[Cite as *Mondi v. Stan Hywet Hall & Gardens, Inc.*, 2010-Ohio-2740.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

TONY MONDI, et al. Appellants v. STAN HYWET HALL & GARDENS, INC., et al. Appellees	C. A. No. 25059 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008-12-8407

DECISION AND JOURNAL ENTRY

Dated: June 16, 2010

CARR, Presiding Judge.

{¶1} Appellants, Tony and Amy Mondi, appeal the judgment of the Summit County Court of Common Pleas granting summary judgment in favor of appellees, Stan Hywet Hall and Gardens Foundation, et al. This Court affirms.

I.

{¶2} This case stems out of an incident which occurred on August 18, 2007, at Stan Hywet Hall in Akron, Ohio. Stan Hywet Hall is a facility that holds itself out to the public for tours, displays, and other activities for which it charges an admission fee. The Stan Hywet Hall and Gardens Foundation and Stan Hywet Hall and Gardens, Inc. are corporations organized to operate and maintain Stan Hywet Hall. While walking through a train display at Stan Hywet Hall with several members of her family, Amy Mondi's foot struck a portion of a wall which was constructed of rocks. Ms. Mondi suffered two broken toes as a result of the incident.

{¶3} On December 5, 2008, Amy Mondi and her husband, Tony Mondi, filed a complaint against Stan Hywet Hall, Stan Hywet Hall and Gardens Foundation, and Stan Hywet Hall and Gardens, Inc. (hereinafter collectively referred to as "Stan Hywet"). In the complaint, Ms. Mondi alleged that, as a business invitee, she sustained injuries while visiting the Stan Hywet premises on August 18, 2007, due to their negligent maintenance of the premises. Tony Mondi claimed loss of consortium due to the injuries to his spouse arising out of Stan Hywet's negligence. Stan Hywet filed a timely answer to the complaint on January 21, 2009.

{¶4} The parties subsequently engaged in discovery. On July 21, 2009, the depositions of Ms. Mondi and her mother, Rosalyn Joyce Worthing, were taken. On the same day, the deposition of two Stan Hywet representatives, Betty Lee Pinter and James Urban, were also taken. On August 4, 2009, Stan Hywet filed a motion for summary judgment. The Mondis filed a brief in opposition on August 26, 2009. Stan Hywet filed a reply brief on September 8, 2009. On October 5, 2009, the trial court granted Stan Hywet's motion for summary judgment.

{¶5} The Mondis appeal from that order, raising one assignment of error.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT[.]"

{¶6} In their sole assignment of error, the Mondis contend the trial court erred in granting Stan Hywet's motion for summary judgment. This Court disagrees.

{¶7} The Mondis make three arguments in support of their assignment of error. First, the Mondis argue the trial court misconstrued the facts before it in ruling on Stan Hywet's motion for summary judgment. The Mondis further argue there was a genuine issue of material fact regarding whether the defective condition was open and obvious. Finally, the Mondis argue

there was a genuine issue of material fact regarding the nature and effect of attendant circumstances.

{¶8} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶9} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No 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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶10} In order to prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶11} Furthermore, in order to prevail on a claim of negligence, appellants must establish the existence of a duty, a breach of that duty, and an injury proximately resulting from

the breach of duty. *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77. Whether or not a duty exists is a question of law. *Williams v. Garcias* (Feb. 7, 2001), 9th Dist. No. 20053.

{¶12} In Ohio, the scope of the legal duty owed by the premises owner is determined by the visitor's classification as either an invitee, a licensee, or trespasser. *Gladon v. Greater Cleveland Regional Transit Auth*. (1996), 75 Ohio St.3d 312, 315. "Business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Light v. Ohio Univ*. (1986), 28 Ohio St.3d 66, 68, citing *Scheibel v. Lipton* (1951), 156 Ohio St. 308. "It is the duty of the owner of the premises to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition." *Light*, 28 Ohio St.3d at 68, citing *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31. Here, the parties agree that Amy Mondi was a business invitee. This stems from the fact that Stan Hywet was charging an admission fee in order to view the various exhibits on the premises.

{¶13} The Supreme Court of Ohio has reaffirmed the viability of the open and obvious doctrine, stating that "[w]here 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 syllabus, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. Under the open and obvious doctrine, an owner owes no duty to protect business invitees from hazards which are so obvious and apparent that the invitee is reasonably expected to discover them and protect himself against them. *Humphrey*, 13 Ohio St.2d at syllabus. This Court has stated that "[a] business is not 'an insurer of the customer's safety,' nor is it duty-bound to protect its invitees from such readily apparent dangers." *Gehm v. Tri-County, Inc*., 9th Dist. No. 09CA009693, 2010-Ohio-1080, at ¶7, citing *Paschal v. Rite Aid Pharmacy, Inc*. (1985), 18 Ohio St.3d 203. The Supreme Court has held, however, that an individual "is not, as a matter of law, required to look

constantly downward under all circumstances even where she has prior knowledge of a potential hazard." *Grossnickle v. Germantown* (1965), 3 Ohio St.2d 96, paragraph two of the syllabus.

{¶14} In support of their assignment of error, the Mondis argue there was a genuine issue of material fact regarding the nature and effect of attendant circumstances. In applying the open and obvious doctrine, this Court considers the totality of the circumstances to determine if the individual should have reasonably known of the alleged condition. *Marock v. Barberton Liedertafel*, 9th Dist. No. 23111, 2006-Ohio-5423, at ¶14 (stating "this Court adopts the view that the consideration of attendant circumstances is merely a generalized version of the reasonableness test subsumed by the open and obvious doctrine").

{¶15} In this case, Amy Mondi alleges that she was injured as a result of Stan Hywet's negligence. On August 18, 2007, Ms. Mondi went to Stan Hywet with several members of her family to view a tree house exhibit. Ms. Mondi's deposition testimony indicates that after a period of time, she entered the model train exhibit inside the Stan Hywet's conservatory with several members of her family including her mother and her two children. Notably, the path through which the group traversed in the conservatory was wide enough for persons to pass freely going back and forth. Trains were displayed both overhead and on the ground. A rock wall separated the edge of the path from the train exhibit. Photographs introduced as exhibits by the parties show that the wall was comprised of loose rocks stacked on top of each other. The pathway was set up in a serpentine manner. As Ms. Mondi entered the exhibit, she was holding Angelina, her nine-month-old daughter, in her arms as she pushed a stroller in front of her. Ms. Mondi's then three-year-old son, Anthony, walked with Ms. Mondi's mother, Rosalyn Joyce Worthing. The group proceeded through the exhibit and observed the trains. After a few minutes, Anthony said, "I have to go potty." At this point, Ms. Mondi handed Angelina to her

mother and turned to follow her son to the restroom. Ms. Mondi averred that within "a step or two," she struck a portion of the rock wall with her foot and broke two of her toes. The portion of the rock wall which Ms. Mondi struck with her foot was at ground level. Ms. Mondi stated that if she would have turned to look at the rock wall, it would have been visible.

{¶16} Betty Lee Pinter, Stan Hywet's hospitality coordinator and event manager, completed an incident report which stated Ms. Mondi "[h]ad flip-flops on and walked into a rock jutting out from train display. May have broken toes or foot."

{¶17} James Urban, a volunteer at Stan Hywet, attempted to aid Ms. Mondi on the day of the accident. Mr. Urban averred that the walkway in the exhibit was wider than a public sidewalk. Mr. Urban further averred that there was sufficient space for people to walk back and forth on the pathway while viewing the train exhibit.

{¶18} Rosalyn Joyce Worthing, Ms. Mondi's mother, was also deposed in this case. Ms. Worthing averred that the incident occurred about two minutes after the group entered the train exhibit. When Anthony indicated that he needed to use the restroom, Ms. Mondi asked her mother, "Do you want to take him or do you want me to stay with Angelina?" Ms. Worthing responded, "You go with Anthony." When asked if Amy had handed off Angelina prior to the incident, Ms. Worthing averred, "I don't remember. It was just like instant. Whatever happened, it was instantly." The rocks in question were "on the ground" as part of a barrier to the plants. The rock which Ms. Mondi struck with her foot was "jutting out." Ms. Worthing further averred that the area was not overly crowded and that there were "maybe two people there." Ms. Worthing also averred that she did not see anything, such as a hanging bush, that would have obstructed Ms. Mondi's vision.

{¶19} We hold that the trial court did not misconstrue the facts of this case, which reveal there was no genuine issue of material fact as to whether the danger of the rock wall was open and obvious. The facts indicate that the path was sufficiently wide to allow people to pass freely without coming into contact with the wall. Nothing in the facts suggests that Ms. Mondi's ability to see the wall was obstructed. By its very nature, a rock wall does not have a smooth, even texture. Rather, portions of a wall comprised of rocks will protrude in an uneven manner creating a multi-dimensional appearance. The natural texture of a rock wall, coupled with the serpentine design of the walkway, was an open an obvious hazard. Ms. Mondi injured her foot immediately after handing her daughter, then nine months old, to Ms. Worthing. While Ms. Mondi was not required to constantly look downward, a pedestrian in her position would have noticed that an abrupt change of direction near the edge of a pathway bordered by a rock wall contained an inherent risk. In light of these facts, the trial court correctly found that the rock wall was an open and obvious condition.

{¶20} The Mondis' assignment of error is overruled.

III.

{¶21} The Mondis' sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

MOORE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

DONALD E. WORTHING, Attorney at Law, for Appellants.

ANN MARIE O'BRIEN, Attorney at Law, for Appellees.