[Cite as *Ammon v. Ohio Expositions Comm.*, 2014-Ohio-5914.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

VERONICA L. AMMON

Plaintiff

v.

OHIO EXPOSITIONS COMMISSION

Defendant

Case No. 2013-00225

Judge Patrick M. McGrath
Magistrate Holly True Shaver

DECISION

{¶1} On November 15, 2013, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). [1] On December 10, 2013, plaintiff filed a response. Defendant's motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also*

Gilbert v. Summit Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} On April 15, 2011, plaintiff was attending an awards ceremony at defendant's Ohio Fairgrounds and Expo Center for her daughter, Tina, who was enrolled in a culinary arts program. The weather conditions were sunny and clear. The awards program included guest speakers in an indoor stage area, and lunch afterward which was held outside in the parking lot. Attendees were to go through various lines to pick up boxed lunches at tables, and then proceed to large barrels at the end of the lines for canned beverages. Plaintiff estimated that thousands of people were in attendance, with lines for food that were "wrapped around" the parking lot. Plaintiff had paid $40 in advance for tickets so that she and her other daughter, Kali, could attend the ceremony. After waiting in line, plaintiff picked up a boxed lunch and proceeded to a large barrel for a can of pop. After she selected a can of pop, she looked up to find a place to sit, stepped forward and twisted her ankle in a pothole in the parking lot. She then fell to the ground, striking her left knee and wrist. After her fall, she waited on the ground for paramedics to arrive. One of plaintiff's daughters took photographs of the pothole after the fall. (Defendant's Exhibits B-1 through B-6.) Plaintiff estimated that the pothole was slightly smaller than her shoe. Plaintiff asserts that defendant was negligent when it failed to maintain the premises in a reasonably safe condition. Defendant maintains that the pothole was an open and obvious condition, which precludes liability.

{¶5} In order for plaintiff to prevail upon her claim of negligence, she must prove by a preponderance of the evidence that defendant owed her a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused her injuries. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984).

{¶6} Under Ohio law, the duty owed by an owner or occupier of premises generally depends on whether the injured person is an invitee, licensee, or trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137. Plaintiff was on defendant's premises for purposes that classify her as an invitee, defined as a person who comes "upon the premises of another, by invitation,

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[1]Defendant's November 12, 2013 motion for extension of time to file a dispositive motion is GRANTED, instanter.

express or implied, for some purpose which is beneficial to the owner." *Baldauf v. Kent State Univ.*, 49 Ohio App.3d 46, 47 (10th Dist.1988). An owner or occupier of premises owes its invitees "a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers." *Armstrong, supra*, at 80. "[T]o establish that the owner or occupier failed to exercise ordinary care, the invitee must establish that: (1) the owner of the premises or his agent was responsible for the hazard of which the invitee has complained; (2) at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its existence or to remove it promptly; or (3) the hazard existed for a sufficient length of time to justify the inference that the failure to warn against it or remove it was attributable to a lack of ordinary care." *Price v. United Dairy Farmers, Inc.*, 10th Dist. No. 04AP-83, 2004-Ohio-3392, ¶ 6.

{¶7} "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong* at syllabus. "Open-and-obvious hazards are those hazards that are neither hidden nor concealed from view and are discoverable by ordinary inspection. '[T]he dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be an "open and obvious" condition under the law. Rather, the determinative issue is whether the condition is observable.' Put another way, the crucial inquiry is whether an invitee exercising ordinary care under the circumstances would have seen and been able to guard himself against the condition. Thus, this court has found no duty in cases where the plaintiff could have seen the condition if he or she had looked even where the plaintiff did not actually notice the condition before falling." (Internal citations omitted.) *McConnell v. Margello*, 10th Dist. No. 06AP-1235, 2007-Ohio-4860, ¶ 10. "[U]nless the record reveals a genuine issue of material fact as to whether the danger was free from obstruction and readily appreciable by an ordinary person, it is appropriate to find that the hazard is open and obvious as a matter of law." *Id*. at ¶ 11, citing *Freiburger v. Four Seasons Golf Ctr., L.L.C.*, 10th Dist. No. 06AP-765, 2007-Ohio-2871.

{¶8} Plaintiff testified in her deposition, as follows:

{¶9} "Q. Okay. Was there anything that was preventing you from seeing the hole prior to your fall?

{¶10} "A. Where they just had the lunch set up at, I mean, you know, you're going through there getting your lunch. And they, where they had the tables and stuff

sat, I guess, yeah, with the pops and stuff sitting there. So, you know, you're, you're looking, getting your lunch, getting your pop and you walk away it's, it's right there.

{¶11} "Q. What do you mean it's right there?

{¶12} "A. The hole was right there at the barrel. In the direction I was going to be going it was right there at the barrel.

{¶13} "Q. Was the barrel obstructing your view at all from seeing the hole?

{¶14} "A. Yes.

{¶15} "Q. How so?

{¶16} "A. Because I didn't see it and I fell in it.

{¶17} "Q. Was it covered?

{¶18} "A. No. Oh, like it's under the table or anything? No. I just wasn't looking straight at the ground when I was walking. I mean I was looking out ahead where I was walking to. So if I would have been staring at the ground I guess I could have seen it.

{¶19} "Q. Okay.

{¶20} "A. But I don't usually stare at the ground when I'm walking.

{¶21} "Q. Was your attention diverted by anything?

{¶22} "A. No." (Deposition of plaintiff, pages 30, line 11 through page 31, line 13.)

{¶23} In her response to defendant's motion, plaintiff submitted an affidavit, wherein she avers, in part:

{¶24} "3. Affiant states that as she proceeded to pick up a beverage, she then slightly turned to step away and that is when she fell.

{¶25} "4. Affiant further states that the barrel had slightly covered or obstructed the view of the hole at which she did not notice until she had fallen.

{¶26} "5. Affiant also states that she did not directly know that the parking lot had other holes in it until she fell and by-standers had stated that there were other holes through the lot.

{¶27} "6. Affiant states that when she fell, she did not realize that she had even fell [sic] in a hole until she looked and got her foot out of the hole.

{¶28} "7. Affiant states that at this time is when she realized what caused her to fall and how big the hole actually was."

{¶29} An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, be used to create a genuine issue of material fact to defeat a motion for summary judgment. *Byrd v. Smith*, 110 Ohio St. 3d 24, 28, 2006-Ohio-3455. Moreover, when a party opposing summary judgment presents an affidavit inconsistent with the affiant's prior deposition testimony, the trial court must consider whether the affidavit contradicts or merely supplements prior testimony. *Id*. at ¶ 29. "A nonmoving party's contradictory affidavit must sufficiently explain the contradiction before a genuine issue of material fact is created." *Id*. at ¶ 31.

{¶30} Although plaintiff stated in her affidavit that the barrel had slightly covered or obstructed her view of the pothole, plaintiff admitted in her deposition that her attention was not diverted from looking where she was walking, and that if she had been looking down, she would have seen the pothole. Plaintiff's affidavit does not sufficiently explain why she now contends that the barrel obstructed her view of the pothole, when she admitted in her deposition that the pothole was not concealed, and that if she had been looking, she would have seen the pothole.

{¶31} Furthermore, plaintiff has a duty to exercise some degree of care for her own safety while walking. *See Lydic v. Lowe's Companies, Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, at ¶ 16. "A pedestrian's failure to avoid an obstruction because he or she did not look down is no excuse." *Id*.

{¶32} Plaintiff asserts that attendant circumstances at the time of her fall create an issue of fact as to whether the pothole was an open and obvious hazard. Plaintiff asserts that since defendant placed the food tables and drink barrels in close proximity to the pothole, she had no control over where she walked to obtain her food.

{¶33} "Attendant circumstances act as an exception to the open-and-obvious doctrine. An attendant circumstance is a factor that contributes to the fall and is beyond the control of the injured party. It can consist of 'any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time.'" (Internal citations omitted.) *Cooper v. Meijer Stores, L.P.*, 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶ 15. "[A] plaintiff who claims attendant circumstances must be able to point out differences between ordinarily encountered conditions and the situation that actually confronted the

plaintiff. The breadth of the attendant circumstances exception does not encompass the common or the ordinary." *Id*. at ¶ 17.

{¶34} Construing the evidence most strongly in plaintiff's favor, the court finds that the only reasonable conclusion is that the pothole was free from obstruction and readily appreciable by an ordinary person; thus, it was an open and obvious condition. Plaintiff's deposition testimony establishes that her attention was not diverted by any unusual circumstance of defendant's making when she stepped away from the barrel of drinks. Weather conditions were sunny and clear. The photographs depict a pothole that is plainly visible. The lunch was held in a parking lot, where potholes are commonplace. Accordingly, inasmuch as no attendant circumstances existed, defendant owed no duty to plaintiff, and plaintiff's claim of negligence is barred as a matter of law.

{¶35} Based upon the foregoing, defendant's motion for summary judgment shall be granted and judgment shall be rendered in favor of defendant.

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PATRICK M. MCGRATH
Judge

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JUDGMENT ENTRY

{¶36} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
PATRICK M. MCGRATH
Judge

cc:

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Filed January 22, 2014
Sent To S.C. Reporter 10/1/15