[Cite as *Gingrich v. D'Ambrozio*, 2009-Ohio-2956.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DARLA NAIL GINGRICH,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-T-0103**
- vs -	:	
DR. JAMES D'AMBROZIO, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2006 CV 978.

Judgment: Affirmed.

Michael P. Marando, Pfau, Pfau & Marando, 3722 Starr's Centre Drive, P.O. Box 9070, Youngstown, OH 44513 (For Plaintiff-Appellant).

Edward L. Lavelle and *Lynn B. Griffith, III*, Letson, Griffith, Woodall, Lavelle & Rosenberg Co., 108 Main Avenue, S.W., 6th Floor, P.O. Box 151, Warren, OH 44482-0151 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Darla Nail Gingrich, appeals the judgment entered by the Trumbull County Court of Common Pleas. The trial court granted a motion for summary judgment filed by appellee, Dr. James D'Ambrozio.

{¶2} Dr. D'Ambrozio owns a medical office building in Hubbard, Ohio. Dr. D'Ambrozio operates his own medical practice out of the building. In addition, he leases

office space to other individuals. One of Dr. D'Ambrozio's tenants is Dr. Hritz, a massotherapist.

{¶3} Dr. D'Ambrozio's building has three entrance doors. In addition to the front door, there are two side doors, one on each side of the building. Gingrich was a patient of Dr. D'Ambrozio for several years, thus she was familiar with the general set-up of the office building. On all prior occasions, Gingrich entered the building through the front door.

{¶4} Dr. D'Ambrozio hired Michael Syersak to replace the flooring in the front entranceway. On June 29, 2005, Syersak was working on the floor. That morning he removed the old flooring, leaving a hole immediately inside the front doorway. Syersak stated the hole in the floor was approximately three feet by six feet in area and eight to 16 inches deep. After creating the hole, Syersak left for the day. He planned on buying materials and returning the next day to install the new floor. Syersak stated he locked the front door and put yellow caution tape on the outside of the door.

{¶5} Also on June 29, 2005, Gingrich was experiencing neck pain as a result of a prior, unrelated injury. She contacted Dr. Hritz and scheduled an appointment for that day. Gingrich had taken Percocet, a pain medication, so her future mother-in-law drove her to the appointment.

{¶6} Upon arriving at Dr. D'Ambrozio's building, Gingrich approached the front door. She noticed a sign on the door, which read "please use side entrance."[1] Gingrich stated that she did not see any caution tape. Also, Gingrich stated that she did not recall seeing an arrow on the sign. Gingrich walked to her left around the side of the

1. Dr. D'Ambrozio's nurse, Gail Bayer, stated in her deposition that she put the sign on the door and that the sign had an arrow pointing to the right.

building and found another door. Gingrich stated the path to the left door was accessible by the building's driveway, but the door to the right required her to walk across grass. Therefore, she went to the left. She attempted to open the left side door, but it was locked. Since she was unable to enter through the left side door, Gingrich walked back to the front door. She did not attempt to open the right side door. Despite the sign instructing her to use another entrance, Gingrich opened the front door and stepped inside.[2] Gingrich fell into the hole that was immediately inside the doorway. As a result of the fall, Gingrich claims she further injured her neck.

{¶7} Gingrich filed a complaint for personal injuries against Dr. D'Ambrozio and Syersak. Dr. D'Ambrozio filed an answer to Gingrich's complaint and a cross-claim against Syersak. Syersak filed his answer to Gingrich's complaint and Dr. D'Ambrozio's cross-claim. In addition, Syersak filed a cross-claim against Dr. D'Ambrozio.

{¶8} Dr. D'Ambrozio filed a motion for summary judgment in relation to Gingrich's negligence claims against him. Gingrich filed a brief in opposition to Dr. D'Ambrozio's motion. The trial court granted Dr. D'Ambrozio's motion for summary judgment. In its judgment entry, the trial court indicated it was a final, appealable order and that there was no just cause for delay.

{¶9} Gingrich raises the following assignment of error:

{¶10} "The trial court erred in granting summary judgment."

{¶11} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

2. The door was unlocked when Gingrich entered. It is unclear whether Syersak failed to lock the door or someone unlocked the door after he left.

{¶12} "(1) [N]o 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." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶13} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶14} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E) provides:

{¶15} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶16} Summary judgment is appropriate pursuant to Civ.R. 56(E) if the nonmoving party does not meet this burden.

{¶17} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶18} Gingrich's complaint against Dr. D'Ambrozio alleged that Dr. D'Ambrozio was negligent. The Supreme Court of Ohio has held that "in order to establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶8, citing *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶19} Initially, we determine what Gingrich's legal status was on the day in question. The trial court found her to be an invitee. However, Dr. D'Ambrozio contends Gingrich should be considered a trespasser, since she disobeyed the message on the sign. "Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315. (Citations omitted.) However, "[a] trespasser is '*** one who unauthorizedly goes upon the private premises of another without invitation or *inducement, express or implied*, but purely for his own purposes or convenience.'" *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 145. (Citation omitted and emphasis added by *Jeffers* Court.)

{¶20} There are significant distinctions between the respective duties owed to invitees versus those owed to trespassers. "[T]o an invitee the landowner owes a duty 'to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition.'" *Bennett v. Stanley* (2001), 92 Ohio St.3d 35, 38, quoting *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68. As to trespassers, "on the other hand, 'a landowner owes no duty *** except to refrain from willful, wanton or reckless conduct which is likely to injure [the trespasser.]'" Id. at 38-39, quoting *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d at 317.

{¶21} The trial court found Gingrich to be an invitee. It noted that she was at the office building to see Dr. Hritz, who presumably paid rent to Dr. D'Ambrozio. Thus, Dr. D'Ambrozio received a benefit as a result of Gingrich being on his property. We agree with this analysis.

{¶22} Dr. D'Ambrozio argues Gingrich was a trespasser, since she was not authorized to use the front door due to the placement of the sign, which instructed "please use side door." We note that Dr. D'Ambrozio has not raised this issue as a cross-assignment of error. Since Dr. D'Ambrozio sought to preserve the relief granted by the trial court, but for different reasons than those advanced by the trial court, a cross-assignment of error was the proper means to challenge the trial court's ruling on Gingrich's status. See *Rzeszotarski v. Sanborn* (June 7, 1996), 11th Dist. No. 95-G-1906, 1996 Ohio App. LEXIS 2372, at *25. However, in light of our de novo review of summary judgment proceedings, we will address this issue on its merits.

{¶23} Dr. D'Ambrozio cites *Salmon v. Rising Phoenix Theatre*, 12th Dist. No. CA2005-11-491, 2006-Ohio-4328 in support of his position that Gingrich was a

trespasser. In *Salmon*, the plaintiff entered a hallway staircase through a door with an "Authorized Personnel Only" sign on it, then proceeded to walk across an unlit catwalk, apparently lost her footing and fell, sustaining injuries. Id. at ¶4-6. At the time of the accident, the plaintiff was in an area that "only authorized personnel such as maintenance workers were allowed." Id. at ¶6. In the case sub judice, Gingrich used the front door to the office building, which is generally the common and preferred entrance for patients of Dr. D'Ambrozio and the other tenants of the office building. Further, the sign in this matter did not serve as an absolute prohibition to patrons, such as the much stronger language on the sign in *Salmon* did. Id. at ¶4-6. As noted below, the sign in the instant matter served as a warning to Gingrich; however, we do not believe Gingrich's disregard for this warning transformed her presence on that portion of the property to a status of "unauthorized."

{¶24} Finally, we note the front door was not locked at the time of the incident. Had Dr. D'Ambrozio sought to exclude all persons from that portion of the building, the front door could have been locked.

{¶25} We agree with the trial court's conclusion that Gingrich was an invitee.

{¶26} The trial court found the hole to be an open and obvious danger. "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶14, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45.

{¶27} In her deposition, Gingrich states, "I would have seen the hole, obviously, if I was looking down. I wasn't looking down." A plaintiff's failure to look down does not remove a danger from the realm of an open and obvious hazard. Instead, when a

plaintiff acknowledges that he or she would have seen the danger had they looked down, the danger is open and obvious. See *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶16.

{¶28} Gingrich asserts there were attendant circumstances that diminished the open and obvious nature of the hole. Gingrich cites this court's opinion in *Hudspath v. The Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911 in support of her argument that there were attendant circumstances. In *Hudspath*, this court held:

{¶29} "[T]he question of whether something is open and obvious cannot always be decided as a matter of law simply because it may have been visible. *** Rather, the 'attendant circumstances' of a slip and fall may create a material issue of fact as to whether the danger was open and obvious. *** Attendant circumstances include any distraction that would divert the attention of a pedestrian in the same circumstances and thereby reduce the amount of care an ordinary person would exercise. *** In short, attendant circumstances are all the facts relating to a situation such as time, place, surroundings, and other conditions that would unreasonably increase the typical risk of a harmful result of an event." Id. at ¶19. (Internal citations omitted.)

{¶30} Dr. D'Ambrozio cites this court's opinion in *Porter v. The Cafaro Co.*, 11th Dist. No. 2008-T-0026, 2008-Ohio-5533, at ¶30 in support of his position that Gingrich is precluded from raising the issue of attendant circumstances at this court because she failed to raise it at the trial court level. In response, Gingrich argues that the attendant circumstances doctrine is part of the open and obvious doctrine, which was raised before the trial court. Upon consideration and in light of our de novo review of summary judgment proceedings, we will address this issue on its merits.

{¶31} One attendant circumstance, Gingrich argues, is that the hole in the floor was not open and obvious since it "was not observable until the door was opened, at which point, it was too late."[3] We do not agree with this reasoning. Again, Gingrich admitted that, had she been looking down, she would have seen the hole.

{¶32} Gingrich argues she had been a patient of Dr. D'Ambrozio for several years and had always used the front door and that there was a lack of warning on the door of the specific danger on the other side of the door. The sign on the door advising people to please use the side door negates both of these circumstances. Gingrich stated in her deposition that the sign on the door meant she was not supposed to use that door.

{¶33} Gingrich argues another attendant circumstance is that she had taken Percocet that day. However, Gingrich has not submitted any medical evidence regarding the effect of this drug on her cognitive abilities. Moreover, we note that Gingrich's future mother-in-law, whom Gingrich relied on to drive her to Dr. D'Ambrozio's office building, was also aware that there was a sign on the door instructing people to use the side door and was with Gingrich when she fell. The fact that Gingrich had a trusted companion with her to assist her in negotiating her trip to and from her medical appointment would typically decrease the risk of a harmful result.

{¶34} Gingrich contends attendant circumstances also exist in the fact the left side door was locked and the front door was unlocked. In her deposition, Gingrich acknowledged that she did not knock on the left side door to have someone open it for her. In addition, she never went to the right side door, which apparently is the door Dr.

3. The record does not indicate whether this door opened inward or outward. Gingrich testified in her deposition that she did not remember which way the door opened.

D’Ambrozio’s employees intended patrons to enter. Potentially, under different circumstances, the fact that the front door was unlocked could be considered an attendant circumstance. Certainly, the better practice would have been for Dr. D’Ambrozio to ensure the door was locked. However, the fact there was a sign on the door, which Gingrich herself interpreted as informing her that she was not supposed to use that door, negates this factor rising to the level of an attendant circumstance to overcome the open and obvious nature of this defect.

{¶35} We agree with the trial court’s conclusion that the hole was an open and obvious danger. Thus, Dr. D’Ambrozio did not owe Gingrich a duty to protect her from the hole. In addition, we reject Gingrich’s argument that attendant circumstances reduced the open and obvious nature of the hole.

{¶36} Alternatively, even if we accept Gingrich’s position that the hole was not an open and obvious defect and Dr. D’Ambrozio owed her a duty of care, there is no genuine issue of material fact on this issue, as the evidence in the record demonstrates Dr. D’Ambrozio discharged that duty.

{¶37} Both Syersak and Bayer stated there was yellow caution tape around the door when Gingrich opened it and fell into the hole. If proven at trial, the use of the caution tape would be probative as to whether Dr. D’Ambrozio warned Gingrich of the danger behind the door. However, in her deposition, when shown a picture of the door with caution tape around it, Gingrich specifically stated the caution tape was not on the door when she opened it. Thus, for the purposes of a summary judgment analysis, we will proceed as if there was no caution tape on the door, as there is a genuine issue of material fact on this issue.

{¶38} Dr. D'Ambrozio's employee posted a sign on the door, which requested people to "please use side door." Bayer stated that there was an arrow on the bottom of the sign pointing to the right. However, Gingrich does not recall an arrow on the sign. Thus, for the purposes of summary judgment, we will not consider whether there was an arrow on the sign.

{¶39} The unequivocal meaning of this sign warned people that they should not use the front door. In her deposition, Gingrich was asked the following question:

{¶40} "Q. Well, I guess I was using it - - if it says, use other door, it means don't use this door. Sorry. But you - - they didn't want you to go in that door. They wanted you to use a different door.

{¶41} "A. Correct."

{¶42} Gingrich acknowledges that the sign informed her not to use the front door. Moreover, at the very least, even if a person did not realize they should refrain from using the door entirely, the sign warned persons using the door to be extra cautious. Obviously, if patrons are being asked to use an alternate entrance, something may be wrong with the warned entrance. Accordingly, if, in fact, Dr. D'Ambrozio owed Gingrich a duty to protect her from the danger of the hole, he discharged that duty by posting a sign warning her of the potential danger.

{¶43} We recognize the legal concepts of the lack of a duty to warn due to an open and obvious danger and the landowner satisfying his duty to warn by posting the warning sign are distinct. However, this case creates a very limited situation where a "merged" analysis of these concepts is appropriate. The sign on the door enhanced the open and obvious nature of the hole inside by alerting individuals that something was

wrong. While individuals normally have an obligation to look for open and obvious defects, that responsibility is magnified when accompanied by a warning sign.

{¶44} There were no genuine issues of material fact, and Dr. D'Ambrozio was entitled to judgment as a matter of law. Thus, the trial court did not err by granting Dr. D'Ambrozio's motion for summary judgment.

{¶45} Gingrich's assignment of error is without merit. The judgment of the trial court is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., dissents.