[Cite as *Madison v. Raceway Park, Inc.*, 2009-Ohio-4068.]

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

Marcia A. Madison, et al.	Court of Appeals No. L-08-1279
Appellants	Trial Court No. CI 2006-07276
v.	
Raceway Park, Inc.	**DECISION AND JUDGMENT**
Appellee	Decided: August 14, 2009

* * * * *

Alan Kirshner, for appellants.

David J. Lenavitt, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the July 18, 2008 judgment of the Lucas County Court of Common Pleas, which granted summary judgment to appellee, Raceway Park, Inc. and dismissed the complaint of appellants, Marcia A. Madison and Lee G. Madison. Upon

consideration of the assignments of error, we affirm the decision of the lower court. Appellants assert the following assignments of error on appeal:

{¶ 2} "First Assignment of Error: The trial court erroneously granted defendant's motion for summary judgment because Mrs. Madison was not required under Ohio law to prove that Raceway Park had knowledge that construction of the chat path to the handicapped parking lot amounted to the creation by Raceway Park of an unreasonable risk of harm.

{¶ 3} "Second Assignment of Error: The trial court erroneously granted defendant's motion for summary judgment because "where reasonable minds can differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine."

{¶ 4} Appellants brought an action against Raceway Park, Inc. in November 2006. They asserted that Marcia Madison was injured because of the negligence of Raceway Park, Inc. in its construction and maintenance of a gravel path, which created a hidden hazard that caused her to fall. Lee Madison asserted a consortium claim.

{¶ 5} Raceway Park, Inc. filed for summary judgment asserting that it was entitled to dismissal of appellants' claims because the cause of Marcia Madison's fall was an open and obvious danger. It contended that Marcia Madison was familiar with the dirt and gravel pathway, knew that it had been raining recently, observed that there was water on the path, and a reasonable person would have expected the ground near the puddle would be soft and could cause a person to fall.

{¶ 6} Appellants opposed the motion arguing that this was not a simple slip and fall because the nature of the chat path caused the fall, not the fact that Marcia Madison left the path and then returned to the path near a puddle. Appellants contended that at the very least, there was a question of fact in this case as to whether the path presented an open and obvious danger or a hidden danger and, therefore, summary judgment would be inappropriate.

{¶ 7} Appellants attached to their memorandum in opposition the affidavit of a safety engineering expert who attested that the chat used to cover the pathway is not an appropriate walkway surface for access to a handicapped parking area. He attested that chat is fine gravel, which is generally used as at a base level to support concrete. In his opinion, such a surface was unreasonably dangerous. The expert, with 40 years of experience, had never seen anyplace where the access path to handicapped parking was poorly drained and used chat in such a manner. He further attested that this was more than a simple trip and fall because the chat and underlying water created a suction action, which caused Marcia Madison's foot to become stuck and caused her fall. The expert attested that standard design procedure established by the National Safety Council, the American Society of Mechanical Engineers, and others would mandate a concrete pathway or at least a safe-guarded pathway or warning signs.

{¶ 8} In her deposition, Marcia Madison testified that for the past 15 years she had been visiting Raceway Park, Inc. three-to-four times each week. On the day she was injured in March 2004, she arrived at the business around 6:30 p.m. on a Friday and

parked her car in the handicapped area, which is located between two doors to the facility. She entered at the south entrance, conducted her business for about an hour, and then exited at the north entrance. To reach the parking lot from the north entrance, one must travel a fine gravel and sand path bordered by a rubber edging and adjacent to grass and mulch. The weather was dry that day, but it had rained earlier in the week on Monday or Tuesday. After she had entered the path, she discovered a puddle on the path which was too deep to pass through without getting her shoes wet. So, she stepped onto the mulch area and walked on it and the grass until she passed the puddle and came to a bush that blocked her path. She then stepped back onto the gravel path. As she placed her first foot on the path, it began to sink immediately and then when she stepped down on the other foot, both feet sank, which caused her to fall on her knees and her right hand she had extended to break her fall. She could not see that the gravel covered mud. She could not get her foot out of the path until someone came to help pull her out. She later learned that she had torn her rotator cuff and the meniscuses in both knees during the fall.

{¶ 9} Bruce Patterson, the maintenance supervisor at Raceway Park, Inc., testified that he has been working for the company since 1991. Prior to his current position, he was a harness trainer/driver for 35 years. He was not trained for his present position, nor did he have any special qualifications for the position. He was first hired to be a starting judge and then moved to track superintendent in 1993, and finally to supervisor of the maintenance department and building services in 1995. As the maintenance supervisor, he supervised the maintenance crew regarding mowing grass

and clearing snow and arranged for maintenance work to be completed either by an outside company or an employee. None of the maintenance crew was specially trained and they did not have any specific assignments. Each morning the crew went to the parking lots to pick up trash and fix the curbing if necessary so that cars would not back up onto the lawn. He would drive around the premises checking the fencing, roadways, and barns. No written records were ever kept regarding maintenance work. If an accident occurred after 5:00 p.m., security or someone in the main office would complete the paperwork. Patterson had no knowledge of the accident at issue until he was called to be deposed. After the time of the accident in this case and the ownership of the company changed, the crew began to be trained in safety procedures. When the Americans with Disabilities Act became effective in the early 1990s, Patterson did not recall doing anything to comply with the Act. In 2007, Moser Construction did a big project for Raceway Park, Inc. and, in addition to other things, added various handicap improvements. Safety experts were brought in from Kansas to examine the premises and make recommendations. Prior to the new owners, the general manager would have been the person accountable for safety at the facility. The general manager had been hired in 1995 or 1996.

{¶ 10} When Patterson arrived at the facility in 1991, there had been a cement walkway to the south entrance, the grandstand entrance. But, people had worn a path from the north entrance, which leads to the clubhouse, and the parking lot. At that time, it was just a beaten dirt path. The area sloped downward about two feet. At first,

Patterson would just keep the area level by raking. He later added cement patio tiles at the direction of the general manager, but the tiles would not lay level. Patterson did not determine the cause of the problem. The general manager told him to cover the path with stone in 2004 or 2005, so he removed the tiles. Patterson used the gravel he used on the racetrack, grade level number nine or stone dust, which is a very coarse stone. The same stone is also used on a roadway used by those who work at the facility. Patterson would add stone as needed and recalled doing it two or three times. He did not research how deep to lay the stone. He just placed it over the worn path area and leveled it to be even with the grass. He did not check whether this stone was appropriate for a pathway used by people. He did not recall ever seeing water accumulate in the area, but believed it could have. The general manager told Patterson to pave the path with concrete in 2006, and he supervised three employees who installed the concrete walkway. Again, he did not do any research as to how to properly install such a walkway.

{¶ 11} The trial court granted the motion for summary judgment finding that a reasonable person would know that the area near a puddle on a sand and gravel path would be soft. Therefore, the court concluded that this was an open and obvious danger, which is a bar to appellants' negligence action. Even if the court had concluded that the gravel path presented a hidden danger, it found that there was no basis for liability in this case because there was no evidence presented to demonstrate that appellee had superior knowledge of the hidden danger.

{¶ 12} Summary judgment is reviewed de novo. *Advanced Analytics Labs., Inc. v. Kegler, Brown, Hill & Ritter*, 148 Ohio App.3d 440, 2002-Ohio-3328, ¶ 33. Therefore, applying the requirements of Civ.R. 56(C), summary judgment is appropriate only when it is clear "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66-67.

{¶ 13} To establish negligence, appellants were required to prove: (1) the existence of a duty owing to the plaintiffs; (2) a breach of that duty; (3) proximate causation; and (4) damages. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, and *Moncol v. Bd. of Ed. of North Royalton School Dist*. (1978), 55 Ohio St.2d 72, 75. Therefore, in this case, appellants were required to establish that: (1) Raceway Park, Inc. had a duty recognized by law requiring it to conform its conduct to a certain standard for Marcia Madison's protection; (2) Raceway Park, Inc. failed to conform its conduct to that standard; (3) the conduct of Raceway Park, Inc. proximately caused appellants' loss or injury; and (4) the amount of appellants' damages.

{¶ 14} In slip and fall cases, negligence liability is based upon the status of the injured party in relation to the property owner. *Lang v. Holly Hill Motel, Inc*. (June 3, 2009), 122 Ohio St.3d 120, 2009-Ohio-2495, ¶ 10. The parties in this case agree that

Marcia Madison was a business invitee. The property owner owes a duty to a business invitee "to exercise ordinary care and to protect business invitees by maintaining the premises in a safe condition." *Lang,* supra, and *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68.

{¶ 15} However, the doctrine of open and obvious dangers provides that a landowner is not required by common law to protect an individual lawfully on the premises from open and obvious dangers. *Lang,* supra at ¶ 11, quoting *Armstrong v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus, approving and following *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. It is expected that the invitee will protect himself against such dangers. *Simmers v. Bentley Constr. Co*. (1992), 64 Ohio St.3d 642, 644.

{¶ 16} Raceway Park, Inc. filed a motion for summary judgment attacking appellants' negligence claim on the basis that appellants could not prove that it owed a duty to appellants because the cause of Marcia Madison's fall was an open and obvious danger. Appellants, as the nonmoving parties, were required to produce evidence on those issues raised for which they bear the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the syllabus.

{¶ 17} We address first the issue of the evidence before this court and then consider appellants' assignments of error in reverse order. Raceway Park, Inc. argues that the affidavit of appellants' expert should not be considered by this court because the trial court, although it never ruled on appellee's motion to strike the affidavit, did not

reference the affidavit in its opinion. Appellants argue that Raceway Park, Inc. waived any such claimed error in the admission of the affidavit because it did not file a cross-appeal.

{¶ 18} Normally, a motion that is not ruled upon is presumed to have been denied. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 223, and *Thayer v. Diver*, 6th Dist. No. L-07-1415, 2009-Ohio-2053, ¶ 85. We agree with appellants that Raceway Park, Inc. did not preserve this issue on appeal when it failed to file a cross-appeal.

{¶ 19} When the trial court granted summary judgment in this case, it found that the puddle presented an open and obvious danger equivalent to snow and ice. Appellants argue in their second assignment of error on appeal that the evidence presented in this case gave rise to a question of fact of whether the danger was open and obvious and, therefore, summary judgment was inappropriate. Appellants contend that the trial court erred by applying the wrong standard for determining whether the danger was open and obvious because it based its conclusion on what a reasonable person would anticipate, not what they could actually observe. We reject appellants' argument. The test is what a reasonable person would conclude about the dangerousness of the condition after observing it. The trial court correctly reasoned that while the mud was not visible, a reasonable person would expect to discover that the area near the puddle would be soft even if it did not appear that way.

{¶ 20} Alternatively, appellants argue that there was at least a question of fact as to whether the hazard was open and obvious. Appellants argue that this case is more akin to the facts in *Fink v. Gully Brook, Inc*., 11th Dist. No. 2004-L-109, 2005-Ohio-6567. In that case, a prospective buyer proceeded across an unfinished yard to enter a home for sale. Because she was walking on dirt, the person exercised extra caution. However, just before reaching the porch of the home, her foot sank in the dirt and she was injured. The yard had been only rough graded, which meant that it was unsettled and could give way or shift as a person walked across it and, therefore, was not stable for pedestrian traffic. The appellate court reversed the grant of summary judgment to the landowner holding that the hazard was not open and obvious because it was not readily observable and, therefore, raised a question of fact as to whether a reasonable person could be expected to discover the hazard. Appellants argue that in their case a reasonable person would expect the area to be wet, but would never have anticipated that the area was muddy and that the gravel would react with the mud to cause her to fall.

{¶ 21} Raceway Park, Inc. argues that the issue of whether a hazard is open and obvious is a question of law when there is no factual dispute. Furthermore, appellee contends that *Fink v. Gully Brook, Inc*., id., is distinguishable on its facts because in that case the ground was dry and there was no way to anticipate that the ground would sink. In the case before us, the area surrounding the hazard was wet, which gave rise to anticipation that the ground would be soft. Raceway Park, Inc. argues that this case is analogous to the facts in *Caravella v. West-WHI Columbus Northwest Partners*, 10th

Dist. No. 05AP-499, 2005-Ohio-6762 (the plaintiff slipped and fell on wet tile of an exit that lacked floor mats, which he chose to use because it was closer to his car and it was raining outside) and *Carano v. Servisteel* (June 16, 1993), 9th Dist. No. 92CA005480 (plaintiff walked in a wet and muddy area and fell into a hole that he thought was just a puddle). In these cases, the courts held that a reasonable person could anticipate that walking in an entrance area that could be wet from rain or walking across wet and muddy ground could cause a person to slip and fall. Therefore, the courts concluded that the dangers were open and obvious.

{¶ 22} Ohio courts disagree whether the determination of the issue of whether a danger was open and obvious is a question of fact or a question of law, *Caravella v. West-WHI Columbus Northwest Partners*, supra. Nonetheless, the question of whether a danger is open and obvious can be determined as a matter of law if the facts are undisputed, as they are in this case, and reasonable minds can come to but one conclusion. The parties do not dispute the facts in this case. Rather, they dispute which facts are relevant to the determination. Appellant focuses on the fact that the mud was hidden under the chat, like the air pockets in the rough graded ground in *Fink,* supra. Therefore, they concluded that a reasonable person would not anticipate that their foot would sink into the path. Raceway Park, Inc. argues that the puddle was clearly observable and that a reasonable person would anticipate that the area near the puddle could be muddy.

{¶ 23} While we agree that the danger that caused the fall was the unseen mud under the gravel, we agree with the trial court that the recent rain and natural accumulation of water in a puddle gave sufficient warning to a reasonable person that the area might be muddy and it could cause someone to fall. A reasonable person would appreciate that the area near standing water always presents a danger. Appellant's second assignment of error is not well-taken.

{¶ 24} Appellants also argue in their first assignment of error that they were not required to prove that Raceway Park, Inc. had superior knowledge of the hazardous condition since they created it. This argument goes to the issue of the defense of Raceway Park, Inc. that it did not breach its duty of care because it did not have superior knowledge of the danger and did not create the danger. Since we have concluded that the danger was open and obvious and, therefore, that Raceway Park, Inc. owed no duty of care to appellants, appellants' other arguments are not relevant. Appellant's first assignment of error is not well-taken.

{¶ 25} We conclude, therefore, that the trial court properly granted summary judgment in this case. Appellant's two assignments of error are found not well-taken.

{¶ 26} Having found that the trial court did not commit error prejudicial to appellants, the judgment of the Lucas 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