[Cite as *Morris v. Fields Family Ents., Inc.*, 2011-Ohio-3433.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

AUBREY MORRIS,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-10-102
	:	O P I N I O N
- vs -		7/11/2011
	:	
FIELDS FAMILY ENTERPRISES, INC., et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CV76973

Dwight D. Brannon, 130 West Second Street, Suite 900, Dayton, Ohio 45402, for plaintiff-appellant

Stephen J. Brewer, 36 East Seventh Street, Suite 2100, Cincinnati, Ohio 45202, for defendant-appellee, Fields Family Enterprises, Inc.

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PIPER, J.

{¶1} Plaintiff-appellant, Aubrey Morris, appeals the decision of the Warren County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Fields

Family Enterprises (Fields Family) and Valley Street, Ltd. (Valley Street). We affirm the decision of the trial court.

{¶2} In October 2006, Morris and her mother attended the Waynesville Sauerkraut Festival, and parked her car in a lot owned by Valley Street. At the time of the 2006 festival, Valley Street and Fields Family owned adjoining lots, with Valley Street's lot located behind the lot owned by Fields Family. Because Valley Street's lot had no street frontage, Fields Family gave Valley Street an easement to use the paved driveway it owned that provided a means of entering the lots. Once on the lots, the cars would then exit onto the public road by a separate dedicated exit driveway, which Fields Family also permitted Valley Street to use.

{¶3} According to Morris' deposition testimony, she entered the field on the paved driveway, paid a $5 parking fee to a Valley Street representative, parked her car, and then attended the festival for a few hours. After attending the festival, and upon her return to the parking lots, Morris and her mother found that the driveway was blocked by yellow caution tape, which was approximately four feet off of the ground. Morris testified that nothing was stopping her from walking around the tape and continuing on the driveway. However, Morris observed other people coming upon the tape and walking around the driveway and onto the grassy parking lots. Morris and her mother decided not to get back onto the driveway and instead followed the others walking in the fields.

{¶4} Once off the driveway, Morris testified that she and her mother continued to walk in the field rather than on the driveway, and that they continued to walk in a more direct route to her car. Soon thereafter, Morris stepped into a hole, which she estimated to be about seven and one-half inches wide and a foot and one-half deep, and broke her leg as a result.

{¶5} Morris filed suit against Fields Family, Valley Street, and the Waynesville Chamber of Commerce. After Morris voluntarily dismissed the Waynesville Chamber of

Commerce from the suit, Fields Family and Valley Street filed motions for summary judgment. Morris argued that Valley Street was liable because she was a business invitee, Valley Street breached its duty of care to maintain a safe ingress and egress. Morris also asserted that Fields Family was liable to her because she fell on its property, and that both defendants are liable because they were engaged in a joint venture for profit.

{¶6} The trial court granted summary judgment in favor of Fields Family and Valley Street, finding that the parties had not created a joint venture and that while Morris was Valley Street's business invitee, Valley Street did not breach its duty to Morris because she fell on Fields Family's property. The trial court also found that Morris was a licensee to Fields Family and that it had not breached its duty to refrain from willful, wanton, or reckless conduct. Morris now appeals the trial court's decision, raising the following assignment of error.

{¶7} "THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS-APPELLEES FIELDS FAMILY ENTERPRISES, INC. AND VALLEY STREET, LTD."

{¶8} Morris argues that the trial court erred by granting summary judgment in favor of Fields Family and Valley Street. This argument lacks merit.

{¶9} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R.56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. A dispute of fact can be

considered "material" if it affects the outcome of the litigation. *Myers v. Jamar Enterprises* (Dec. 10, 2001), Clermont App. No. CA2001-06-056, 2001 WL 1567352. A dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. Id.

{¶10} "To survive a properly supported motion for summary judgment in a negligence action, a plaintiff must establish that genuine issues of material fact remain as to whether: (1) the defendant owed a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. If a defendant points to evidence illustrating that the plaintiff will be unable to prove any one of the foregoing elements, the defendant is entitled to judgment as a matter of law." *Albright v. University of Toledo* (Sept. 18, 2001), Franklin App. No. 01AP-130, 2001 WL 1084461,*2.

Valley Street

{¶11} Because Valley Street invited Morris onto its property for its own benefit, mainly the $5 parking fee, Valley Street's premises liability will be determined by the law specific to business invitees. An "invitee" is a business visitor who rightfully comes onto the premises of another by invitation, express or implied, for the benefit of the owner. *Gladon v. Greater Cleveland Regional Transit Auth.,* 75 Ohio St.3d 312, 315, 1996-Ohio-137. "An owner of premises owes a business invitee a duty to exercise ordinary care to maintain the premises in a reasonably safe condition so that the invitee is not unreasonably or unnecessarily exposed to danger." *French v. New Paris*, Preble App. No. CA2010-05-008, 2011-Ohio-1309, ¶21. "That duty included responsibility for due care in providing a reasonably safe ingress and egress." *Tyrrell v. Investment Assoc., Inc.* (1984), 16 Ohio App.3d 47, 49.

{¶12} "Such duty of care, however, has not been held to extend to property which is beyond the owner's control." *Carr v. Brock* (June 5, 1989), Butler App. No. CA88-09-136, 4. "The element of control is required as a predicate to liability because the possessor of the

land is thought to be in the best position to diminish dangers to invitees." *Albright* at *5. Because Morris fell on Fields Family's property, the focus of Valley Street's duty is on the area which it controlled, mainly its right to use the paved driveway via its easement. "Although the owner or occupier of the premises is not an insurer of the safety of his invitees, he does owe a duty to exercise ordinary or reasonable care for their protection." *Albright* at *3. Valley Street therefore owed Morris a duty to exercise ordinary care to maintain the ingress and egress by way of the paved driveway in a reasonably safe condition so that she was not unreasonably or unnecessarily exposed to danger.

{¶13} During her deposition testimony, Morris stated that upon returning from the festival, she found the entrance to the driveway cordoned off with a single strip of yellow tape. According to her statement, the tape was tied to two sticks at the end of the driveway, and was approximately four feet high. Morris testified that she did not attempt to lift the tape to go underneath and did not step around the tape. Morris also stated that there was nothing that would have prohibited her from "simply walking around the tape and getting onto the walkway." Morris also testified that she started walking on the field when other festival goers did the same thing, and that she kept walking on the grassy field because it was a "straight line to the car."

{¶14} Morris' testimony establishes that while the tape blocked the initial entrance to the paved driveway, she could have easily stepped around the stick at the end of the driveway and immediately reentered the paved driveway. Instead of using the safe ingress and egress provided by Valley Street, Morris chose to continue to walk on the grassy field because it was a straight line to her car.

{¶15} After reviewing the record, Morris cannot point to any genuine issue of material fact that Valley Street failed to exercise ordinary care to maintain the ingress and egress. By way of the easement, Valley Street provided its customers with a paved walkway to utilize.

Morris does not point to any facts regarding where the tape came from, and no one is able to state who hung the tape. Regardless of who placed the tape, the fact that the tape blocked Morris' initial entrance to the walkway does not demonstrate a breach of duty because Morris admitted that she could have easily reentered the paved driveway but chose instead to take a more direct route to her car. Her choice to do so, however, was not a result of any breach of duty by Valley Street. The law establishes that Valley Street was not an insurer of Morris' safety, and the record indicates that it fulfilled its duty by providing a safe ingress and egress on the area it controlled via the easement. As there are no genuine issues of material fact to litigate and Valley Street is entitled to judgment as a matter of law, the trial court properly granted summary judgment in its favor.

Fields Family

{¶16} Regarding Fields Family, Morris was a licensee because she was permitted to walk across its land but was not otherwise there to benefit Fields Family. "A licensee is one who enters property with the permission or acquiescence of the owner or occupier and for the benefit of the individual instead of the owner or occupier. The duty of care owed to a licensee is a duty to avoid wanton or willful misconduct. To constitute willful and wanton misconduct, an act must demonstrate heedless indifference to or disregard for others in circumstances where the probability of harm is great and is known to the actor." *Estate of Enzweiler v. Bd. of Commrs.*, Clermont App. Nos. CA2010-11-085, CA2010-11-086, 2011-Ohio-896, ¶15. (Internal citations omitted.)

{¶17} Morris is unable to establish that genuine issues of material fact remain as to whether Fields Family acted in a wanton or willful manner and demonstrated heedless indifference or disregard to circumstances where the probability of harm was great or known. Kenneth Fields, one of the owners of the Fields Family property, testified that he and his family prepared their lot for parking use by inspecting the property for holes. He stated that

he, his brother, and father walked up and down the property multiple times looking for any dangers and did not find any. The family also placed colored tape around a tree and an old shed so that its customers would not collide with them during parking.

{¶18} These acts demonstrate that Fields Family inspected its property, took steps to secure its customers' safety, and was unaware of any dangerous areas or circumstances where the probability of harm was known to them. Therefore the trial court correctly determined that summary judgment in favor of Fields Family was proper.

Joint Venture

{¶19} Morris also asserts that the trial court erred in finding that Fields Family and Valley Street had not formed a joint venture. According to the Ohio Supreme Court, a joint venture is "an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each co-adventurer shall stand in the relation of principal, as well as agent, as to each of the other co-adventurers." *Al Johnson Construction v. Kosydar* (1975), 42 Ohio St.2d 29, paragraph one of the syllabus.

{¶20} Based on the record, Fields Family and Valley Street did not engage in a joint venture. According to the testimony of the owners of Fields Family and Valley Street, the parties did not enter into an express or implied contractual association. While Valley Street had the right to use the entrance driveway through its easement, and the ability to use the dedicated exit, the hospitable agreement allowing the use of the paved driveway did not create the necessary elements of contractual formation. Jerry Bush testified that Valley Street and Fields Family merely reached an oral agreement on the first morning of the festival to allow all of Valley Street's parkers to use the dedicated exit on Fields Family's

property. However, their cooperation with one another in furthering their separate enterprises was not the result of contractual negotiations and was not granted in return for consideration.

{¶21} No genuine issues of material fact remain that would reasonably demonstrate that Valley Street and Fields Family were carrying out a single business venture. Although Kenneth Fields testified that his lot was small and filled up quickly, and that the parties cooperated with one another, the parties had no express or implied agreement reasonably sufficient to create a joint venture. Jerry Bush testified that there was nothing to stop a customer from entering the paved driveway and parking in the back lot owned by Valley Street even if there were spots open in Fields Family's lot. Instead, Fields Family's lot would fill up first due to its closer proximity to the festival and was the first off-street parking opportunity given the drivers upon entering the lots. Because Valley Street's easement came from Fields Family, it may have been impertinent for Valley Street not to assume that Fields Family's smaller lot would be filled first. However, the courtesy shared between the parties is insufficient to create a joint venture where none otherwise existed.

{¶22} Furthermore, the parties employed different people to collect and direct traffic, and even accepted different amounts as a parking fee. While Fields Family charged a $7 parking fee, Valley Street would accept $5 if the customer was confused by the sign across the street from the fields offering $5 parking. While Kenneth Fields testified that Fields Family did not deviate from its $7 rate, Morris testified that she paid the Valley Street employee $5 to park on its lot.

{¶23} Even when the evidence is viewed in a light most favorable to Morris, Valley Street and Fields Family did not combine their efforts, property, money, skill and knowledge in a joint venture. Instead, the parties maintained two distinct lots, separated on one side by a wooden fence. The parties also hired separate employees dedicated to accepting money and directing traffic specific to their own lot. Neither did the parties share any expenses in

readying their properties for festival parking.

{¶24} The parties testified that they did not share any of their profits with the other party, and never exchanged, split, or shared the money parkers would pay. Neither did the parties account their profits to the other party. In fact, Jerry Bush testified that he and his brother treated the weekend as a "fun family weekend" and that he and Jason gave their wives and kids the collected parking money "to go to the festival and have fun and play with." At no time, however, did the Bush brothers discuss finances with Fields Family, or vice versa.

{¶25} While Fields Family and Valley Street may have talked with one another and even extended courtesy or cooperation to the other (in order to advance their separate ventures), there is no evidence of a mutual intention of the parties to treat their separate parking areas as "a whole" in a singular venture. The parties also took separate actions before the festival started to ready their land for use. Fields Family mowed their own grass, hung tape to point out a tree and shed on its property, and walked up and down its own lots to detect any dangers. It did not, however, survey or prepare Valley Street's lot in any way. Valley Street also mowed its own property, removed trash and tree limbs from the grounds, and spray painted reference lines so that its customers knew where to park. However, Valley Street did not paint lines on Fields Family's property or help Fields Family prepare its own land. There are no genuine issues of material fact indicating the parties assisted or combined their efforts, skill or knowledge to ready the other field for use as a parking lot.

{¶26} The record is also clear that the parties did not stand in the relation of principal, as well as agent, as to the other party. Kenneth Fields, and Jerry and Jason Bush testified that each party had their own employees collecting fees and directing traffic. The Fields Family crew would not accept money from those parkers who utilized Valley Street's lot, nor would Valley Street collect funds from those who parked on Fields Family's property. While Fields Family and Valley Street may have both had the same idea of charging people for

parking, no genuine issues of material fact remain that this was a "joint" effort on behalf of a "single business adventure."

{¶27} Having found that the trial court properly determined that Valley Street and Fields Family had not formed a joint venture, and that they were entitled to judgment as a matter of law, the grant of summary judgment to Valley Street and Fields Family was proper.

{¶28} Judgment affirmed.

POWELL, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

{¶29} I respectfully dissent from the majority's decision, for when the evidence is looked at in the light most favorable to Morris, the non-moving party, a genuine issue of material fact remains as to whether Fields Family and Valley Street were engaged in a joint venture. Therefore, because I find reasonable minds could not come to but one conclusion as it relates to the question of joint venture, and because each party to a business venture is liable for the tortious acts of the other committed within the scope of the venture, I would find the trial court erred by granting summary judgment to Fields Family and Valley Street.

{¶30} As the majority correctly states, and as this court has previously stated, "[a] joint venture arises from an express or implied contractual association of parties with the common purpose of carrying out a single business venture for their mutual profit, for which they combine their efforts, property, money, skill and knowledge without creating a partnership or a corporation." *Nead v. Brown Cty. Gen. Hosp.*, Brown App. No. CA2005-09-018, 2007-Ohio-2443, ¶103; *Funk v. Hancock* (1985), 26 Ohio App.3d 107, 109. "[W]hether the parties have the relationship of joint venturers as a matter of law depends upon the facts and

circumstances of the case." *Kahle v. Turner* (1979), 66 Ohio App.2d 49, 52. Where a joint venture exists, "each party to the venture is liable for the tortious acts of the other committed within the scope of the business venture." *Hensley v. New Albany Co. Ohio General Partnership* (Dec. 31, 1997), Franklin App. No. 97APE02-189, 1997 WL 798776, *8, citing *Clifton v. Van Dresser Corp.* (1991), 73 Ohio App.3d 202, 211.

{¶31} In this case, while the evidence does indicate Fields Family and Valley Street never entered into any formal agreement, there was evidence indicating the parties discussed the necessary parking arrangements to be implemented prior to the start of the festival. This included, among other things, the parties' agreement that after Fields Family's lot reached capacity, cars would then be directed to park on Valley Street's property. The evidence also indicates the parties reached an agreement on how cars were to exit the property. In fact, as Jeffery Bush testified, the Fields Family and Valley Street came to a "verbal understanding" as to how the cars were to exit from the property.

{¶32} In addition, and contrary to the majority's claim that "there was no collaboration between the parties other than the sharing of an easement," the evidence indicates Family Fields and Valley Street shared a sign advertising the property as available for parking, that employees from both Fields Family and Valley Street directed traffic to enter onto the property, and that Fields Family's employees directed cars to park on Valley Street's property once their lot had reached capacity. As Kenneth Fields testified, "[w]hen my lot was full * * * we then stopped allowing people to park on my parcel and then all of the cars were directed to Valley Street's parcels." The evidence also indicates that there was nothing to differentiate between either party's employees.

{¶33} Furthermore, while it may be true that Fields Family and Valley Street did not pool their respective profits, based on the parking arrangements made prior to the start of the festival, it seems apparent that both parties intended to treat the entire parking area as a

whole. In turn, although money never changed hands, the parties effectively split the total profits by ensuring Fields Family's lot had reached capacity before any cars were directed to park on the property owned by Valley Street.

{¶34} In light of the foregoing, and while their arrangements were certainly hospitable, I find this evidence, when looked at in a light most favorable to Morris, the non-moving party, creates a genuine issue of material fact as to whether Fields Family and Valley Street were engaged in a joint venture. Therefore, because each party to a business venture is liable for the tortious acts of the other committed within the scope of the venture, a question of fact remains as to whether both parties may be held liable for Morris' injuries. Accordingly, I respectfully dissent from the majority's decision and would find the trial court erred by granting summary judgment to Fields Family and Valley Street.