[Cite as *Madison v. Woodlawn Cemetery Assn.*, 2010-Ohio-5650.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Marcia Madison, et al.	Court of Appeals No. L-10-1131
Appellant	Trial Court No. CI 08-8262
v.	
Woodlawn Cemetery Association	**DECISION AND JUDGMENT**
Appellee	Decided: November 19, 2010

* * * * *

Robert Z. Kaplan and Dan Nathan, for appellant.

Timothy C. James and Lorri J. Britsch, for appellee.

* * * * *

COSME, J.

{¶ 1} Appellant, Marcia Madison, appeals from the judgment of the Lucas County Common Pleas Court granting summary judgment in favor of appellee, Woodlawn Cemetery Association ("Woodlawn"). For the foregoing reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant asserts she was injured when she fell into a hole at Woodlawn while visiting the gravesite of her uncle on December 4, 2007. According to appellant, she was walking around, looking for her uncle's grave. Appellant was having trouble locating the grave where he had been buried several weeks earlier because there was no headstone, only numbered markers. Although she could tell where newly dug graves were because they were covered in dirt and raked over, and she could see areas where there was new grass, she was still unable to locate her uncle's grave.

{¶ 3} Appellant called Woodlawn from her cell phone to ask for directions. While making the call, she stepped into a hole. She contends that the hole was covered by leaves and grass. She screamed, attracting the attention of cemetery employee Roger Wilhelm, who had been working nearby. The hole was located at the foot of her uncle's grave. Appellant, apparently uninjured, was able to stand up, pay her respects to her uncle, and walk back to her car.

{¶ 4} Appellant returned the next day and on several occasions thereafter to take pictures of the hole. She also claims that the following May, Woodlawn re-dug and re-seeded her uncle's plot. She did not, however, report her fall to Woodlawn or seek treatment for any injury.

II. STANDARD OF REVIEW

{¶ 5} We review the grant of summary judgment de novo. See *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶ 6} Therefore, Woodlawn may prevail under Civ.R. 56(C) only if: (1) there is no genuine issue of material fact; (2) it 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 when viewing evidence in favor of appellant, and that conclusion is adverse to appellant. Id.

III. PRETRIAL ORDER

{¶ 7} In her sole assignment of error, appellant maintains that:

{¶ 8} "The trial court erred in granting Woodlawn Cemetery's Motion for Summary Judgment."

{¶ 9} Appellant argues that she is a business invitee and asks that we impose upon Woodlawn a duty of ordinary care in maintaining its premises in a safe condition to persons visiting a gravesite.

{¶ 10} We disagree.

A. Business Invitee v. Licensee

{¶ 11} In this case, the trial court rejected the stipulation by both of the parties that appellant was a business invitee, holding instead, that appellant was a licensee. Appellant disagrees, relying upon Woodlawn's acquiescence in its motion for summary judgment

that appellant was a business invitee. Appellant also argues that she was a business invitee because Woodlawn received some tangible or economic benefit from holding its cemetery open to the public.

(1) "Stipulation"

{¶ 12} Appellant contends that Woodlawn did not dispute appellant's status as a business invitee. However, we note that the trial court was not bound by concessions that are incorrect conclusions of law as opposed to stipulations of fact. *State ex rel. Leis v. Bd. of Elections of Hamilton Cty*. (1971), 28 Ohio St.2d 7, 8. Therefore, the trial court could disregard the parties' "stipulation." *Hill v. Wadsworth-Rittman Area Hosp.* (2009), 185 Ohio App.3d 788, 792. See *Thames v. Asia's Janitorial Serv., Inc.* (1992), 81 Ohio App.3d 579, 586.

(2) Economic benefit

{¶ 13} Appellant argues that she was a business invitee because her presence at Woodlawn was by express or implied invitation and Woodlawn received a beneficial interest by holding open its cemetery to visitors. We note, however, that the purpose of appellant's visit was to go to her uncle's grave, not to conduct any business with Woodlawn.

{¶ 14} Appellant argues that she should be afforded the legal status of a business invitee because permitting visitors is simply part of the business of a cemetery. She argues that it would be against the cemetery's economic benefit to require a fee to visit. According to appellant, individuals who purchased a plot at Woodlawn did so intending

that anyone wishing to pay their respects could do so without having to pay a fee. Thus, appellant argues that holding the cemetery open to the public inures to the benefit of the cemetery.

{¶ 15} An "invitee" is "* * * a business visitor [or business invitee], that is, one rightfully on the premises of another for purposes in which the possessor of the premises has a beneficial interest." *Provencher v. Ohio Dept. of Transp.* (1990), 49 Ohio St.3d 265, 266, quoting *Scheibel v. Lipton* (1951), 156 Ohio St. 308, 328-329; see *Light v. Ohio Univ*. (1986), 28 Ohio St.3d 66, 68. In other words, "[b]usiness 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*, supra, at 68. See *Scheibel*, supra, at 328-329. 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. *Presley v. City of Norwood* (1973), 36 Ohio St.2d 29, 31.

{¶ 16} A licensee, however, is a person who enters the owner's premises by permission or acquiescence, for his own pleasure or benefit, and not by invitation. A licensee takes his license subject to its attendant perils and risks. *Light*, 28 Ohio St.3d at 68. The owner is not liable for ordinary negligence and owes the licensee no duty except to refrain from wantonly or willfully causing injury. *Hannan v. Ehrlich* (1921), 102 Ohio St. 176, paragraph four of the syllabus.

{¶ 17} In this case, the trial court relied upon this court's reasoning in *Mostyn v. CKE Restaurants, Inc.*, 6th Dist. No. WM-08-018, 2009-Ohio-2934, to distinguish

between a business invitee and licensee. In *Mostyn*, this court held that visitors to an Ohio Turnpike rest stop restaurant were licensees. In *Mostyn*, the sole and undisputed purpose of the stop was for appellants to use the restrooms for their *own* benefit. The *Mostyn* court further noted that appellants "had not entered the area of the incident for any business purpose beneficial to appellee." Id. at ¶ 18.

{¶ 18} Similarly, in *Light v. Ohio Univ.*, supra, the Supreme Court of Ohio found that "a person who enters the premises of another by permission or acquiescence, for his *own* pleasure or benefit, and not by invitation, is a licensee." (Emphasis sic.) Id. at 68. In that case, "Ohio University consented to the use of its property, by the public, for the pleasure of those making use of the facility." Id. In *Light*, the court discounted any tangential or economic benefit to Ohio University, concluding that "[a]ny payment of a [locker] rental fee was merely incidental to the use of this facility." Id. at 68.

{¶ 19} In *Provencher v. Ohio Dept. of Transp.*, supra, the Supreme Court of Ohio rejected appellees' argument that they had been invited to use the rest area and that they were on the premises for purposes in which the premises owner, ODOT, had a beneficial interest. Concluding that individuals who use public roadside rest areas are generally licensees, the court held that "the increased safety of Ohio's highways which results from highway travelers' use of the rest areas" is not a tangible benefit sufficient to the state of Ohio "to confer invitee status upon all highway travelers who stop at the rest areas." Id. at 266.

{¶ 20} In *Provencher*, the court refused to adopt the "public invitee" doctrine, holding that the pivotal issue before it was the economic benefit received by the party. Id. at 266. The "public invitee" standard rejects the requirement that some type of benefit must be conferred on the owner or occupier before a visitor can be considered an invitee. The court in *Provencher*, however, made clear that it had never adopted the Restatement's definition of public invitee, and declined to do so in that case. Id. at 267.

{¶ 21} Although two appellate courts have attempted to distinguish *Provencher*, we find those cases are not germane to the issue before us. See *Newton v. Pennsylvania Iron & Coal, Inc.* (1993), 85 Ohio App.3d 353, 356 (*Provencher* is not controlling because state agency was not maintaining a public facility); *Martin v. Konstam* (1992), 62 Ohio Misc.2d 507, 509 (*Provencher* considered only whether Ohio recognized "public invitee" and did not consider the landlord's duty of care to his tenant's guests). Courts in other jurisdictions have also required some benefit, whether it is mutual, tangible, economic, monetary, commercial, material, pecuniary, or financial. *Provencher* at 266, fn. 1. Cf. *Blair v. Ohio Dept. of Rehab. & Corr.* (1989), 61 Ohio Misc.2d 649, 654. The Supreme Court of Ohio has not indicated any change from *Provencher*, *Light*, or *Scheibel*.

{¶ 22} Thus, in order to prove that she is a business invitee, appellant must establish that Woodlawn received a tangible or economic benefit from her visit. See *Roesch v. Warren Distrib./Fleet Eng. Research*, 8th Dist. No. 77121, 2000-Ohio-2694, ¶ 18; *McAllister v. Trumbull Properties Co. Ltd. Partnership* (Feb. 11, 1994), 11th Dist.

No. 93-T-4891; *Wheeler v. Am. Legion Community Home Co., Inc.* (June 28, 1991), 11th Dist. No. 90-A-1571.

{¶ 23} In the instant matter, appellant offered no evidence that Woodlawn received any tangible benefit from her visit to the cemetery. She did not pay an entrance fee, purchase flowers, or anything of tangible value. She did not receive a bill from Woodlawn or pay Woodlawn for any services associated with her visit to the cemetery. Because appellant has offered no evidence that Woodlawn received a tangible benefit, she failed to establish her status as a business invitee.

{¶ 24} In this case, there is nothing in the record to demonstrate any economic benefit to Woodlawn from appellant's presence at the cemetery. Because the evidence failed to show that appellant's visit to the cemetery was for Woodlawn's benefit, the trial court correctly held that appellant was a licensee.

B. Duty of Care

{¶ 25} To succeed in a premises liability action, a plaintiff must prove by a preponderance of the evidence that defendant owed her a duty, that it breached that duty, and that breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. See *Menifee v. Ohio Welding Products., Inc.* (1984), 15 Ohio St.3d 75, 77. The status of a person injured on an owner's premises determines the scope and extent of the owner's duty to the injured person. *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315. Under Ohio law, an owner's duty of care

depends on whether the injured person is an invitee, a licensee, or a trespasser. *Menifee*, supra, at 77; *Gladon*, supra, at 315; *Bennett v. Stanley* (2001), 92 Ohio St.3d 35, 44.

{¶ 26} Because appellant is a licensee, the trial court properly stated that Woodlawn owed appellant only a duty to refrain from wantonly or willfully injuring her. *Light*, 28 Ohio St.3d at 68; *Hannan*, 102 Ohio St. 176 at paragraph four of the syllabus. See *Scheurer v. Trustees of The Open Bible Church* (1963), 175 Ohio St. 163, 171; *Wiley v. Natl. Garages, Inc.* (1984), 22 Ohio App.3d 57, 62.

{¶ 27} A licensee takes the premises subject to the attendant perils and risks. *Brown v. Rechel* (1959), 108 Ohio App. 347, 353-354, citing *Ehrlich*, supra. Ohio courts have held that if the licensor knows of the presence of any such danger, the licensee must be alerted to any danger which the licensor has reason to believe the licensee will not discover. *Salemi v. Duffy Constr. Corp.* (1965), 3 Ohio St.2d 169, paragraph two of the syllabus; *Soles v. Ohio Edison Co.* (1945), 144 Ohio St. 373, paragraph one of the syllabus; *Chadwick v. Ohio Collieries Co.* (1928), 31 Ohio App. 311, 313; *Ehrlich*, supra, paragraph four of the syllabus; *Railroad Co. v. Harvey* (1907), 77 Ohio St. 235. Here, there was no evidence that Woodlawn was aware that a hole had formed, and absent knowledge of that hole, could not have warned appellant of that hole.

{¶ 28} Because appellant failed to present evidence that her injuries were caused by wanton or willful conduct by Woodlawn, we hold that the trial court properly found that reasonable minds could come to but one conclusion, and that conclusion was adverse to appellant.

{¶ 29} Additionally, we note that even if the discussion regarding appellant's status were different, appellant failed to provide evidence that Woodlawn did not exercise ordinary and reasonable care.

{¶ 30} Accordingly, we find appellant's sole assignment of error not well-taken.

IV. CONCLUSION

{¶ 31} On consideration whereof, this court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE