[Cite as *Cummin v. Image Mart, Inc.*, 2004-Ohio-2840.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Janis Cummin et al.,	:	
Plaintiffs-Appellants,	:	
		No. 03AP-1284
v.	:	(C.P.C. No. 02CVC10-12034)
Image Mart, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

O P I N I O N

Rendered on June 3, 2004

Law Offices of Alan Wayne Sheppard, Alan Wayne Sheppard and *Donald P. Beck*, for appellants.

Lane, Alton & Horst, LLC, and *Thomas E. Switzer*, for appellee Image Mart, Inc., dba McAlister Camera & Imaging.

Beau Rymers, for appellee Chesapeake Realty Company, Inc.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Janis and John Y. Cummin, plaintiffs-appellants, appeal from a judgment of the Franklin County Court of Common Pleas, in which the court granted summary

judgment in favor of Chesapeake Realty Company, Inc. ("Chesapeake"), and Image Mart, Inc. ("Image Mart"), dba McAlister Camera & Imaging ("McAlister"), defendants-appellees.

{¶2} On December 15, 2000, Janis parked her car in front of McAlister, which was located in a shopping center. She entered McAlister and purchased photographs from the store. Image Mart owns and operates McAlister and leases the premises from Chesapeake. Janis then exited the store, turned left, and began walking to a beauty shop in the same shopping center. She reached a corner and again turned left toward the beauty shop. At some point while executing this maneuver, Janis looked down momentarily to open the envelope of photographs. After turning the corner, Janis saw a white patio chair approximately three to four feet in front of her on the walkway. The white chair was owned by Image Mart and was used by employees while on break. Janis took one to three steps to her right to walk around the chair, after which she slipped on a patch of ice. Appellants alleged that water had been dripping from gutters that started near the McAlister entrance and lead to the corner downspout near the ice, thereby causing an unnatural accumulation of ice.

{¶3} On October 30, 2002, appellants filed a complaint against appellees alleging negligence. On August 25, 2003, Chesapeake filed a motion for summary judgment asserting that the ice Janis slipped upon was open and obvious such that no duty was owed to Janis. On August 28, 2003, Image Mart filed a motion for summary judgment based upon the same grounds. On November 18, 2003, the trial court filed a decision and entry granting appellees' motions for summary judgment, finding that the ice was an open and obvious hazard. The trial court issued a final judgment entry on

December 9, 2003. Appellants appeal the judgment of the trial court, asserting the following assignment of error:

> The Trial Court improperly granted Appellee Image Mart and Appellee Chesapeake Realty's Motion For Summary Judgment Based Upon the "Open and Obvious Doctrine."

{¶4} Appellants argue in their assignment of error that the trial court erred in granting summary judgment to appellees based upon the open and obvious doctrine. Summary judgment is proper if there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. See Civ.R. 56. It is a procedural device designed to terminate litigation at an early stage where a resolution of factual disputes is unnecessary. However, it must be awarded with caution, resolving all doubts and construing the evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can only reach a conclusion adverse to the party opposing the motion. See *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64; and *Ohio Bus Sales, Inc. v. Toledo Bd. of Edn.* (1992), 82 Ohio App.3d 1. In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, the Ohio Supreme Court stated that the moving party, on the grounds that the non-moving party cannot prove its case, has the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the non-moving party's claim. Once the moving party satisfies this initial burden, the non-moving party has the reciprocal burden to set forth specific facts showing there is a genuine issue for trial. Id. Appellate review of summary judgment is de novo and, as such, we stand in

the shoes of the trial court and conduct an independent review of the record. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579.

{¶5} To prevail upon a claim of negligence, appellant must show that appellees owed her a duty of care, appellees breached that duty, and the breach was the proximate cause of her injuries. *Flowers v. Penn Traffic Co.* (Aug. 16, 2001), Franklin App. No. 01AP-82. In Ohio, the status of a person who enters upon another's land determines the scope of the legal duty the landowner owes to the entrant. *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315. A business owner owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unreasonably exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. Business invitees, as Janis was in the present case, are those who enter the premises of another by express or implied invitation for some purpose that is beneficial to the owner. *Flowers*, supra. The owner must warn the invitee of unreasonably dangerous latent or hidden conditions that the invitee cannot reasonably be expected to discover. Id. A latent danger is hidden, concealed, and not discoverable by ordinary inspection. Id. However, a business owner is not an insurer of a customer's safety. Id.

{¶6} In the present case, the trial court found that the ice upon which Janis slipped was open and obvious. The open and obvious doctrine is related to a landowner's duty. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶13. There is no duty to protect an invitee from open and obvious dangers. Id., at ¶14. "Open and obvious" hazards are neither hidden or concealed from view nor non-discoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49,

50-51. The open and obvious nature of the hazard serves as the warning, and the business owner may reasonably expect that persons entering the premises will discover those dangers and take measures to protect themselves, consistent with an invitee's duty to exercise care for his or her own safety. *Stuhr v. Anthony's Hair Fashions*, Franklin App. No. 03AP-240, 2004-Ohio-103; *Austin v. Woolworth Dept. Stores* (May 6, 1997), Franklin App. No. 96APE10-1430 (no duty to protect invitee from dangers that were known to the invitee or that were so obvious that the invitee could have, upon reasonable inspection, discovered them and taken sufficient steps to protect himself or herself from them). However, "the dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be an 'open and obvious' condition under the law. Rather, the determinative issue is whether the condition is observable." *Lydic v. Lowe's Companies, Inc.*, Franklin App. No. 01AP-1432, 2002-Ohio-5001, at ¶10. Even in cases in which the plaintiff did not actually notice the condition until after he or she fell, this court has found no duty to exist when the plaintiff could have seen the condition if he or she had looked. See *Parsons*, supra, and *Francill v. The Andersons, Inc.* (Feb. 15, 2001), Franklin App. No. 00AP-835. Further, "[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." *Stuhr*, supra, at ¶14, citing *Miller v. Beer Barrel Saloon* (May 24, 1991), Ottawa App. No. 90-OT-050.

{¶7} Appellants first argue that the "open and obvious" doctrine applies only to the duty owed for natural accumulations of ice and snow and does not apply to situations in which the accumulation was unnatural. However, appellants failed to raise this argument anywhere in the court below, and the trial court did not address this issue.

"Issues not raised and tried in the trial court cannot be raised for the first time on appeal." *Holman v. Grandview Hosp. & Med. Ctr.* (1987), 37 Ohio App.3d 151, 157. Appellants' failure to raise this issue before the trial court operates as a waiver of their right to assert it for the first time on appeal. *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 278. Therefore, as the parties did not analyze this issue below, and the trial court never had an opportunity to address it, we decline to address this issue. We note that, in finding appellants waived this argument, we are making no determination as to whether the accumulation of ice was the result of natural or unnatural forces or whether the evidence and testimony presented by appellants were sufficient to raise a genuine issue of material fact as to this issue.

{¶8} Appellants next argue that the accumulation of ice and snow was not open and obvious because there existed "attendant circumstances." Attendant circumstances act as an exception that allows a plaintiff to avoid the open and obvious doctrine. *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 498. An attendant circumstance is a factor that contributes to the fall and is beyond the control of the injured party. *Backus v. Giant Eagle, Inc.* (1996), 115 Ohio App.3d 155, 158. 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. See *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319, 324. An "attendant circumstance" has also been defined to include "any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time." *McGuire*, supra, at 499.

{¶9} Appellants claim there were two attendant circumstances that acted separately and/or in concert to increase the normal risk: (1) the plastic chair on the walkway; and (2) the similarity of color between the dark-shaded ice and the dark-shaded wetness on the surface of the concrete surrounding the ice. With regard to the plastic chair on the walkway, we find it did not constitute an attendant circumstance. In her deposition, Janis testified that, when she rounded the corner, she saw the plastic chair "probably" three or four feet in front of her. She thought she had taken two or three steps before walking around it. Thus, the chair was not immediately around the corner where Janis had to take a sudden or drastic action to avoid a collision with it. There was also no evidence that she was surprised by the chair or had to take such evasive maneuvers that she could only focus attention on the chair and not on attentive ambulation. Indeed, a reasonably prudent pedestrian should be even more observant and watch for hazards at all levels high and low as a corner is being rounded, bringing into view a previously unseen portion of the walkway. See *Neuhauser v. Jarusiewic* (Jan. 16, 1998), Greene App. No. 97-CA-42. The lack of testimony regarding any sudden surprise is persuasive evidence that the placement of the chair was not so unreasonable as to heighten any risks.

{¶10} Importantly, Janis said her visual attention was on the chair. Therefore, she clearly appreciated the existence of the chair. Janis did not indicate that the chair demanded her attention any more or for any longer than the casual attention necessary to move about under normal conditions. There is no evidence that she had to fix her attention on the chair to pass it so as to prevent her from looking forward toward the path she was about to traverse. See *Zuzan v. Shutrump*, 155 Ohio App.3d 589, 2003-Ohio-

7285, at ¶15-16 (attendant circumstances arise when the attention of the person walking is diverted from looking at the ground to ensure that he does not get hit by vehicular or pedestrian traffic or to ensure he does not bump into a foreign object); See *Henry v. Dollar General Store*, Greene App. No. 2002-CA-47, 2003-Ohio-206 (attendant circumstance arose when a plaintiff who tripped on a cement block propping open a door did not look down because she was distracted by a display after turning a corner). We view the existence of the chair under these circumstances as being no different than the existence of any other stationary object that may be encountered and must be avoided in the normal course of daily life. See *McGuire*, supra, at 498 (the breadth of the exception to the open and obvious doctrine for distracting displays or objects does not encompass the common or the ordinary). The existence and placement of the chair was not so abnormal that it unreasonably increased the normal risk of a harmful result or reduced the degree of care an ordinary person would exercise.

{¶11} We also find the similar color between the ice and surrounding wetness of the walkway was not an attendant circumstance. Although appellants argue in their brief that there was little if any contrast between the ice that caused the fall and the wet concrete, such contention is directly belied by Janis' own admission that, if she had been looking down at the ice, she would have seen it. She testified that it was a clear day and there was nothing preventing her from seeing the ice. See *Zuzan*, supra, at ¶15 (poor lighting may be an attendant circumstance). This testimony wholly negates the underlying premise that the color between the ice and surrounding wet concrete was so similar as to increase the risk of a harmful result. See *Richards v. Bowling & Sons, Inc.* (Jan. 29, 1999), Montgomery App. No. CA17375 (plaintiff's contention that the loose gravel and

asphalt upon which she fell were the same color as the surrounding pavement and, thus, was an attendant circumstance, was contradicted by plaintiff's own testimony that when she later looked at the place where she slipped she had no difficulty seeing the gravel and asphalt).

{¶12} Our own review of the photographs taken about one hour after Janis' fall demonstrates that the icy area contained visible ripples and small lumps of slush and snow. Also, the large area of dark, wet concrete encircling the ice patch was clearly contrasted with the dry concrete. Although it was not the wet concrete upon which Janis slipped, the presence of wet concrete on a cold winter day in Ohio logically forewarns of possible ice within the area of wetness. We find these circumstances different from those in which the dangerous condition is obscured by the similarity of the entire surrounding ground. See *Horner v. Jiffy Lube Intern., Inc.*, Franklin App. No. 01AP-1054, 2002-Ohio-2880, at ¶23 (color of oil pan in the pit of an oil-change facility was similar in color to the entire floor of the garage); *Thompson v. Do-An, Inc.* (Sept. 28, 2000), Franklin App. No. 99AP-1423 (the similarity of color of a landing, a hall, and a step upon which the plaintiff fell made it difficult to see the step); *Goldshot v. Romano's Macaroni Grill*, Montgomery App. No. 19023, 2002-Ohio-2159 (the lack of a discernable change in coloration of the sidewalk, which would have highlighted the defect, was an attendant circumstance when coupled with other circumstances). Here, wet concrete containing ice was not a similar color as the lighter, dry concrete surrounding it. Thus, the similarity in color between the ice and surrounding wet pavement was not so abnormal that it unreasonably increased the normal risk of a harmful result

{¶13} Further, we find the two circumstances, while acting in concert, did not comprise an attendant circumstance. There was no evidence that Janis was so distracted or transfixed by the chair that the ice became incapable of recognition due to its color. This is not a case in which appellees placed an obstacle in a pathway that unreasonably drew Janis' attention from any peril caused by the ice or somehow caused the ice to become imperceptible. Importantly, Janis never even testified that she was so distracted by the chair that it prevented her from perceiving the ice. Therefore, considering the totality of the evidence presented, there were no attendant circumstances that would render the open and obvious doctrine inapplicable.

{¶14} Under the circumstances of this case, the ice upon which Janis slipped was an open and obvious condition. The ice was not an unreasonably dangerous latent or hidden condition that Janis could not reasonably be expected to discover. Even though Janis never actually saw the ice, it was not concealed, and, as Janis admitted in her deposition, it was discoverable and observable by ordinary inspection. See *Parsons*, supra, and *Lydic*, supra. There was no duty on behalf of appellees when Janis could have seen the condition if she had looked. See *Parsons*, supra, and *Francill*, supra. The open and obvious nature of the ice should have served as a warning, and appellees could have reasonably expected that Janis would discover the ice and take measures to protect herself, particularly given her testimony that it was a very cold day and she had previously seen snow and ice in other locations while running errands. See *Stuhr*, supra. Accordingly, no genuine issue of material fact remained as to whether the condition of the walkway was open and obvious.

{¶15} Upon review of the evidence and based upon Janis' own testimony, we find that appellants have failed to show that the ice on the walkway constituted a condition that was unreasonably dangerous or that attendant circumstances made the condition unreasonably dangerous. As such, appellants have failed to put forth sufficient evidence to create a question of fact as to whether appellees breached a duty owed to her as an invitee. If there is no duty, the owner or shopkeeper cannot be negligent. *Anderson v. Ruoff* (1995), 100 Ohio App.3d 601. Based upon the record before us, even when we construe the evidence most strongly in favor of appellants, we find that reasonable minds could only come to the one conclusion that no genuine issue of material fact exists on the issue of premises liability, and appellees are entitled to judgment as a matter of law. Appellants' sole assignment of error is without merit.

{¶16} Accordingly, appellants' assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN and WATSON, JJ., concur.

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