[Cite as *Hartman v. Cedar Fair, L.P.*, 2009-Ohio-3914.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Linda Susan Hartman, et al.	Court of Appeals No. E-09-002
Appellants	Trial Court No. 2007-CV-0433
v.	
Cedar Fair, L.P.	**DECISION AND JUDGMENT**
Appellee	Decided: August 7, 2009

* * * * *

Mark McGraw, for appellants.

James Hart, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas which granted summary judgment to appellee pursuant to Civ.R. 56. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants, Linda Susan Hartman and Ronald Hartman, set forth the following assignment of error:

{¶ 3} "ASSIGNMENT OF ERROR I: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANT-APPELLEE CEDAR FAIR'S MOTION FOR SUMMARY JUDGMENT."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. On September 24, 2005, appellants were patrons of Cedar Point Amusement Park ("Cedar Point") in Sandusky, Ohio. Appellants were Cedar Point season-ticket holders. One of appellant Linda Hartman's preferred rides at Cedar Point was the Sir-Tub-A-Dub's Tub water ride in the Kiddy Kingdom section of the park.

{¶ 5} During the course of her numerous visits to Cedar Point as a season-ticket holder, Hartman estimated that she rode the Sir-Tub-A-Dub's Tub ride on approximately 15 to 20 occasions. This ride is comprised of eight tub-style boats which travel through a water filled channel designed to replicate a slow-moving stream or river.

{¶ 6} On September 24, 2005, Hartman and several members of her family were at Cedar Point. They took another excursion on the Sir-Tub-A-Dub's Tub ride. When the ride concluded, Hartman's husband and grandson safely exited the ride, assisted by a ride attendant.

{¶ 7} When Hartman went to exit the ride immediately after her husband, Hartman perceived that the same employee who had assisted her family exit the ride was for some unknown reason unwilling to help her likewise exit the ride. She perceived that this same ride attendant had given her "dirty looks." This perception was not rooted in any objective facts or evidence. Based upon this perception, Hartman elected to proceed

exiting the ride in a manner which, given her deposition testimony, was clearly and openly hazardous.

{¶ 8} Without asking for assistance from the nearby ride attendant or her husband, Hartman stood up in her tub-boat, picked up her granddaughter in one arm and her belongings in the other, and attempted to climb over a railing on the side of the tub. Appellant failed to clear the railing and tripped, sustaining injury.

{¶ 9} On April 13, 2007, appellants filed suit in the Huron County Common Pleas Court. On May 15, 2007, appellants' action was transferred to the Erie County Common Pleas Court. On September 10, 2008, appellee filed for summary judgment on the basis of the open and obvious doctrine.

{¶ 10} On December 23, 2008, the trial court granted summary judgment in favor of appellee. In support, the trial court determined that the open and obvious doctrine applied, extinguished any duty on the part of appellee, and precluded recovery. Timely notice of appeal was filed.

{¶ 11} In the single assignment of error, appellants assert that the trial court erred in granting summary judgment to appellee. In support, appellants contend that the open and obvious doctrine should not be applied to this case.

{¶ 12} We note at the outset that an appellate court reviews a trial court's granting of summary judgment on a de novo basis, applying the same standard utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127,129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St. 3d 102, 105. Summary judgment will be granted

when there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 13} Ohio courts consistently recognize, as was recently reaffirmed by this court in *Mostyn v. CKE Restaurants, Inc*., 6th Dist. No. WM-08-018, 2009-Ohio-2934, the validity of the open and obvious doctrine. This doctrine establishes that no duty is owed to warn business invitees, such as Hartman, of potentially dangerous conditions which are determined to be open and obvious to any reasonable person such that it may be anticipated that the invitee will discover those dangers and engage in actions to protect themselves. *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644.

{¶ 14} Appellants maintain that the open and obvious doctrine is not applicable to this case. In support, appellants placed determinative reliance upon the claims of applicability of the Tenth District Court of Appeals case of *Simmons, et al. v. American Pacific Enterprises,* LLC, 164 Ohio App.3d 763. We have reviewed and considered the *Simmons* case. We find that is fundamentally distinguishable from, and inapplicable to the present case. *Simmons* involved modification of flooring conditions in a freight facility that occurred in the course of a delivery. This modification resulted in a gap through which a worker fell and was injured. We find that the *Simmons* freight facility scenario is materially distinguishable from appellants' incident occurring while disembarking from a children's water ride at an amusement park.

{¶ 15} The record establishes that Hartman was acutely familiar with the Sir-Tub-A-Dub's Tub ride given her status as a season-ticket holder and her unambiguous deposition testimony reflecting that she had been on the ride in excess of a dozen times. The record establishes that a ride attendant was nearby available to assist. The record establishes that Hartman unfortunately elected not to ask for assistance based upon her unsupported perception that she had been given "dirty looks" by the ride attendant.

{¶ 16} Hartman had this perception despite this very same attendant having just assisted her husband and grandson off of the same ride. The record reflects that Hartman attempted to hold her granddaughter in one arm, belongings in the other arm, while simultaneously trying to climb over a railing to disembark from the ride.

{¶ 17} We find that under the facts and circumstances of this case, the hazardous condition experienced by Hartman was not latent. It was open and obvious to a reasonable person. As such, no duty was owed by appellee. The open and obvious doctrine operates to bar recovery. There is no genuine issue of material fact in dispute. Appellants' assignment of error is found not well-taken.

{¶ 18} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE