[Cite as *Daher v. Bally's Total Fitness*, 2015-Ohio-953.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

MARIE DAHER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2014-L-061**
BALLY'S TOTAL FITNESS,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 13 CV 001933.

Judgment: Affirmed.

John W. Gold, John W. Gold, LLC, 101 West Water Street, Sandusky, OH 44870 (For Plaintiff-Appellant).

John V. Scharon, Jr., 18675 Parkland Drive, #504, Shaker Heights, OH 44122 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

Appellant, Marie Daher, appeals from the June 5, 2014 judgment of the Lake County Court of Common Pleas, granting appellee's, Bally's Total Fitness ("Bally's"), motion for summary judgment. This case arose from injuries sustained by appellant from a slip and fall in a Bally's locker room. On appeal, appellant alleges the trial court erred in applying the open and obvious doctrine and in finding that she had released Bally's from liability. For the reasons that follow, we affirm.

Appellant has been a health club member for some 31 years. For the past eight years, she went to Bally's located in Willoughby, Lake County, Ohio. She had used that club hundreds of times. She went there three times per week and followed the same routine. To gain admittance to the club, appellant had to swipe her membership card on each visit. Her membership card contained her name, photograph, and the following language: "Use of this card or club acknowledges agreement to comply with club rules and written membership contract, including but not limited to the waiver and release of liability from any and all claims or causes of action arising out of our negligence for personal injury or theft of property."

Bally's Rules and Regulations contain the following provision:

"**WAIVER AND RELEASE**. * * * You agree that if you engage in any physical exercise, class or activity, or use any club equipment or facility on the premises, you do so at your own risk. You agree that you are voluntarily participating in activities and use of the facilities and premises (including the parking lot) and assume all risk of injury, illness, damage or loss to you or your property that might result, including, without limitation, any loss or theft of any personal property. You agree to release and discharge us (and our affiliates, employees, agents, representatives, successors and assigns) from any and all claims or causes of action (known or unknown) arising out of our negligence. You acknowledge that you have carefully read this Waiver and Release and fully understand that it is a release of liability. You are waiving any right that you may have to bring a legal action to assert a claim against us for our negligence."

Appellant concedes that she had a membership card and used it to gain admittance into the club. She also concedes that her card contained the foregoing language regarding her agreement to comply with club rules including waiving and releasing Bally's from liability arising out of negligence. However, she denies seeing the language printed on her card and denies seeing the Rules and Regulations containing the "Waiver and Release" provision.

As to her workout routine, appellant testified in her deposition to the following: she would enter the locker room from the lobby to change into workout clothes; she would walk through an aisle way to a back hall, and go upstairs to the workout floor; she would come back down the same way after her workout to change into a swimsuit; she would shower then take the aisle way to the back hall to go to the pool area; she would use the steam room, sauna, swimming pool, and hot tub; between each activity appellant would shower near the pool area; she would get wet in every one of the various parts of the pool area; and when she would finish, appellant would return to the locker room, shower again, change her clothes, and leave the club.

On September 2, 2011, appellant was returning to the locker room from the pool area in her wet swimsuit. She slipped and fell on the wet floor just after making a right turn from the back hall to the aisle way leading to the locker room. She suffered back and shoulder injuries. She walked on the same spot where she fell several times that day during her gym routine. She had never fallen before at the club and was unaware that any other member had ever fallen.

Appellant does not know where the water came from. However, appellant indicated that Bally's did not cause the condition, had no actual knowledge of it, and did

not know how long the water was there. Appellant was aware that many other ladies were in the locker room, used the pool area and showers, and were dripping wet. Although appellant and others had reported the area to be wet on prior occasions, no one, including appellant, had reported the area to be wet on the date of her fall. Appellant knew the area, which had no mats or handrails, was not a good place to walk on.

Bally's employees, Mike Rizer and Steve Bacnik, averred that the wet floor could be seen, the area was well lit, no one was walking in front of appellant, there were no obstructions, and appellant was not distracted in any manner. Bally's employees dry mop the locker room floor throughout the day but it is impossible to keep the floors dry at all times. On the day of appellant's incident, Bally's received no reports regarding the locker room floor.

On September 3, 2013, appellant filed a complaint for premises liability against Bally's. Appellant alleged that Bally's was negligent in maintaining its premises. As a result, appellant alleged she slipped and fell near the pool area and sustained injuries. Bally's filed an answer on September 26, 2013.

On May 9, 2014, Bally's filed a motion for summary judgment pursuant to Civ.R. 56(C). Appellant did not oppose the motion. On June 5, 2014, the trial court granted Bally's motion for summary judgment. Appellant filed a timely appeal asserting the following two assignments of error:

"[1.] The trial court erred when it applied the open & obvious doctrine where there was no alternative route or other means available for plaintiff-appellant to protect herself from the hazard posed by the wet floor.

"[2.] The trial court erred when it found that plaintiff-appellant had released defendant from liability where the record contained no evidence of an executed contract containing 'clear & unequivocal' release language."

Preliminarily, we note that this appeal stems from the trial court's granting summary judgment in favor of Bally's. As stated, appellant did not oppose Bally's motion for summary judgment. "[N]otwithstanding appellant's lack of response to [the] motion for summary judgment, [Bally's is] not entitled to summary judgment absent proof that such judgment is, pursuant to Civ.R. 56(C), appropriate." *Morris v. Ohio Cas. Ins. Co.*, 35 Ohio St.3d 45, 47 (1988). This court, however, finds that summary judgment is appropriate in this case.

"Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66 * * * (1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant 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 the evidence in the non-moving party's favor, that conclusion favors the movant. *See, e.g.,* Civ.R. 56(C).

"When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 121 * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn.

Pierson v. Norfork Southern Corp., 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-252 * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 * * * (1996)." *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6. (Parallel citations omitted.)

Appellant presents two assignments of error. Upon review, we find her first assignment to be determinative of this appeal.

In her first assignment of error, appellant argues the trial court erred in applying the open and obvious doctrine because there was no alternative route or other means available for her to protect herself from the hazard posed by the wet floor. Appellant stresses a genuine issue of material facts exists as to whether a condition is "open and obvious" since Bally's floor plan precluded an alternate route of ingress/egress and since no handrails or alternative means of protecting herself was available to her as a club member.

"In *Porter v. Cafaro Co*., 11th Dist. No. 2008-T-0026, 2008-Ohio-5533, at ¶18-25, this court indicated the following:

"'This court stated in *O'Brien v. Bob Evans Farms, Inc*., 11th Dist. No. 2003-T-0106, 2004-Ohio-6948, at ¶19-22:

""'To prevail on a claim for negligence the plaintiff must prove the following elements: (1) the existence of a duty owed by the defendant to the plaintiff, (2) the

breach of duty, (3) causation, and (4) damages.' *Erie Ins. Co. v. Cortright*, 11th Dist. No. 2002-A-0101, 2003-Ohio-6690, at ¶12.

"""In *Estate of Mealy v. Sudheendra*, 11th Dist. No. 2003-T-0065, 2004-Ohio-3505, at ¶29-30, this court stated that:

""""(a) business owner owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition. *Jones v. H. & T. Enterprises* (1993), 88 Ohio App.3d 384, 388 * * *, (* * *), (* * *). (T)he extent of (a business owner's) duty (is) to keep their premises in a reasonably safe condition and to warn (invitees) about any hidden dangers of which he had or should have had knowledge. See, e.g., *Robinson v. Martin Chevrolet, Inc*. (May 28, 1999), 11th Dist. No. 98-T-0070, 1999 Ohio App. LEXIS 2466, at *4-5.

""""Moreover, the mere fact that a party slipped and fell, of itself, is insufficient to create an inference that premises are unsafe or to establish negligence, there must be evidence showing that some negligent act or omission caused the plaintiff to slip and fall. *Green v. Castronova* (1966), 9 Ohio App.2d 156, 162, * * *, (* * *) (* * *). Put differently, negligence will not be presumed and cannot be inferred from the mere fact that an accident occurred. *Beair* (*v. KFC National Management Co*. (Mar. 23, 2004), 10th Dist. No. 03AP-487, 2004-Ohio-1410).' (Parallel citations omitted.)

""This court stated in *Hudspath v. Cafaro Co.,* th Dist. Ashtabula No. 2004-A-0073, 2005-Ohio-6911, at ¶18-19:

"""The duty of reasonable care a premises-owner generally owes its invitees ceases to exist where dangers or obstructions are so obvious that the invitee may reasonably be expected to discover them and protect herself against them. *Armstrong*

v. Best Buy Co., Inc., 99 Ohio St.3d 79, 80, 2003-Ohio-2573, * * *, (* * *) (* * *). This principle is based upon the legal acknowledgement that one is put on notice of a hazard by virtue of its open and obvious character. Id. Where a danger is obvious, an owner may reasonably expect that persons entering the premises will discover those hazards and take proper measures to protect themselves. When applicable, the open and obvious doctrine abrogates the duty to warn and completely precludes negligence claims. *Hobart v. City of Newton Falls*, 11th Dist. No. 2002-T-0122, 2003-Ohio-5004, ¶10.

"'"However, the question of whether something is open and obvious cannot always be decided as a matter of law simply because it may have been visible. *Collins v. McDonald's Corp.*, 8th Dist. No. 83282, 2004-Ohio-4074, at ¶12, citing *Texler v. D. O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, * * *, (* * *) (* * *). 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. *Louderback v. McDonald's Restaurant*, 4th Dist. No. 04CA2981, 2005-Ohio-3926, at ¶19. 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. *McGuire v. Sears, Roebuck and Co.* (1996), 118 Ohio App.3d 494, 499, * * *, (* * *) (* * *). In short, attendant circumstances are all 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. See *Menke v. Beerman* (Mar. 9, 1998), 12th Dist. No. CA97-09-182, 1998 Ohio App. LEXIS 868, at 2-3, citing *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319, * * *, (* * *), (* * *).' (Parallel citations omitted.)' (Parallel citations

omitted.)" *Baker v. J.I.G.S. Investments, Inc.,* 11th Dist. Trumbull No. 2010-T-0045, 2010-Ohio-5180, ¶15-23. (Parallel citations omitted.)

In the case at bar, Bally's owed appellant, a business invitee, a duty of ordinary care to maintain the premises in a reasonably safe condition so that she would not be unnecessarily and unreasonably exposed to danger. *Baker, supra,* at ¶24. By no means is Bally's, as a property owner, an insurer of an invitee's safety. *Id.*

In support of her position that there was no alternative route, (a fact not contained in the record), or other means available for her to protect herself from the hazard posed by the wet floor, appellant relies on a 40-year-old Sixth District case, *Mizenis v. Sands Motel, Inc.*, 50 Ohio App.2d 226 (6th Dist.1975). However, her position and reliance on *Mizenis* confuses the distinct doctrine of assumption of risk and open and obvious danger. *See Goldstone v. Scacchetti's, Inc.*, 7th Dist. Mahoning No. 07 MA 112, 2008-Ohio-2563, ¶17 (distinguishing *Mizenis*, which involved natural accumulation of snow and ice on an exterior stairway, from a slip and fall on a wet floor in a restroom).

In *Mizenis,* the Sixth District was asked to decide whether a plaintiff had assumed the risk when encountering a snow and ice covered stairway. In that case, the plaintiff was a motel guest who had to walk down an exterior stairway to exit the motel from a second-floor room. The Sixth District held that the plaintiff did not voluntarily assume the risk when encountering the stairway since he had "no reasonable alternative to taking his chances." *Mizenis, supra,* at 231.

This legal principle simply does not apply in this case "since the doctrine of assumption of the risk is distinct from the open and obvious doctrine." *Goldstone,*

supra, at ¶19. "'(T)he open-and-obvious doctrine (* * *) relates to the threshold issue of duty.' * * * In contrast, implied assumption of risk (the form of the doctrine at issue in *Mizenis*) assumes establishment of a prima facie case (including the duty element), and therefore is a traditional affirmative defense." *Id.* (Citations omitted.)

"Under the open and obvious doctrine, it does not matter whether the invitee had a viable alternative to encountering the open and obvious danger. *Steiner v. Ganley Toyota Mercedes Benz,* 9th Dist. No. 20767, 2002-Ohio-2326, at ¶13-20. Where a condition is patent or obvious, the business invitee is expected to protect himself, unless the condition is unreasonably dangerous. *Sidle* [*v. Humphrey*, 13 Ohio St.2d 45,] at paragraph one of the syllabus [(1968)]." *Goldstone, supra,* at ¶20.

Thus, unlike *Mizenis*, the instant case involves the open and obvious doctrine regarding a slip and fall. As stated, appellant was returning to the locker room from the pool area in her wet swimsuit. She slipped and fell on the wet floor leading into the locker room.

We note that "water is inherently slippery and can create dangerous conditions that would be obvious to a reasonable person." *Herbst v. Riverside Community Urban Redevelopment Corp.*, 9th Dist. Summit No. 26493, 2013-Ohio-916, ¶15. Wet floors in locker room areas adjacent to swimming pools are not extraordinary conditions but rather are conditions which a reasonable person would expect in such areas. *Tarescavage v. Meridian Condominium, Inc.*, 8th Dist. Cuyahoga No. 65446, 1994 Ohio App. LEXIS 2048, *8 (May 12, 1994).

Based on the facts presented, the wet condition of the locker room floor near the pool area was open and obvious. In fact, appellant admitted in her deposition that she

was aware that the area became wet and slippery and that she needed to exercise care in traversing that area of the locker room. As stated, appellant indicated that Bally's did not cause the condition, had no actual knowledge of it, and did not know how long the water was there. Appellant was aware that many other ladies were in the locker room, used the pool area and showers, and were dripping wet. No club member, including appellant, had reported the area to be wet on the date of her fall. There is no evidence that this was an exclusive route. Also, appellant knew the area was not a good place to walk on. Although no handrails and/or floor mats were located in the area where appellant slipped and fell, we note that there is no such requirement to have these items under any statute or building code.

When viewing the evidence in a light most favorable to appellant, the trial court properly determined that reasonable minds could only conclude that Bally's did not violate any duty as the wet locker room floor was open and obvious. Thus, the trial court properly granted Bally's motion for summary judgment.

Appellant's first assignment of error is without merit.

In her second assignment of error, appellant contends the trial court erred in finding that she had released Bally's from liability because the record contains no evidence of an executed contract containing "clear and unequivocal" release language. Appellant stresses that a genuine issue of material fact exists as to whether she released Bally's because Bally's presented no evidence of an executed release and waiver of liability.

Based on our resolution of appellant's first assignment of error, and the finding that summary judgment was appropriate, appellant's remaining assignment of error is

rendered moot. *See* App.R. 12(A)(1)(c); *Williamson v. Geeting*, 12th Dist. Preble No. CA2011-09-011, 2012-Ohio-2849 (holding that the assignments of error concerning the open and obvious doctrine in a slip and fall case are determinative of an appeal thereby rendering any remaining assignments moot).

For the foregoing reasons, appellant's first assignment of error is not well-taken and her second assignment is moot. The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.