.* The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing there is a genuine issue of material fact for trial and may not rest upon mere allegations or denials in the pleadings. Civ.R. 56(E).

{¶17} The material issues in a given case depend on the applicable substantive law. *Byrd*, 110 Ohio St.3d 24 at ¶ 12. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* As such, if a genuine issue of fact is alleged on several minor items that together would not be dispositive, then the entry of summary judgment would not be reversible and those items would be unnecessary to address on their merits. *Talbott v. Condevco Inc.*, 7th Dist. Monroe No. 19 MO 0007, 2020-Ohio-3130, ¶ 18. *See also Peters v. Tipton*, 7th Dist. Harrison No. 07 HA 3, 2008-Ohio-1524, ¶ 8 ("even if there is shown to be some genuine issue of fact, if that issue is not dispositive due to the lack of a genuine issue on a threshold legal matter, summary judgment is still appropriate").

{¶18} Appellant lists the general disputes she has with the trial court's findings or omissions from the findings. She notes a court ruling on summary judgment cannot choose which expert opinion is more believable. *See Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 613, 687 N.E.2d 735 (1998) ("In reviewing a summary judgment motion, a trial court should not reject one expert opinion for another simply because it believes one theory over the other."). She points out that a court must construe reasonable inferences in favor of the non-movant. *See Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 11 (consider the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the non-movant). Appellant believes the court ignored her expert's opinion and disregarded the duty a premises owner owes to a business invitee.

{¶19} Appellant recites that a business invitee enters the premises with express or implied invitation for a purpose beneficial to the owner. *See Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68, 502 N.E.2d 611 (1986). She says she was a player invited by the school to play a high school basketball game in their gymnasium and was permitted to

use the locker room on this basis. She then recites that a premises owner owes a duty of ordinary care to protect a business invitee. *See id.*

{¶20} However, as the school points out, the two alternative doctrines eliminate this duty and preclude a negligence action. As to primary assumption of the risk, this is "a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action.'" *See Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 431, 659 N.E.2d 1232 (1996), quoting Prosser & Keeton, *Law of Torts*, Section 68, 496-497 (5th Ed.1984). "[A] successful primary assumption of risk defense means that the duty element of negligence is not established as a matter of law * * *." *Gallagher*, 74 Ohio St.3d at 431.

{¶21} Regarding the open and obvious doctrine: "A shopkeeper ordinarily owes its business 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. * * * When applicable, however, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims." *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. The main principles of the doctrine include: "a premises-owner owes no duty to persons entering those premises regarding dangers that are open and obvious"; "the open and obvious nature of the hazard itself serves as a warning"; and "the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *Id.* Each doctrine will be further discussed within the pertinent assignment of error.

{¶22} The school says Appellant was assumed to be a business invitee for purposes of summary judgment, noting they could have argued she occupied the lesser status of licensee after her game. The school did not seek summary judgment on the ground that it satisfied its duty of ordinary care to a business invitee. The school sought and the trial court granted summary judgment on the issue of whether the two alternative doctrines eliminated the duty and precluded the negligence action.

{¶23} Any issue in the negligence action regarding the duty a premises owner owes to a business invitee is not relevant in this appeal and would only become relevant if we were to rule in Appellant's favor on one of the substantive issues. For instance, if the primary assumption of risk doctrine was properly applied to eliminate the duty, then the issue of whether the school breached a duty of ordinary care to a

business invitee never arises and is irrelevant. If the doctrine does not apply and the open and obvious doctrine does not apply in the alternative, then the case would be remanded for further proceedings on the duty of ordinary care.

{¶24} The trial court did not choose an expert opinion and make a finding on the issue of negligence. To the extent Appellant's argument on conflicting expert opinions relates to the issue of recklessness, it is addressed in assignment of error three where she addresses that topic. Appellant's first assignment of error is an outline of a variety of arguments she more specifically addresses under one of her other three assignments of error, which address the following topics: the primary assumption of risk doctrine as a bar to the negligence action; the recklessness component of the action as an exception to the doctrine; and the open and obvious doctrine as an alternative bar to the action. She acknowledges this presentation format. *See* Apt.Br. 8, 10. We will address the arguments previewed under her first assignment of error where she specifically addresses them below.

ASSIGNMENT OF ERROR 2: PRIMARY ASSUMPTION OF RISK

{¶25} Appellant's second assignment of error contends:

"THE TRIAL COURT ERRED IN FINDING THAT PRIMARY ASSUMPTION OF THE RISK APPLIED TO APPELLANT WHEN SHE WAS INJURED AS A SPECTATOR/ BUSINESS INVITEE."

{¶26} "Under the primary assumption of the risk doctrine, a recreation provider ordinarily owes no duty to a participant or spectator of an active sport to eliminate the risks inherent in the sport." *Bundschu v. Naffah*, 147 Ohio App.3d 105, 2002-Ohio-607, 768 N.E.2d 1215, ¶ 37 (7th Dist.). "Primary assumption of the risk may apply to relieve the liability of both co-participants and non-participants (the recreation provider and the landowner typically being non-participants)." *Id.* (the driving range owner had no duty regarding the risks inherent in hitting golf balls, including a ricochet off a fence).

{¶27} "In limiting a defendant's liability in sports and recreational activities, courts have relied upon primary assumption of the risk and have reasoned that 'those entirely ignorant of the risks of a sport, still assume the risk (in this 'primary' sense) by participating in a sport or simply by attending the game'." *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, 802 N.E.2d 1116, ¶ 12 ("The law simply deems certain risks as accepted by plaintiff regardless of actual knowledge or consent"), quoting Gilles,

From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law, 75 Temple L.Rev. 231, 236 (2002).

{¶28} Where injuries stem from "conduct that is a foreseeable, customary part" of the activity, the defendant is not liable for negligence because no duty is owed to protect the victim from that conduct. *Gentry*, 101 Ohio St.3d at 141, quoting *Thompson v. McNeill*, 53 Ohio St.3d 102, 104, 559 N.E.2d 705 (1990). Where the action is for injury to a spectator at a sporting or recreational activity and the injury was the result of an inherent risk of being at the event, "recovery is dependent upon whether the defendant's conduct was either reckless or intentional." *Gentry*, 101 Ohio St.3d 141 at ¶ 13. (Appellant discusses whether the school was reckless or intentional in the third assignment of error.)

{¶29} "Primary assumption of risk is a defense of extraordinary strength." *Gallagher*, 74 Ohio St.3d at 431. A defense of primary assumption of the risk is different than a typical affirmative defense raised in a negligence action because a defendant who raises this defense asserts that "no duty whatsoever is owed to the plaintiff." *Id.* (whereas the typical affirmative defense means the plaintiff cannot recover even if the plaintiff can establish a prima facie case of negligence).

{¶30} "[W]hen a plaintiff is found to have made a primary assumption of risk in a particular situation, that plaintiff is totally barred from recovery, as a matter of law * * *." *Id.* at 431. "Because primary assumption of risk, when applicable, prevents a plaintiff from establishing the duty element of a negligence case and so entitles a defendant to judgment as a matter of law, it is an issue especially amenable to resolution pursuant to a motion for summary judgment." *Id.* at 433, 435 (primary assumption of the risk "is a question of law to be decided by the trial judge").

{¶31} For instance, "no jury question would arise when an injury resulting from such a direct risk is at issue, meaning that no duty was owed by the defendant to protect the plaintiff from that specific risk." *Gallagher*, 74 Ohio St.3d at 432, citing *Cincinnati Baseball Club Co. v. Eno*, 112 Ohio St. 175, 147 N.E. 86 (1925). In *Eno*, the Court said the doctrine would have barred recovery against the baseball park operator if the spectator was hit by the ball during the normal course of the game. Yet, the Court found "at least a scintilla of evidence" suggesting attendant circumstances created "unusual dangers" where players were permitted to practice batting balls from the sidelines in a spot very close to the stands during an intermission between two games

(and other balls were moving around the field as well). *Eno*, 112 Ohio St. at 182, 185. We note, however, that *Eno* involved the application of the special "baseball rule" through which courts imposed a duty to provide some screened seats in the grandstand which spectators could choose to occupy. *See id.* at 181.

{¶32} "[A]s in *Eno*, there will be attendant circumstances that raise questions of fact whether an injured party assumed the risk in a particular situation. In that case, the doctrine of implied assumption of risk, not primary assumption of risk, would be applicable." *Gallagher*, 74 Ohio St.3d at 432.[1] Appellant emphasizes this statement and points to the advisement: "Because of the great impact a ruling in favor of a defendant on primary assumption of risk grounds carries, a trial court must proceed with caution when contemplating whether primary assumption of risk completely bars a plaintiff's recovery." *Id.*

{¶33} First, Appellant argues the primary assumption of risk doctrine is inapplicable because "Appellant was a Business Invitee at the time of the Injury, not a Spectator." She also believes it was a question of fact as to whether she was a spectator once she: left her seat, entered a locker room to retrieve belongings in preparation to leave, and began to exit the locker room into the gymnasium through a door with no view of the game.

{¶34} We have applied the primary assumption of risk doctrine to eliminate a landowner's general duty to a business invitee to exercise ordinary care for the invitee's protection, including the duty to warn of latent or concealed defects which are or should be known. *See Bundschu*, 147 Ohio App.3d 105 at ¶ 14-15, 35, 37. In *Bundschu*, the patron of the driving range, who was hit by a golf ball which ricocheted off a fence, was a business invitee. *See id.* (the driving range owner had no duty regarding this risk inherent in hitting golf balls).

{¶35} As another example, a spectator at a Scrappers game was hit by a baseball during the game after she chose to leave her seat and stand at the end of a walkway in the baseball park overlooking a picnic area and a parking lot behind the bleachers. *Warga v. Palisades Baseball*, 7th Dist. Mahoning No. 08 MA 25, 2009-Ohio-1224, ¶ 1. The spectator claimed the primary assumption of risk doctrine did not apply to her because she was not seated in the stands when she was hit by the

[1] The Court explained the distinctions between primary assumption of the risk, implied or secondary assumption of the risk (which has merged into contributory negligence), and express assumption of the risk (which is a contractual doctrine)

baseball. *Id.* at ¶ 2. We rejected this argument and found no evidence of special or attendant circumstances that raised a question of fact as to whether the spectator assumed the risk of being at the game. *Id.* at ¶ 3, 27 (distinguishing *Eno*).

{¶36} In the case cited by the trial court, the Eighth District pointed out: "Spectators at sporting events routinely leave their seats—to go to the restroom or purchase concessions, for example—and are still subject to the doctrine of primary assumption of the risk." *Rawlins v. Cleveland Indians Baseball Co.*, 2015-Ohio-4587, 48 N.E.3d 136, ¶ 28 (8th Dist.) (the court then found an issue of material fact existed as "a different circumstance may be created when spectators are forced to leave their seats [during the game] for a non-emergency or unjustified reason" such as to prepare for a post-game fireworks show).

{¶37} In another case, the plaintiff was a participant and then a spectator in a football game during school recess. The plaintiff argued his spectator status had ended, but the court of appeals agreed with the trial court's decision and found: "engaging in the activities of making a snowman and looking toward the hills, when he was not watching the game, does not transform him from a spectator to a non-participant such that he is exempted from the primary assumption of the risk doctrine." *Sword v. Altenberger*, 5th Dist. Ashland No. 07-COA-029, 2008-Ohio-2513, ¶ 19. "Certainly, all spectators are not required to continuously, and without any interruption at all, watch the recreational activity they are witnessing in order for the doctrine to apply." *Id.*

{¶38} As the school points out, being a business invitee does not preclude a person from qualifying as a participant or spectator. Moreover, at the time of Appellant's injury, she at least remained a spectator. Appellant was a junior varsity player for an away team whose game was over but who was required by her coach to stay and watch at least half of her team's varsity game. Her initial access to the locker room was due to her status as a participant in a sporting event. She apparently believed she could leave her belongings in the locker room because she was a part of a basketball team whose varsity team was still playing. At the least, she watched the first half of the varsity game as a spectator. During half-time of a varsity game, Appellant entered the locker room to retrieve belongings she left there as a participant.

{¶39} Appellant did not become less than a spectator merely because she temporarily entered the participants' locker room. At the time of injury, she had re-

entered the gymnasium. To push the door ajar, her left hand crossed the door threshold into the gymnasium, and her right hand entered the opening before the impact. It is not relevant whether she returned to the gymnasium with an intent to return to the stands, stand against a wall, or immediately walk through the gymnasium to the exit and leave the building. A spectator does not lose their status because they leave a sporting event before it ends.

{¶40} Appellant suggests a person in a restroom at a game does not expect to get hit by an object or a player, which relates to her argument on the ordinary risks of the game. However, a spectator is subject to foreseeable risks as they return to the gymnasium.

{¶41} This leads to her next argument contending the court should consider only the risks directly associated with the sporting activity and the risk of harm from the door was not a risk inherent to the activity. The primary assumption of risk doctrine applies to "conduct that is a foreseeable, customary part" of the activity at issue. *Gentry*, 101 Ohio St.3d at 141. The risk must be so inherent to the sport or activity that it cannot be eliminated; only risks "directly associated with the activity" are covered by the primary assumption of risk doctrine. *Horvath v. Ish*, 134 Ohio St.3d 48, 2012-Ohio-5333, 979 N.E.2d 1246, ¶ 19, 21 (for example, a collision between skiers is an inherent risk of skiing), quoting *Gallagher*, 74 Ohio St.3d at 431. "Where the risk at issue is not inherent, then a negligence standard applies." *Horvath*, 134 Ohio St.3d 48 at ¶ 19.

{¶42} A basketball player leaving the bounds of a court is foreseeable and customary conduct inherent to the sport of basketball. In fact, Appellant testified she observed players doing so, experienced this herself as a player, and knew the padding covering the wall under the hoop was to protect players who may run from the court into the wall, which included the door she used numerous times. Appellant admits a spectator in the stands assumes the risk of being hit by a player who leaves the bounds of the basketball court during a play in the game and the school would not have a duty to protect the spectator in the stands from a player leaving the court due to stumbling, colliding, or momentum.

{¶43} Clearly, this would also apply to spectators who stand against or move along the walls under the basket. Basketball is considered a contact sport and racing full-speed to the basket is common. In a typical high school gymnasium, a player must make a quick stop before reaching the wall under the backboard. The risk of a player

falling outside of the court and injuring a person walking along the wall or entering the gymnasium from that wall was a risk inherent to basketball that could not be eliminated.

{¶44} The question becomes whether this particular locker room door can be characterized as a special or attendant circumstance which transformed the danger so it was no longer a foreseeable or inherent part of the sport. *See Gallagher*, 74 Ohio St.3d at 432 ("In many situations, as in *Eno*, there will be attendant circumstances that raise questions of fact whether an injured party assumed the risk in a particular situation. In that case, the doctrine of implied assumption of risk, not primary assumption of risk, would be applicable."). *See also Eno*, 112 Ohio St. 175 (where the Court indicated the primary assumption of risk doctrine would have barred recovery against the baseball park operator if the spectator was hit by a ball during the normal course of the game but finding a factual question on attendant circumstances where players were practicing very close to the stands between games).

{¶45} Referring to some policy reasons behind the doctrine as applied to spectators, Appellant says she could not have avoided the risk as there was only one, windowless door (whereas a spectator in the basketball stands can look for stumbling players and a spectator at a baseball game can stay alert for foul balls). Yet, she could have avoided the risk by not using the participants' locker room during the game. This is not like the *Rawlins* case where the Eighth District said a baseball leaving the playing field is inherent to the game but found an attendant circumstance where the operator ordered spectators in a certain section to leave their seats while the game was still being played (to prepare for a post-game fireworks show).[2] In any event, many collisions in the sport cannot be avoided by the injured party, but the doctrine still applies to bar a negligence action if the risk is inherent to the sport and the plaintiff was a participant or spectator.

{¶46} Appellant suggests this door presents the same risk even when no athletic event is taking place. *Yet, there was an athletic event taking place* where the risk of a player falling into the door was foreseeable; she used the door as a junior varsity member of the varsity team who was playing and opened it into a game she knew was about to resume when she entered the locker room. The primary assumption of risk

[2] Appellant also may have avoided the risk by slightly opening the door, without putting a body part between the door and jamb, to listen or watch for approaching players running down the court. The door was set back over 14 feet from the baseline and set off over 7 feet from the center of the basket, and the door's opening faced the basket.

doctrine does not even apply when there is no sporting or recreational activity at which the injured party was a participant or spectator. The conduct and attendant circumstance causing injury was her own use of this locker room door during a game.

{¶47} She focuses on the negligence in maintaining the door as a usable feature of the gymnasium without safety precautions. However, foreseeable negligence is the very action eliminated by the doctrine; again, the landowner's duty to protect or warn against ordinary risks is eliminated if the primary assumption of risk doctrine applies. *See Gallagher*, 74 Ohio St.3d at 431 (the doctrine is "a principle of no duty, or no negligence").

{¶48} Finally, Appellant concludes the locker room door was not a danger directly associated with the sport of basketball and was not a danger so inherent to the game that it cannot be eliminated. She says the door slammed shut on her fingers not because of a risk inherent to a basketball game but due to the door's characteristics of opening out[3] under a hoop with no window which would have allowed her to avoid exiting while players were approaching. She says a recreational provider need not decrease the risk of a sport but cannot increase the risk involved and claims the school increased the risk involved by installing and continuing to use this door.

{¶49} The school suggests the risk from a player voluntarily using the locker room door during a game was a risk related to the game, and the same would be true for a player-turned-spectator who left their belongings in the players' locker room after her junior varsity game, watched half of her own team's varsity game, went to collect her belongings, and then exited the players' locker room into that game she knew would re-start after half-time. The school urges that the mechanism of the injury was the door, but the cause of the injury was the basketball player colliding with a spectator and engaging in the very conduct admitted to be a foreseeable event and inherent to the sport (hitting the wall under the hoop).

{¶50} Appellant compares the situation to a case where the plaintiff was thrown through the air while on a hayride, which this court concluded was not an ordinary risk inherent to the activity of a hayride and found the plaintiff's action was not barred by the primary assumption of risk doctrine. *Byer v. Lucas*, 7th Dist. Noble No. 08-NO-351, 2009-Ohio-1022, ¶ 27, 30. We also noted the injuries were not those typically

[3] Appellant suggests the outward swing of the door was improper. Her expert mentioned the door opened into the gymnasium in the facts of his report and later said the "location and swing" were not consistent with good design, but he did not say an inward swinging door was the standard or safer.

sustained on a hayride. *Id.* at ¶ 38. However, the driver in that case was intoxicated and chose to pull a trailer down a steep hill causing it to jack-knife.

{¶51} The *Byers* court found the situation distinguishable from our *Shaner* case where the plaintiff rode a motorcycle in high grass in an area that he knew contained tree stumps and was injured when he hit a stump. *Id.* at ¶ 24, 26-27*, citing Shaner v. Smoot*, 7th Dist. Carroll No. 712 (Oct. 12, 2001). In *Shaner*, we concluded: the risk of hitting a tree stump was an ordinary risk of riding a motorcycle in such a location; the plaintiff assumed the ordinary risk of riding the motorcycle under such conditions; and the defendants were not liable for failure to warn of an ordinary risk assumed by the plaintiff. *Shaner*, 7th Dist. No. 712. Recovery for injuries sustained in recreational activities must by definition arise from something other than an ordinary risk, and the conditions under which an activity occurs determines what injuries are foreseeable and ordinary. *Byer*, 7th Dist. No. 08-NO-351, citing *Shaner*, 7th Dist. No. 712.

{¶52} Our *Bundschu* case involved complaints of failure to warn and negligent design due to the location of the driving range fence where a patron could hit it with a golf ball. *Bundschu*, 147 Ohio App.3d 105 at ¶ 5. The plaintiff argued the ricochet of the golf ball off the fence was not an inherent and ordinary risk of using a driving range. *Id.* at ¶ 22. This court found a plaintiff's action against driving range owner was barred by the primary assumption of risk doctrine. *Id.* at ¶ 45.

{¶53} In our *Wilson* case, the baseball player's claim involved allegations of an underfilled and defective base. This court held that even if he could prove the base was defective, he failed to demonstrate a defective base was not an ordinary or customary risk of the sport. *Wilson v. Lafferty Volunteer Fire Dept.*, 7th Dist. Belmont No. 00 BA 29, 2001-Ohio-3454.

{¶54} We reject Appellant's final argument and conclude the collision of a varsity basketball player with a junior varsity player (who became a spectator, entered the locker room during half-time of her school's varsity game, and alighted from the locker room after play had resumed) was a risk inherent in the sporting activity. The sporting activity was high school basketball *in a high school gymnasium*. The wall in which the locker door was located was more than 14 feet from the baseline, and the evidence showed this was well over the minimum of 3 feet suggested by the Federation's guidelines and over the preferred guideline of 10 feet. This leads to the rational inference that many high school gymnasiums have much less of a buffer zone than the

gymnasium at issue, meaning that playing at those other schools entails even more risk of higher speed collisions with spectators who stand at or move along the wall.

{¶55} As agreed, a player's collision with a spectator is a risk inherent in the game. Locker rooms are an inherent part of basketball. The evidence, rational inferences, and common knowledge indicated that players or coaches may use the locker room on occasion during a game and thus exit into the gymnasium during the game. Appellant initially used the locker room as a player, left her belongings there due to her status as being a junior varsity teammate watching her school's varsity team, and used it again as a former player during her team's varsity game. A player hitting the door during the game was a risk inherent in the use of the locker room door during a varsity game. The plaintiff has not cited to evidence indicating that it was unusual for a locker room to be located adjacent to the basketball court and to open into the gymnasium. And, there was no evidence that it was out of the ordinary for a locker room door to be located in the wall under the basket or that locker room doors on the wall under the basket were customarily set off further from the center of the court than here where the door was set off from the center of the basket by more than seven feet.

{¶56} The absence of a guard at the door or a clear panel did not mean the risk was not inherent to basketball. Appellant testified that it was not customary for an authority to monitor the locker room door during a basketball game. High school gymnasiums have doors which could injure a spectator on the way into or from the gymnasium when a player slams out of bounds at full speed, regardless of whether the door has windows or opens toward or away from the gymnasium. Under the particular circumstances of this case, we conclude the collision of a basketball player into Appellant during a game was a customary and inherent part of the game and Appellant's entry into the gymnasium from the player's locker room did not raise an attendant circumstance showing there was a factual question on whether the risk of collision was inherent to the game.

{¶57} Consequently, the school's duty was eliminated, and the negligence action was precluded. This assignment of error is overruled.

ASSIGNMENT OF ERROR 3: RECKLESS OR INTENTIONAL

{¶58} Appellant's third assignment of error alleges:

"THE TRIAL COURT ERRED BY FAILING TO APPLY THE LAW WHICH IMPOSED A DUTY UPON APPELLEE TO TAKE REASONABLE PRECAUTIONS TO PREVENT HARM TO APPELLANT."

{¶59} This assignment of error refers to the duty a premises owner owes to a business invitee *if* the primary assumption of risk doctrine and the open and obvious doctrine do not apply. If neither doctrine applied, a negligence action could proceed on the alleged failure to take reasonable precautions to protect the invitee (as summary judgment was not sought or granted as to negligence).

{¶60} The argument set forth under this assignment of error revolves around the following principle: even where the primary assumption of risk doctrine applies to bar a negligence action, a plaintiff can still recover if there was reckless or intentional conduct. Appellant claims there was evidence demonstrating a genuine issue of material fact as to whether the school's conduct regarding the door was reckless or intentional. Appellant reiterates her contention that the school increased the risk of basketball by accepting the unsafe design or location of the door and failing to prohibit use of the door during a game.

{¶61} Initially, the school points out that Appellant's complaint did not clearly connect the allegation of recklessness to the door's design. The complaint began by generally stating the school's negligence included: "the negligent location of the Door below a basketball hoop being used, the failure to prevent ingress and egress through the door during basketball play, and the failure to warn of the imminent danger * * *." Then, under the count entitled "Negligence," the complaint referred to the school's "negligent, reckless, and/or willful[ly] permitted use of the Door, and failure to warn [Appellant] of the dangerous concealed hazard * * *." Appellant's opposition to summary judgment referred to "reckless, willful, and entire absence of care in regard to the door design and its flaws * * *." However, the complaint did not specifically allege reckless or intentional conduct as to the design of the door.

{¶62} Even if the complaint is read as saying the school recklessly permitted the use of a negligently designed and located door or even if the complaint is read as extending recklessness to the design or location, the school states the trial court correctly concluded as a matter of law that no evidence indicated the school's conduct was reckless or intentional. Contrary to any suggestion by Appellant, there is not

automatically a genuine issue of material fact on recklessness if there is a genuine issue of material fact on whether the door design or location was flawed.

{¶63} If the action is for injury to a participant or spectator at a sporting or recreational activity and the injury was the result of an inherent risk of being at the event, "recovery is dependent upon whether the defendant's conduct was either reckless or intentional." *Gentry v. Craycraft*, 101 Ohio St.3d 141, 2004-Ohio-379, 802 N.E.2d 1116, ¶ 13. Notwithstanding the primary assumption of risk doctrine's preclusion of a negligence action: "the duty not to commit an intentional tort" against another remains regardless of the occurrence of an athletic event, and reckless misconduct will also give rise to liability. *Thompson v. McNeill*, 53 Ohio St.3d 102, 104, 559 N.E.2d 705 (1990).

{¶64} "[W]here individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional' as defined in Sections 500 and 8A of the Restatement of Torts 2d." *Marchetti v. Kalish*, 53 Ohio St.3d 95, 100, 559 N.E.2d 699 (1990). Intentional in this context means "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Id.* at 100, fn.2, quoting 1 Restatement of the Law 2d, Torts, Section 8A (1965).

{¶65} Reckless in this context means: "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." *Marchetti*, 53 Ohio St.3d at 100, fn.2, quoting 2 Restatement of the Law 2d, Torts, Section 500 (1965). Consequently, the actor "must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent." *Id.* at fn.3 (adopting Comment g). To be reckless, this type of unreasonable risk must involve a "strong probability that harm may result" from the conduct, and there must be a "serious danger to others." *Id.* at fn.3 (adopting Comments f and g).

{¶66} Stated differently, reckless conduct involves "a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man" and "the degree of the risk [for recklessness] is so marked as to amount substantially to a

difference in kind" than the quantum of risk for negligence. *Id.* (adopting Comment g). In contrast, negligence is "mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency" or even "intentionally doing an act with knowledge that it contains a risk of harm to others." *Id.*

{¶67} The school points to the observation that there is no "list of actions that will give rise to tort liability for recklessness or intentional misconduct in every sport. The issue can be resolved in each case only by recourse to the rules and customs of the game and the facts of the incident." *Thompson v. McNeill*, 53 Ohio St.3d 102, 105, 559 N.E.2d 705 (1990) (noting an inverse relationship between duty and the inherent dangerousness of the sport so that "bodily contact games such as basketball" involve a lesser duty between participants than non-contact sports). "What constitutes an unreasonable risk under the circumstances must be delineated by the rules and/or customs that shape the participant's ideas of foreseeable conduct in the course of the recreational activity." *West v. Devendra*, 2012-Ohio-6092, 985 N.E.2d 558, ¶ 34, 38 (7th Dist.) (failure to follow written instructions before using a feature on an all-terrain vehicle for the first time was a failure to take a precaution but was not a reckless action), citing *Thompson*, 53 Ohio St.3d at 105.

{¶68} In *Marchetti*, where a child voluntarily participated in a backyard game of kick-the-can, the Court found no factual questions on the claim of reckless or intentional conduct asserted against the defendant where the plaintiff testified at deposition that the defendant was supposed to stop running when she called to him but he instead rushed at her and kicked the ball out from under her foot in frustration. *Marchetti*, 53 Ohio St.3d at 100 (violating the rules of the game does not necessarily satisfy the standard of recklessness). In *Wilson*, a baseball player was injured after stepping on an underfilled base, and we held the plaintiff did not present specific facts which would allow a reasonable juror to find the defendant's failure to warn about or replace the base was reckless or intentional conduct. *Wilson v. Lafferty Volunteer Fire Dept.*, 7th Dist. Belmont No. 00 BA 29, 2001-Ohio-3454 (finding it was an ordinary risk).

{¶69} We now consider the risk of maintaining this locker room door as a feature of the gymnasium without modification or a posted prohibition on the use of the locker room during a high school basketball game. As for intentional conduct, there is no indication the school "desire[d] to cause [the] consequences" of its conduct or that the

school "believe[d] that the consequences [were] substantially certain to result" from its conduct. *See Marchetti*, 53 Ohio St.3d. 95 at fn.2 (finding no evidence of intentional conduct where a participant in a backyard game intentionally kicked a ball from under the plaintiff's foot instead of stopping but did not intend to cause her to break her leg). As a matter of law, there was no evidence of an intentional tort.

{¶70} As for recklessness, this court concludes the existence of this unlocked locker room door located in the wall behind a basketball hoop during a game was not an "unreasonable risk" which the school consciously disregarded and the risk was not "substantially greater" than the risk involved in a standard negligence case. *See id.* at fn.2. This was a high school basketball game taking place in a high school gymnasium. The locker room door was covered by obvious padding. As discussed in the prior assignment of error, basketball is a contact sport, and leaving the boundaries with force is a customary risk of the game applicable to participants and spectators. *See Thompson*, 53 Ohio St.3d at 105 (accepted risk may be higher for contact sports).

{¶71} Basketball is also a sport that customarily uses a nearby locker room. It is common knowledge that a player may occasionally be required to use the team's unlocked locker room during an active game if their coach instructs them to do so, for instance, due to a bloody nose or ripped uniform. As the door at issue was the only way into the locker room, the school would be reasonable in expecting that an authorized user exiting through the same door they entered would know that they were entering a gymnasium in which there existed a game on a court where collisions and uncontrolled movements toward the walls were foreseeable. In such case, the user would be expected to proceed with caution upon exiting the locker room.

{¶72} Although spectators may be invitees in relation to the premises, there was no evidence showing spectators were invited to use the locker room. The school submitted an affidavit saying only participants (players, coaches, and officials) were authorized to use the locker room during the game. The locker room was for players, not general spectators. Appellant claimed she was no longer a participant or player at the time of her injury (and even argued she was no longer a spectator).

{¶73} The totality of the circumstances show the risk of the school's failure to bar the locker room door during a game was not substantial or consciously disregarded. *See Marchetti*, 53 Ohio St.3d. 95 at fn.2. This is especially true due to the distance of the door from the baseline. The door was more than 14 feet from the

baseline; applicable Federation guidelines suggest a buffer zone of 3 feet, with 10 feet preferred. And, the door was set off from the center of the court by more than 7 feet, with the opening facing the center of the court. Also, there were no prior incidents since the door was installed in 1956.

{¶74} A tragedy occurred to Appellant. She may or may not have evidence of negligence on the part of the school. Whether she satisfied that standard is not at issue in this appeal. We conclude there was no indication the school knew or had reason to know (from facts available to a reasonable person) that there was an "unreasonable risk" of a "serious danger" that had a "strong probability" of causing harm if the school continued to allow authorized individuals to access the locker room and thus use this particular door during a basketball game. *See id.* at fn.2-3. This assignment of error is overruled. The trial court's judgment can be affirmed without further discussion at this point; however, we shall alternatively address the open and obvious doctrine.

ASSIGNMENT OF ERROR 4: OPEN & OBVIOUS DOCTRINE

{¶75} Appellant's fourth assignment of error contends:

"THE TRIAL COURT ERRED IN FINDING THE DOOR WAS AN OPEN AND OBVIOUS HAZARD TO APPELLANT."

{¶76} As Appellant repeatedly points out, a premises owner owes a duty to an invitee to exercise ordinary care for her safety and protection by maintaining the premises in a reasonably safe condition and by warning of latent or hidden dangers. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. The trial court was not asked to reach whether this duty was breached (or whether Appellant remained an invitee). After finding the primary assumption of risk doctrine eliminated the school's duty for the claim of negligence and finding no evidence the school's conduct was reckless or intentional, the trial court alternatively found that the open and obvious doctrine would also apply to eliminate the school's duty. As the school points out, questions on whether the school breached the duty of ordinary care and conflicting expert opinions on that topic are irrelevant if the school's duty was eliminated.

{¶77} The open and obvious doctrine provides that "a premises-owner owes no duty to persons entering those premises regarding dangers that are open and obvious." *Id*. Since it "obviates the duty to warn," the open and obvious doctrine "acts as a

complete bar to any negligence claims." *Id.* The rationale is "that the open and obvious nature of the hazard itself serves as a warning." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992). "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.*

{¶78} "Attendant circumstances may create a genuine issue of material fact as to whether a danger was open and obvious." *Bounds v. Marc Glassman, Inc.*, 8th Dist. Cuyahoga No. 90610, 2008-Ohio-5989, ¶ 24. "[A]n attendant circumstance is the circumstance which contributes to a fall and a circumstance which is beyond the control of the injured party." *Backus v. Giant Eagle Inc.*, 115 Ohio App.3d 155, 158, 684 N.E.2d 1273 (7th Dist.1996). Attendant circumstances include a condition that would distract a person's attention in the same circumstances and reduce the degree of care an ordinary person would exercise. *Spence v. Baird Bros. Saw Mill Inc.*, 7th Dist. Mahoning No. 16 MA 0117, 2017-Ohio-8161, ¶ 14. This special circumstance is more than a common or ordinary circumstance. *Id.* (noise was not an attendant circumstance defeating the open and obvious nature of an overhead door the previously plaintiff walked under).

{¶79} Appellant complains the trial court mentioned only the location of the door in relation to the basketball court when finding the hazard was open and obvious, whereas she alleged the danger was posed by the location *and* the design of the door. The school points out that the open and obvious doctrine also applies to claims of negligent design or maintenance of certain features of a structure. *See Brown v. Pet Supplies Plus*, 7th Dist. Mahoning No. 98 CA 9 (Aug. 26, 1999).

{¶80} In *Brown*: the plaintiff entered a store through an automatic door; an employee told her where to put an item she wanted the store to hold; the plaintiff entered the path of the door while bending down to lift the item her husband set there; and the door hit her in the head when another customer entered. *Id.* We found reasonable minds could only conclude the inward opening design of the entrance door was an open and obvious feature of the store which the plaintiff had just used to enter. *Id.*

{¶81} Appellant believes the case is distinguishable because of a "Do Not Enter" sign on the door in the *Brown* case. Yet, the *Brown* plaintiff did not attempt to leave the store through the door in violation of the sign; she moved into the door's inward

path. Regardless, there is no indication a sign at the locker room door would have made the condition more obvious than it already was to Appellant under the circumstances.

{¶82} Appellant also says the case is distinguishable because the *Brown* plaintiff had an opportunity to avoid putting her head into the automatic door's inward path but Appellant had no opportunity to exit the locker room through a different door or a door with an unobstructed view of the game. She equates her situation to cases where the plaintiff is unaware of what lies behind a door. *See Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961, 927 N.E.2d 1161, ¶ 35 (2d Dist.) (where a door opened directly onto a staircase, the court believed the danger was not open and obvious because the plaintiff only viewed it for a second as she stepped through the doorway). Appellant suggests locker room users could not reasonably be expected to "take appropriate measures to protect themselves" against the door's location during a game as the door had no window. *See Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992) (noting a rationale behind the doctrine).

{¶83} As to her inability to protect herself or no-other-choice argument, it is noteworthy that Appellant did not have to leave her belongings in the players' locker room after her game and did not have to use the player's locker room when half-time of her school's varsity game was ending. *See Pass v. Cinemark, USA Inc.*, 5th Dist. Stark No. 2003CA00276, 2004-Ohio-5191, ¶16-17 (the danger posed by dark stairs was open and obvious where a patron chose to leave the theater before the end of the movie at which time the stairs would have been illuminated). Further, an ordinary user under these known circumstances may have protected herself by slowly inching the door open, without entering the space between the door and the frame, in order to ascertain the location of the action in the game. *Spence*, 7th Dist. No. 16 MA 0117 at ¶ 14 (attendant circumstances distract a person's attention in the same circumstances and reduce the degree of care an ordinary person must exercise).

{¶84} Nevertheless, in determining if the hazard is open and obvious, we are to consider "the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it." *Armstrong*, 99 Ohio St.3d 79 at ¶ 13. "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.* *See also Trowbridge v. Franciscan Univ. of Steubenville*, 7th Dist. Jefferson No. 12 JE 33, 2013-Ohio-5770, ¶ 16-17 (the plaintiff's choices are relevant to implied assumption of the risk as merged into comparative negligence).

{¶85} Still, in considering attendant circumstances, we consider the degree of care expected from an ordinary person under those special circumstances. See *Spence*, 7th Dist. No. 16 MA 0117 at ¶ 14. "Whether a reasonable person would find a hazard open and obvious is usually determined by testimony from actual people who observed the danger." *Trowbridge*, 7th Dist. No. 12 JE 33 at ¶ 14. This includes a plaintiff's prior observations and knowledge. It has therefore been stated that when a plaintiff previously observes or navigates a hazard, she cannot thereafter claim that the hazard was not open and obvious on her way back through it. *Bounds*, 8th Dist. No. 90610 at ¶ 26 (when a party observes a hole in a parking lot or other defect in a walkway while previously traversing the area, the defect is open and obvious); *Zuzan v. Shutrump*, 155 Ohio App.3d 589, 2003-Ohio-7285, 802 N.E.2d 683, ¶ 12 (7th Dist.) (emphasizing the number of times the plaintiff encountered the hazard), citing *Raflo v. Losantiville Country Club*, 34 Ohio St.2d 1, 295 N.E.2d 202 (1973), paragraph one of the syllabus.

{¶86} The contention is that the known features of the door concealed the precise hazard approaching in the game. Under the circumstances, the danger was the use of the locker room during a game, not merely the exit from the locker room. The door was not a "latent" or "concealed" defect as the features of the door (location, swing, and lack of window) were readily observable to one who already used the locker room.

{¶87} Appellant used the door throughout the day and before she entered the locker room the final time. She knew the wall behind the backboard and the door were padded because of the ordinary risk of basketball players leaving the boundaries of the court; she witnessed and experienced collisions outside of the bounds of the court. The "door operated as it was intended to do, and reasonable minds can only reach one conclusion, that the door's operation was open and obvious." *Spence*, 7th Dist. No. 16 MA 0117 at ¶ 12.

{¶88} The hazard posed by using the locker room (and thus its door) during a basketball game where players commonly collide with objects outside of the court was open and obvious to Appellant during her own game, and it remained readily

observable after her game (when she left her belongings there) and when she began to leave the varsity game before it was over. Although she said she did not know the varsity game had re-started from half-time, she entered the locker room knowing the varsity half-time was about to end and active play was about to restart. We conclude the hazard posed by using the locker room (or by exiting the locker room without pausing) was open and obvious to Appellant. This assignment of error is overruled.

{¶89} For the foregoing reasons, the trial court's judgment is affirmed.

D'Apolito, J., concurs.

Hess, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.