**[Cite as *Bounds v. Marc Glassman, Inc.*, 2008-Ohio-5989.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 90610**

## VANESSA BOUNDS, ET AL.

PLAINTIFFS-APPELLEES

vs.

## MARC GLASSMAN, INC., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:**
**REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-602884

**BEFORE:** Cooney, P.J., Rocco, J., and Dyke, J.

**RELEASED:** November 20, 2008

**JOURNALIZED:**

**[Cite as *Bounds v. Marc Glassman, Inc.*, 2008-Ohio-5989.]**

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**[Cite as *Bounds v. Marc Glassman, Inc.*, 2008-Ohio-5989.]**
COLLEEN CONWAY COONEY, P.J.:

**{¶ 1}** Defendant-appellant, City of South Euclid, appeals the trial court's denial of summary judgment. Finding merit to the appeal, we reverse.

**{¶ 2}** In 2006, Vanessa Bounds ("Bounds") filed suit against the City, Marc Glassman, Inc., and various other parties alleging claims of negligence stemming from her fall in the City-owned parking lot adjacent to the Cedar Center Shopping Center ("Cedar Center").[1]

**{¶ 3}** In April 2005, Bounds went shopping at Marc's at Cedar Center. The weather was cloudy, but it was not snowing or raining. In her deposition, Bounds testified that the parking lot was crowded and full of potholes. After she completed her shopping at Marc's, she exited the store and crossed the crowded parcel pick-up area. She stepped over a median and observed a car approaching her. She testified that she stepped in a pothole that was filled with water to avoid the car. She fell but was able to get up and walk to her car. The pothole's dimensions were approximately thirty-four inches long, ten inches wide, and four inches deep.

**{¶ 4}** Bounds testified that she could identify the pothole and saw the pothole before stepping in it but did not think it was "that deep." She also acknowledged that she saw many potholes as she walked into Marc's. She broke her left ankle and had complications from the fracture, including a blood clot that traveled to her lung.

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[1] Bounds has dismissed her claims against Marc Glassman, Inc. and all other parties, leaving only the City as a party.

**{¶ 5}** The record shows that the City-owned parking lot where Bounds fell is adjacent to Cedar Center, and the City had been in the process of planning a redevelopment of the area for almost ten years.

**{¶ 6}** The City moved for summary judgment, arguing that it was immune from liability or, in the alternative, that it had no duty to protect Bounds from open and obvious dangers. The trial court denied the City's motion, and it is from this denial that the City now appeals.

**{¶ 7}** The City raises two assignments of error for our review. In the first assignment of error, the City argues that the trial court erred in granting summary judgment because the City is immune from liability.

Standard of Review

**{¶ 8}** Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

> "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine

issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264."

**{¶ 9}** Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

**{¶ 10}** In order to defeat a motion for summary judgment on a negligence claim, a plaintiff must establish that a genuine issue of material fact remains as to whether: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; and (3) the breach of duty proximately caused the plaintiff's injury. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602, 693 N.E.2d 271. Whether a duty exists is a question of law for the court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. If no duty exists, the legal analysis ends and no further inquiry is necessary. *Gedeon v. East Ohio Gas Co.* (1934), 128 Ohio St. 335, 338, 190 N.E. 924.

Immunity

**{¶ 11}** In most cases, the broad immunity of R.C. Chapter 2744 provides a defense to a cause of action for negligence. *Fogle v. Bentleyville*, Cuyahoga App. No. 88375, 2008-Ohio-3660, citing *Turner v. Central Local School Dist.*, 85 Ohio St.3d 95, 98, 1999-Ohio-207, 706 N.E.2d 1261. However, the immunity afforded a political subdivision in R.C. 2744.02(A)(1) is not absolute. *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421, 697 N.E.2d 610, citing *Hill v. Urbana*, 79 Ohio St.3d 130, 1997-Ohio-400, 679 N.E.2d 1109.

**{¶ 12}** Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis. *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 2000-Ohio-486, 733 N.E.2d 1141. The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. Id. at 556-557; R.C. 2744.02(A)(1). The second tier requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. If any of the exceptions to immunity in R.C. 2744.02(B) apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability. *Greene Cty.*, at 557.

**{¶ 13}** R.C. 2744.02(B) states, in part, that political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions. Proprietary

functions include the operations and control of off-street parking facilities. R.C. 2744.01(G)(2)(e).

**{¶ 14}** For the first time on appeal, the City argues that the maintenance of the parking lot in this case was a governmental function. Bounds argues that the City-owned parking lot behind Cedar Center in which she fell was akin to an off-street parking facility; thus, it was a proprietary function and the City is not immune from liability for the negligent performance of this proprietary function. We find the City's argument unpersuasive and find that the maintenance of the parking lot was a proprietary function. Thus, under the second tier, we find that the City is exposed to liability under R.C. 2744.01(G)(2)(e).

**{¶ 15}** As to the final tier, the City argues that defenses found in R.C. 2744.03 shield it from liability. R.C. 2744.03 provides, in pertinent part:

> "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:
>
> * * *
>
> (3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.
>
> * * *
>
> (5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities,

> and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

**{¶ 16}** The City argues that its officials and employees had to make judgment decisions regarding the allocation of the city's limited resources to maintain and repair the parking lot, which was slated for redevelopment. In addition, the City argues that there is no evidence that any City employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. We agree with the City. Although Bounds claims that the City acted in a wanton and reckless manner in not maintaining the parking lot, she offers no evidence to support this contention.

**{¶ 17}** Therefore, we find that the City was immune from liability and sustain the first assignment of error.

Open-and-Obvious Doctrine

**{¶ 18}** In the second assignment of error, the City argues that Bounds' claims were barred by the open-and-obvious doctrine. Even if immunity did not bar Bounds' claims, the open-and-obvious doctrine bars them.

**{¶ 19}** In premises liability law, a business invitee is one who enters another's land by invitation for a purpose that is beneficial to the owner. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287. A property owner owes an invitee a duty of ordinary care to maintain the premises in a reasonably safe condition and to warn of hidden defects. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474. This includes providing safe ingress to and

egress from the premises. *Tyrrell v. Investment Associates, Inc.* (1984), 16 Ohio App.3d 47, 474 N.E.2d 621. Invitees, however, have a duty in that they are expected to take reasonable precautions to avoid dangers that are patent or obvious. See *Brinkman v. Ross,* 68 Ohio St.3d 82, 84, 1993-Ohio-72, 623 N.E.2d 1175.

**{¶ 20}** The open-and-obvious doctrine provides that a premises owner owes no duty to persons entering those premises regarding dangers that are open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, at paragraph one of the syllabus. The rationale underlying this doctrine is "that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504.

**{¶ 21}** A business ordinarily 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. *Paschal*; *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 390 N.E.2d 810. When applicable, however, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088. It is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the

plaintiff. Id. The open-and-obvious doctrine satisfies the duty prong of a negligence claim. Id.

**{¶ 22}** When only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. *Klauss v. Marc Glassman, Inc.*, Cuyahoga App. No. 84799, 2005-Ohio-1306. However, where reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. *Carpenter v. Marc Glassman, Inc.* (1997), 124 Ohio App.3d 236, 240, 705 N.E.2d 1281.

**{¶ 23}** In this case, Bounds conceded that the parking lot was full of potholes. Bounds argues that even though the pothole causing her fall was observable, the open-and-obvious doctrine does not apply because "attendant circumstances" distracted her from seeing the pothole.

**{¶ 24}** Attendant circumstances may create a genuine issue of material fact as to whether a danger was open and obvious. *Quinn v. Montgomery Cty. Educ. Serv. Ctr.*, Montgomery App. No. 20596, 2005- Ohio-808; *Collins v. McDonald's Corp.*, Cuyahoga App. No. 83282, 2004-Ohio-4074. While "there is no precise definition of 'attendant circumstances' * * * they generally include '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.'" *Klauss*, citing *McGuire v. Sears, Roebuck and Co.* (1996), 118 Ohio App.3d 494, 693 N.E.2d 807. Attendant circumstances are all facts relating to the

event, such as time, place, surroundings or background, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event. *Menke v. Beerman* (Mar. 9, 1998), Butler App. No. CA97-09-182.

**{¶ 25}** Bounds argues that attendant circumstances that were present included the crowded parking lot. But Bounds has not established that the traffic in the parking lot at the time she fell was any different than a shopper would ordinarily encounter in that parking lot. See *Cooper v. Meijer Stores L.P.*, Franklin App. No. 07AP-201, 2007-Ohio-6086. Vehicles and other pedestrians are commonplace in a store parking lot. Without more, they do not create a distraction, or attendant circumstance, that would reduce the degree of care an ordinary person would exercise. *Cooper*; see, also, *Seifert v. Great Northern Shopping Center* (Nov. 5, 1998), Cuyahoga App. No. 74439 (finding that a crowded parking lot and heavy vehicular traffic on a holiday weekend did not constitute attendant circumstances).

**{¶ 26}** "When a plaintiff observes a hazard, she cannot thereafter claim that the hazard was unnoticeable before but became unreasonably dangerous when the injuries later occurred." *Kirksey v. Summit Cty. Parking Deck*, Summit App. No. 22755, 2005-Ohio-6742, at ¶13. More specific to this case, courts have held that when a party observes a hole in a parking lot or other defect in a walkway while previously traversing the area, the defect is open and obvious. *Cooper* at ¶20; see, also, *Zuzan v. Shutrump*, 155 Ohio App.3d 589, 2003-Ohio-7285, 802 N.E.2d 683 (holding that when the invitee admits to knowing of the danger,

summary judgment is easily granted); *Sheppard v. KAP Realty* (Aug. 12, 1999), Franklin App. No. 75860.

**{¶ 27}** Even though Bounds did not testify she saw the actual pothole she stepped in before entering the store, she acknowledged that the parking lot was filled with potholes and she saw them before she went into Marc's. She saw the pothole before she stepped in it, however, but did not think it was "that deep." Moreover, the allegedly unreasonable condition created by the water in the pothole has been held not to be a latent defect, but rather an open and obvious hazard. *Howson v. Amorose* (Nov. 30, 2000), Franklin App. No. 00AP-8.

**{¶ 28}** Thus, based on Bounds' prior knowledge of the potholes and the open and obvious nature of the condition of the parking lot, we conclude that the City was not charged with any duty to protect or warn Bounds of any danger posed by the known hazard. See *Haynes v. Mussawir*, Franklin App. Nos. 04AP-110 and 04AP-117, 2005-Ohio-2428. Owing no duty to Bounds, we find that the City cannot be found to be negligent.

**{¶ 29}** Therefore, we sustain the second assignment of error.

**{¶ 30}** Accordingly, judgment is reversed, and the case is remanded for entry of summary judgment for the City.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
ANN DYKE, J., CONCUR