COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MARGARET MILATZ,	:	**Case No. A1603564**
	:	
	:	
Plaintiff,	:	**Judge Tom Heekin**
	:	
	:	
	:	
CITY OF CINCINNATI, et al.	:	**MEMORANDUM OF**
	:	**DECISION AND ORDER**
	:	
Defendants.	:	

This matter came before the Court on Summary Judgment Motions by the City of Cincinnati ("Defendant City of Cincinnati"), Cincinnati USA Regional Chamber ("Defendant Cincinnati USA Regional Chamber"), and Loud and Clear, Inc. ("Defendant Loud and Clear") Margaret Milatz ("Plaintiff") opposes Defendant's Motions. The Court, after reviewing the written memoranda submitted by the parties, finds the Defendant's Motions to be well taken.

BACKGROUND

This premises liability case involves Plaintiff's claim that she fell and sustained injuries on September 19, 2015 at downtown Cincinnati's annual Oktoberfest Festival.[1] Plaintiff arrived at the downtown festival at approximately 9:30 p.m. and stayed for about an hour.[2] That evening, Plaintiff and her acquaintance visited several aspects of the sprawling venue, including the area where vendors surrounded Fountain Square and Governor's Plaza.[3] During their visit to the festival, Plaintiff and her friend observed several "cable protector ramps" that had been set up to

[1] Plaintiff's Complaint at ¶¶9-28.
[2] Deposition of Plaintiff Margaret Milatz at pg. 36, 44.
[3] *Id*. at pg. 44-46.

cover and protect the cables that had been laid out on the street to serve the various soundstages, booths, and vendors.[4]

At approximately 10:30 p.m., Plaintiff and her friend decided to leave the festival and began walking back to the parking garage where they had left their vehicle.[5] Plaintiff was paying attention to where she was walking, saw the cable protector ramp at issue, and fell as she attempted to walk over it.[6] After falling to the ground, Plaintiff was in shock, had chest pain, and noticed her shoe was off her foot.[7] Despite feeling like she may have broken her sternum, Plaintiff left the scene of the fall and returned to her hotel.[8]

The day after her fall, Plaintiff returned to the festival and took pictures of the cable protector ramp she tripped over and several others.[9] Subsequently, Plaintiff filed this action against the above-mentioned Defendant's for negligence.[10]

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[11] The burden is upon the party moving for summary judgment to identify "those portions of the record that demonstrate an absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims."[12] Whether a genuine issue of material fact exists depends on whether the evidence presents "a sufficient disagreement to require submission to a jury" or whether it is so "one-sided that one

[4] *Id*. at pg. 42.
[5] *Id*. at pg. 44.
[6] *Id*. at pg. 60-61,215.
[7] *Id*. at pg. 63-64.
[8] *Id*. at pg. 68.
[9] *Id*. at pg. 211. Plaintiff's Response in Opposition to the Motion for Summary Judgment Filed By Defendant the City of Cincinnati at pg. 2.
[10] *See* Plaintiff's Complaint
[11] Ohio R. Civ. P. 56(C).
[12] *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996).

party must prevail as a matter of law."[13] Furthermore, the evidence must be construed in the light most favorable to the nonmoving party.[14] When a motion for summary judgment is made and supported by evidence showing that there is no issue of material fact, the nonmoving party then has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.[15]

DISCUSSION

Defendants filed three separate Motions for Summary Judgment, each arguing that there is no liability because the condition that caused Plaintiff to fall was open and obvious. Additionally, Defendant City of Cincinnati argued there is no liability because the City is immune pursuant to Chapter 2744 of the Ohio Revised Code.

This Court, after construing the evidence in the light most favorable to the Plaintiff find that no genuine issue of material fact exists and that the evidence provided is so one sided that Defendant's must prevail as a matter of law.

I. Defendant City of Cincinnati Governmental Immunity Claim

Defendant City of Cincinnati claims they are entitled to statutory immunity, pursuant to R.C. 2744.01(c)(2), because the alleged loss relates to the performance of a governmental function: regulation of the use of, and the maintenance of, sidewalks.[16]

The First District Court of Appeals in *Brown v. Village of Lincoln Heights* held that the sponsoring of a festival is not one of the delineated governmental functions.[17] In *Brown*, the plaintiff tripped over a grounding rod and attached wire which had been placed on the premises to provide electricity to booths at a festival.[18] The Court of Appeals affirmed the trial court's

[13] *Turner v. Turner*, 67 Ohio St.3d 337, 340 (1993).
[14] *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 617 (1998).
[15] *Vahila v. Hall*, 77 Ohio St. 3d 421, 429 (1997).
[16] Defendant City of Cincinnati Motion for Summary Judgment at pg. 10-13.
[17] *Brown v. Village of Lincoln Heights*, 195 Ohio App.3d 149, 156-157, 2011-Ohio-3551, ¶20, 958 N.E.2d 1280, 1286.
[18] *Brown*, 2011-Ohio-3551, ¶5.

decision denying summary judgment on the basis of governmental immunity.[19] Defendant City of Cincinnati may not claim immunity because the cable protector ramp was placed on the sidewalk not as a result of sidewalk maintenance but as part of a street festival.

II. Open and Obvious Nature of the Hazard

In any negligence claim, the plaintiff must establish (1) that the defendant had a duty to protect the plaintiff from injury, (2) that the defendant breached its duty, and (3) that the breach of duty proximately caused the plaintiffs injury.[20] When a plaintiff is injured by an open and obvious danger, summary judgment is generally appropriate because the duty of care necessary to establish negligence does not exists as a matter of law.[21]

In the First District, festival goers have traditionally been classified as invitees.[22] For an "invitee" or "business visitor," "the landowner owes the invitee a duty to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition."[23] However, the owner or occupier of property owes no duty to warn a person entering the premises of an open and obvious danger.[24] "The rationale underlying this doctrine is 'that the open and obvious nature of the hazard itself serves as a warning.[25] Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.'"[26]

---

[19] *Id*., ¶28.
[20] *Baker v. Meijer Stores Ltd. Partnership*, 12th Dist. Warren No. CA2008-11-136, 2009-Ohio-4681, ¶26 (citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co*., 81 Ohio St.3d 677, 680, 693 N.E.2d 271, 1998-Ohio-602).
[21] *Simmers v. Bentley Constr. Co*., 64 Ohio St.3d 642, 597 N.E.2d 504 (1992).
[22] *Brown*, 2011-Ohio-3551, ¶25.
[23] *Bullucks v. Moore*, 1st Dist. Hamilton No C-020178, 2002-Ohio-7332, ¶5.
[24] *Armstrong v. Best Buy Co*., 99 Ohio St.3d 79, 2003–Ohio–2573, 788 N.E.2d 1088.
[25] *See Esterman v. Speedway LLC*, 1st Dist. Hamilton No. C-140287, 2015-Ohio-689.
[26] *Simmers*, 64 Ohio St.3d 642.

A danger is open and obvious if it is not hidden, concealed from view, or undiscoverable upon ordinary inspection.[27] In determining whether a danger is open and obvious, a court may consider attendant circumstances that would reduce the attention of a patron in the same circumstances and increase the risk of fall.[28]

Here, the purported "hazard" that allegedly caused the injury is a cable protector ramp with black on the sides and a bright neon yellow cover on the top.[29] Plaintiff states that she saw and walked over several cable protector ramps throughout her time at the festival and that she did not have trouble seeing the cable protector ramp she tripped and fell over.[30] Based on Plaintiff's testimony there were no crowds, the ramp was not concealed from her view, and the area where she was walking was well lit.[31] Under these circumstances, the presence and condition of the cable protector ramp was open and obvious.

Plaintiff argues that "attendant circumstances" militate against a finding that the hazard was open and obvious.[32] Specifically, she argues that seeing cable protector ramps, correctly assembled, diverted her attention from seeing the condition of the cable protector ramp over which she allegedly tripped.[33]

In order to qualify as an "attendant circumstance" to overcome the "open and obvious" defense and establish a genuine issue of material fact for trial, the condition(s) at issue must be a "distraction that would come to the attention of a pedestrian in the same circumstances and

---

[27] *Esterman*, 2015–Ohio–659, ¶ 7, quoting *Thompson v. Ohio State Univ. Physicians, Inc.,* 10th Dist. Franklin No. 10AP–6l2, 2011–Ohio–2270, ¶ 12.
[28] *McGuire v. Sears, Roebuck & Co.,* 118 Ohio App.3d 494, 499, 693 N.E.2d 807 (1st Dist.1996).
[29] Deposition of Plaintiff Margaret Milatz at pg. 84-86.
[30] *Id*. at pg. 42-43;60.
[31] *Id*. at pg. 47,60, 63.
[32] Plaintiff's Response Motion to the Motion For Summary Judgment Filed by Defendant City of Cincinnati at pg. 4-6.
[33] Plaintiff's Response in Opposition to the Motion for Summary Judgment Filed by Defendant Loud & Clear, Inc. at pg. 7.

reduce the degree of care an ordinary person would exercise at the time."[34] Specifically, "for this exception to apply, an attendant circumstance must divert the attention of the injured party, significantly enhance the danger of the defect, and contribute to the injury."[35] Furthermore, "an attendant circumstance must be a 'significant distraction,' and cannot include 'regularly encountered, ordinary, or common circumstances.'"[36]

Plaintiff claims that the attendant circumstances in this case include the state of other cable protector ramps in various locations throughout the festival.[37] However, the record is void of reference to how these ramps diverted her attention. Plaintiff fails to explain how the ramps in other locations were a "significant distraction" that ultimately contributed to her fall. Additionally, Plaintiff fails to explain how the assemblage of the other ramps enhanced the danger of the defect, and contributed to her injury. At festivals, properly installed cable protector ramps are hardly "an unusual circumstance." Even after considering the properly assembled cable protector ramps, we have little difficulty concluding the danger confronting Plaintiff was open and obvious. Consequently, in the absence of any attendant circumstances, Plaintiff is barred from recovery resulting from an open and obvious hazard. Defendant's City of Cincinnati and Cincinnati USA Regional Chambers are shielded from liability by the "Open and Obvious" doctrine and summary judgment is appropriate as a matter of law.

III. Open and Obvious Defense is Applicable to Defendant Loud and Clear

Plaintiff argues that the "open and obvious" defense is inapplicable to Defendant Loud and Clear because she considers them an "independent contractor" rather than an owner or

[34] *McGuire*, 118 Ohio App.3d 494.
[35] *McCoy v. Wasabit House, LLC*, 5th Stark No. 2017CA00098, 2019-Ohio-182, ¶44 (citing *Aycock v. Sandy Valley Church of God*, 5th Dist. Tuscarawas No. 2006AP090054, 2008-Ohio-105).
[36] *Esterman*, 2015–Ohio–659, ¶ 11, (quoting *Haller v. Meijer, Inc.*, 10th Dist. Franklin No.11AP-290, 2012-Ohio-670, ¶10).
[37] Plaintiff's Response in Opposition to the Motion for Summary Judgment Filed by Defendant Loud & Clear, Inc. at pg. 7.

occupier of land.[38] Application of the open and obvious doctrine to a plaintiff's negligence claim depends upon the status of the defendant as either (1) an owner or occupier of land, or (2) a contractor on the premises with permission of the owner/occupier.[39] If the defendant is an owner/occupier, then the open and obvious doctrine, if applied, negates the "duty" element of a negligence claim.[40] If, however, the defendant is a contractor on the premises with the permission of the owner/occupier, then the open and obvious nature of the alleged hazard negates the "breach" element of the negligence claim.[41] Despite the distinction of negating either the "duty" element or the "breach" element, proper application of the open and obvious nature of the purported hazard precludes a finding of negligence regardless of whether the defendant is considered an owner/occupier or a contractor.[42] Thus, Plaintiff cannot prove required elements of her premises claim and Defendant Loud and Clear is entitled to summary judgment as a matter of law.

IV.

CONCLUSION

Accordingly, IT IS THE ORDER OF THE COURT that Defendant's Motions for Summary Judgment are hereby GRANTED and this case is dismissed.

Be it so Ordered.

DATE:_____ _____

JUDGE TOM HEEKIN

[38] *Id*. at pg. 5.
[39] *Brock v. Food, Folks & Fun, Inc.*, 2d Dist. Montgomery No. 25719, 2014-Ohio-2668, ¶21.
[40] *Id*.
[41] *Id*.
[42] *See Id*.