[Cite as *McQueen v. Kings Island*, 2012-Ohio-3539.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

SHARON K. MCQUEEN, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2011-11-117
	:	O P I N I O N
- vs -		8/6/2012
	:	
KINGS ISLAND, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CV78376

Morrow, Gordon & Byrd, Ltd., Steven T. Greene, 33 West Main Street, P.O. Box 4190, Newark, Ohio 43058, for plaintiffs-appellants, Sharon K. & Kevin L. McQueen

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PIPER, J.

{¶ 1} Plaintiff-appellant, Sharon McQueen, appeals a decision of the Warren County Court of Common Pleas, granting summary judgment in favor of defendant-appellee, Kings Island.

{¶ 2} McQueen, along with several members of her family, were visiting Kings Island amusement park on the evening of August 13, 2006, when she stepped into an area of

uneven blacktop near the Eiffel Tower attraction. McQueen fell, and injured her shoulder as a result. In her deposition, McQueen described the uneven portion of the walkway as more than an inch deep, but less than two inches, and stated that the defect "wasn't deep." Kings Island employees came to McQueen's aid, and she received medical attention.

{¶ 3} McQueen filed a personal injury suit against Kings Island, claiming that the park was negligent in failing to maintain the blacktop, and her husband joined the suit, claiming loss of consortium. Kings Island answered, and later filed a motion for summary judgment, which was granted by the trial court. McQueen now appeals the trial court's decision, raising the following assignment of error.

{¶ 4} THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS IN GRANTING THE MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS-APPELLEES.

{¶ 5} McQueen argues in her first assignment of error that the trial court erred in granting summary judgment in favor of Kings Island because (1) the defect in the blacktop was not insubstantial when taking into account all attendant circumstances; and because (2) a jury should determine whether the defect was open and obvious or whether Kings Island had a duty to warn her of the condition.

{¶ 6} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.*, 118 Ohio App.3d 881, 887 (2nd Dist.1997). Civ.R.56 sets forth the summary judgment standard and requires that (1) there be no genuine issues of material fact to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, 12th Dist. 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.*, 54 Ohio St.2d 64 (1978).

{¶ 7} The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein,* 76 Ohio St.3d 383, 385, 1996-Ohio-389. A dispute of fact can be considered "material" if it affects the outcome of the litigation. *Myers v. Jamar Enterprises*, 12th Dist. No. CA2001-06-056, 2001 WL 1567352,*2 (Dec. 10, 2001). A dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Id.*

{¶ 8} McQueen first argues that the trial court erred in granting summary judgment because genuine issues of material fact remain to be litigated in order to determine whether Kings Island was negligent in failing to maintain the blacktop. In support of her argument, McQueen argues that the defect which caused her fall was not insubstantial when taking into consideration the attendant circumstances.

{¶ 9} In order to avoid summary judgment in a negligence action, the plaintiff must show the following: (1) the defendant owed plaintiff a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of defendant's breach, plaintiff was injured. *Barnett v. Beazer Homes Invests., L.L.C.,* 180 Ohio App.3d 272, 2008-Ohio-6756, ¶ 12 (12th Dist.).

{¶ 10} Neither party disputes that McQueen was a business invitee on Kings Island's premises. An owner or occupier of a business owes its invitees a duty of ordinary care in maintaining the premises in a "reasonably safe condition" so that its customers are not exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 204 (1985). Premises owners, however, are not insurers against all accidents and injuries to their business invitees. *Id.* at 203.

{¶ 11} Specific to trip and fall cases, the Ohio Supreme Court stated that a minor imperfection in sidewalk variances, usually two inches or less, is insufficient as a matter of

law to impose liability on municipalities. *Kimball v. Cincinnati*, 160 Ohio St. 370 (1953). Several years later, the court extended *Kimball* to private owners, and held that "no liability rests on the owner or occupier of private premises for minor imperfections * * * which are commonly encountered and are to be expected and which are not unreasonably dangerous, representing 'trivial departures from perfection.'" *Helms v. American Legion, Inc.,* 5 Ohio St.2d 60, 62 (1966).

{¶ 12} The court further stated that courts must also consider any attendant circumstances when determining whether liability exists for trivial defects. *Cash v. Cincinnati*, 66 Ohio St.2d 319 (1981). The holding in *Cash* reaffirmed that a height difference of two inches or less is insubstantial as a matter of law to establish liability, but that the defect may be proven substantial if sufficient attendant circumstances exist.

{¶ 13} Attendant circumstances refer to all facts relating to the event, and have included such circumstances as the time of day, lack of familiarity with the route taken, and lighting conditions. *Galinari v. Michael Koop,* 12th Dist. No. CA2006-10-086, 2007-Ohio-4540, ¶ 21. An attendant circumstance must divert the attention of the injured party, significantly enhance the danger of the defect, and contribute to the injury. *Id.* An attendant circumstance is one that is beyond the control of the injured party. *Hart v. Dockside Townhomes, Ltd.*, 12th Dist. No. CA2000-11-222, 2001 WL 649763 (June 11, 2001).

{¶ 14} McQueen does not dispute the fact that the defect in the walkway was less than two inches. Instead, McQueen argues that there are genuine issues of material fact regarding whether the slight defect in the walkway was made more dangerous by the attendant circumstances, thus contributing to her injury. McQueen argues that attendant circumstances existed because Kings Island knew about the defect and did not take any corrective measures, and because Kinds Island created distractions to attract the attention of its business invitees, such as the Eiffel Tower attraction.

{¶ 15} Regarding Kings Island's knowledge of the defect, McQueen relies on *Goldshot v. Romano's Macaroni Grill*, 2nd Dist. No. 19023, 2002-Ohio-2159, 2002 WL 857678, for the proposition that prior knowledge of a defect can create an attendant circumstance.[1] In *Goldshot*, a group of diners left the Macaroni Grill after having dinner, and Goldshot tripped on the sidewalk and broke her arm. Although the defect was less than two inches, the court noted that the following possible attendant circumstances existed to raise genuine issues of material fact: "insufficient lighting; no discernible color contrast; and Macaroni Grill's *knowledge of prior accidents at the exact same spot*." *Id.* at *5. (Emphasis added.)

{¶ 16} While several Kings Island employees were deposed about the defect and any knowledge the park may have had, none of the employees ever stated that Kings Island had knowledge of prior accidents at the same spot of the defect that caused McQueen's fall, and none of the depositions established that Kings Island had any knowledge of the defect's existence. For example, Leslie Stalker, an employee of the fire and safety department at Kings Island, stated that in her 14-year tenure with the park, she had not been aware of any falls at the Eiffel Tower area previous to McQueen's.

{¶ 17} Todd Colonel, the head supervisor at the Eiffel Tower attraction, stated in his deposition that he saw McQueen fall out of the corner of his eye as he was working near the ride. Colonel stated that he had reported defects in the walkway to maintenance on two previous occasions, one defect near the Eiffel Tower, and one near the carousel. When asked if the defect he reported by the Eiffel Tower was the same one that caused McQueen's fall, Colonel responded, "I'm not sure. It might be." Colonel stated later in his deposition that he was not aware of anyone else falling in the area near the Eiffel Tower. This testimony

1. Courts in Ohio are split over whether prior knowledge of the defect or injuries at the site of the defect can create attendant circumstances. However, we find no need to analyze this issue because there are no established facts in the record that Kings Island was aware of the defect or that other patrons had been injured at the spot of McQueen's fall.

does not demonstrate that Kings Island was notified of a defect in the exact spot where McQueen fell, only that it was a possibility. Mere possibilities do not create the existence of material facts. Moreover, Colonel's testimony established that he was unaware of anyone else falling where McQueen did.

{¶ 18} Matthew Addington, a part-time fire inspector for Kings Island, stated during his deposition that he was in the first aid area on the night that McQueen fell, and saw her being brought in for medical attention. Addington stated that after McQueen went to the hospital, he investigated the area around the Eiffel Tower and tried to locate the defect, but was unable to. Addington stated that he has located defects in the past and has cordoned them off to warn patrons of the danger until maintenance could fix the problem. Addington was shown a picture of the defect that caused McQueen's fall, and was asked whether he would suggest cordoning off the area until maintenance could fix it. Addington responded, "yes, I probably would." However, this testimony does not establish that Addington knew that the defect that caused McQueen's fall existed, or that he had informed Kings Island that such a defect existed. Addington's testimony that he would cordon the defect based on a photograph was simply an after-the-fact answer to a hypothetical question.

{¶ 19} The deposition testimony offered by the Kings Island employees did not establish that the park had any knowledge of the defect, or that the defect had caused any injuries in the past. Therefore, we cannot say that McQueen has demonstrated the existence of genuine issues of material fact regarding whether Kings Island's knowledge created an attendant circumstance.

{¶ 20} Regarding distractions created by Kings Island, McQueen argues that she was distracted by the crowds trying to enter the Eiffel Tower attraction, and that Kings Island creates distractions such as rides and landscaping. McQueen is correct in asserting that case law exists regarding attendant circumstances designed by owners to attract the

attention of business invitees, such as strategically-placed merchandise or displays. *See Carpenter v. Marc Glassman, Inc.,* 124 Ohio App.3d 236 (8th Dist.1997). However, courts have also recognized that plaintiffs who claim that attendant circumstances existed at the time of their injury must demonstrate "differences between ordinarily encountered conditions and the situation that actually confronted the plaintiff." *Cooper v. Meijer Stores Ltd. Partnership*, 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶ 17, citing *McGuire v. Sears, Roebuck & Co*., 118 Ohio App.3d 494 (1st Dist.1996).

{¶ 21} McQueen argues that she was too distracted by the people clamoring to enter the Eiffel Tower attraction and by the atmosphere of the park to appreciate the danger of a defect in the walkway. However, McQueen was not faced with any unique circumstances not also facing any of the other Kings Island's patrons who were at the park on the evening McQueen fell. Kings Island is an amusement park, and as such, is in the business of building and maintaining rides, attractive landscaping, and attractions such as the Eiffel Tower. Kings Island's patrons cannot be unaware of the commotion and excitement surrounding the park, as such is evident even before entering the premises. McQueen stated that she had been to Kings Island "several times" before the day she fell, and she would therefore have been well aware of the active environment of the amusement park.

{¶ 22} Unlike the cases cited by McQueen where merchants create an attendant circumstance through their product placement or advertising in an attempt to attract the customer's attention while shopping, Kings Island patrons are on the premises to enjoy the surroundings and to take part in the attractions. An amusement park is inherently different from a store for that reason, and Kings Island patrons specifically seek the entertainment and distraction an amusement park offers.

{¶ 23} In fact, McQueen stated during her deposition that she and her family "were looking to get in line at the Eiffel Tower" at the time she fell. When asked if there was

anything blocking her view of the defect, had she been looking at the ground, she responded "maybe other people that – ahead of me." McQueen also stated that immediately before her fall, she and her family were "just basically looking around, enjoying the last of the day."

{¶ 24} The very reasons McQueen states she was distracted are the reasons that people choose to go to an amusement park. McQueen was in a crowd of people, looking around at the park, enjoying her time there with her family, and trying to find the line to enter an attraction. Her deposition did not contain any indication that McQueen was distracted by any circumstance that significantly enhanced the danger of the defect in the walkway. Therefore, based on the inherent nature of the amusement park, there are no genuine issues of material fact regarding the existence of attendant circumstances.

{¶ 25} McQueen also argues that Kings Island had a duty to warn her of the defect and that such defect was not open and obvious. Although a landowner owes a duty to its invitees to exercise ordinary care in maintaining its premises, the open and obvious doctrine, when applicable, obviates the duty to warn and acts as a complete bar to any negligence claims. *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 5. Thus, "[w]here the danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Id.* at ¶ 14. The rationale behind this rule is that "the open and obvious nature of the hazard itself serves as a warning." *Id.* at ¶ 5. "[T]he dangerous condition at issue does not actually have to be observed by the plaintiff * * * to be an 'open and obvious' condition under the law. Rather, the determinative issue is whether the condition is observable." *Lydic v. Lowe's Cos., Inc.,* 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶ 10.

{¶ 26} McQueen admitted in her deposition that nothing was obstructing the view of the ground prior to her fall other than "maybe other people that – ahead of me." McQueen also stated that she knew that there was "cracking" in the blacktop, but that she was not

looking at the ground at the time she fell. As previously stated, McQueen had visited Kings Island several times before her fall and can therefore be expected to be familiar with the surrounding environment and condition of the walkways.

{¶ 27} As previously noted, Matthew Addington stated in his deposition that he was unable to locate the defect. However, he looked for the defect at night, once it was "getting dark" and knew only the general location where the defect was reported to be. Addington did not return the following morning to look for the defect when there was sunlight to help make the scene more visible than it was the prior night when there was only illumination from park lights. The fact that Addington was unable to locate the defect in a general area of a park as large as Kings Island does not vitiate the open and obvious nature of the defect, as such is measured by whether McQueen would have observed the open and obvious nature of the defect prior to her fall.

{¶ 28} The record contains photographs of the defect that caused McQueen's fall. In viewing the photographs that McQueen provided, we find that as a matter of law, the defect in question was visible to all persons using the walkway. Thus, the defect presented an open and obvious danger. As a result, Kings Island owed no duty to McQueen and there are no genuine issues of material fact. Kings Island is therefore entitled to judgment as matter of law.

{¶ 29} Judgment affirmed.

POWELL, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

{¶ 30} I respectfully dissent from the majority's decision for when the evidence is

looked at in the light most favorable to McQueen, the nonmoving party, a genuine issue of material fact remains regarding Kings Island's knowledge of the defect's existence, as well as the open and obvious nature of the hazard. Therefore, I would find the trial court erred by granting summary judgment to Kings Island.

{¶ 31} The majority notes that Todd Colonel, head supervisor at the Eiffel Tower attraction, testified that he reported defects in the walkway on two previous occasions. Colonel 's testimony also revealed that one of the defects he reported "might be" the same one that caused McQueen's fall. It is for a trier of fact to determine whether Colonel's reporting of those defects and his belief that one of them may have caused McQueen's fall imparted knowledge of the hazard upon Kings Island. In construing that evidence most strongly in favor of McQueen, reasonable minds could differ as to whether Kings Island had knowledge of the hazard, and therefore I would find that the trial court erred in granting summary judgment.

{¶ 32} There also remains a genuine issue of fact as to the open and obvious nature of the hazard. This court has consistently stated that, "[a] hazard is open and obvious when it is in plain view and *readily discoverable upon ordinary inspection*." (Emphasis added.) *Forste v. Oakview Constr., Inc.*, 12th Dist. No. CA2009-05-054, 2009-Ohio-5516, ¶16, citing *Parsons v. Lawson Co.*, 57 Ohio App.3d 49 (12th Dist.1989), 51; *see also Barnett v. Beazer Home Invests, L.L.C.*, 180 Ohio App.3d 272, 2008-Ohio-6756, ¶32 (12th Dist.). The crucial inquiry, therefore, is whether "a customer exercising ordinary care under [the] circumstances would have seen and been able to guard * * * against the condition." (Brackets sic.) *Kidder v. Kroger Co.*, 2nd Dist. No. 20405, 2004-Ohio-4261, ¶11. However, while customers, as invitees, are expected to exercise ordinary care while walking, "the law does not require them to 'look constantly downward[.]'" *Mohn v. Wal-Mart Stores, Inc.*, 3rd Dist. No. 6-08-12, 2008-Ohio-6184, ¶14, quoting *Grossnickle v. Germantown*, 3 Ohio St.2d 96 (1965), paragraph two

of the syllabus.

{¶ 33} Nothing in the record indicates McQueen was acting unreasonably or that she was engaged in activities contrary to her duty of ordinary care as she made her way around the park. As noted above, the law does not require her to "look constantly downward." In addition, the majority notes that Matthew Addington testified that he was unable to locate the defect when he returned to inspect the area where the fall took place. Addington was therefore conducting much more than an ordinary inspection as the law requires, but instead, was investigating the scene with heightened scrutiny to determine what caused the fall. If the hazard could not be discovered during a *purposeful inspection*, I believe a trier of fact could certainly interpret that evidence as demonstrating that the walkway hazard was not readily discoverable upon *ordinary inspection*. I would find that Addington's inspection and the conditions thereof require a weighing of the evidence by a trier of fact. Therefore, when the evidence is looked at in the light most favorable to McQueen, a genuine issue of material fact remains regarding the hazard's open and obvious nature.

{¶ 34} In light of the foregoing, and based on the facts and circumstances of this case, I disagree with the majority's decision finding that Kings Island did not have prior knowledge of the hazard and finding the defect in the walkway to be open and obvious as a matter of law. Accordingly, I respectfully dissent from the majority's decision and would find the trial court erred by granting summary judgment to Kings Island.