[Cite as *Hendrickson v. Miami Univ.*, 2002-Ohio-1712.]

IN THE COURT OF CLAIMS OF OHIO

GERTRUDE HENDRICKSON, et al. :

Plaintiffs : CASE NO. 2000-06041

v. : DECISION

MIAMI UNIVERSITY : Judge Fred J. Shoemaker

Defendant :

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{¶1} This case was tried to the court on the sole issue of liability. Plaintiffs allege claims of negligence and loss of consortium. Defendant denies liability.

{¶2} On May 12, 1996, at some time before 9:30 a.m., plaintiff[1] was on defendant's premises in order to attend the graduation ceremony of her grandson, Mark Hendrickson. She was accompanied by family members as she walked to Millett Hall for the ceremony. Plaintiff had not been to Millett Hall before the day in question. It was a sunny day, and the concrete walkway leading to Millett Hall was crowded with pedestrian traffic.

{¶3} Plaintiff was walking slowly and looking forward. There were people on all sides of her. As she was walking, the heel of her right shoe became caught in a hole located in an expansion joint between two sections of concrete. She did not see the hole before stepping in it. Plaintiff fell, landing on her hands and shoulder.

{¶4} A few days after plaintiff fell, her husband and granddaughter went to the site of the fall and took photographs. The photographs show that there was a hole approximately fifteen inches long and two-to-three inches deep in the expansion joint in the walkway. Defendant contends that

[1]The term "plaintiff" shall be used to refer to Gertrude Hendrickson throughout this decision.

the hole was an open and obvious condition, and consequently, that defendant had no duty to repair the hole.

{¶5} In order to prevail upon her claim of negligence, plaintiff must prove by a preponderance of the evidence that defendant owed her a duty, that it breached that duty, and that the breach proximately caused her injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

{¶6} There is no dispute that plaintiff was on university property as an invitee. *Baldauf v. Kent State University* (1988), 49 Ohio App.3d 46. Therefore, defendant owed plaintiff the common law duty of reasonable care. *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718. Reasonable care is that which would be utilized by an ordinary prudent person under similar circumstances. *Smith v. United Properties, Inc.* (1965), 2 Ohio St.2d 310.

{¶7} In order to recover from the occupier of a premises for personal injuries claimed to have been caused by the condition of those premises, an invitee must allege and prove that the fall was proximately caused by some unreasonably dangerous condition on the premises. *Baldauf, supra.*

> **{¶8}** [Governmental entities] [a]nd owners or occupiers of private premises are not insurers of the safety of pedestrians traversing those premises, and minor or trivial imperfections therein, which are not unreasonably dangerous and which are commonly encountered and to be expected, as a matter of law do not create liability on the part of such owners or occupiers toward a pedestrian who, on account of such minor imperfection, falls and is injured. *Helms v. American Legion, Inc.*, (1966), 5 Ohio St.2d 60, syllabus. See, also, *Kimball v. City of Cincinnati* (1953), 160 Ohio St. 370.

{¶9} The trier of fact must consider all of the attendant circumstances in making its determination of whether the defect is substantial enough to support a finding of liability. *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319.

{¶10} Plaintiffs' Exhibits 4 and 5 and the testimony at trial demonstrate that the hole measured fifteen inches long and two-to-three inches deep. Although plaintiff testified that she did not see the hole before she stepped in it, she admitted that she could have seen it if she had looked. In addition, the conditions on the walkway were crowded that day, and plaintiff had never been at that location before. "A pedestrian using a public sidewalk is under a duty to use care reasonably proportioned to the danger likely to be encountered but is not, as a matter of law, required to look

constantly downward ***." *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, quoting *Grossnickle v. Germantown* (1965), 3 Ohio St.2d 96, paragraph two of the syllabus. Based upon the size and location of the defect, the court finds that plaintiff has proven, by a preponderance of the evidence, that the defect was substantial and constituted an unreasonably dangerous condition.

{¶11} Plaintiff must further prove that defendant had notice of the defect. The legal concept of notice is of two distinguishable types; actual and constructive.

> **{¶12}** "The distinction between actual and constructive notice is in the manner in which notice is obtained or assumed to have been obtained rather than in the amount of information obtained. Wherever from competent evidence the trier of facts is entitled to hold as a conclusion of fact and not as a presumption of law that information was personally communicated to or received by a party, the notice is actual. Constructive notice is that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." *In re Estate of Fahle* (1950), 90 Ohio App. 195, paragraph two of the syllabus.

{¶13} James Jameson, Quality Manager of Campus Services, testified that his duties included managing the "Walks and Drives Projects" at the university, and reporting matters related to the care of defendant's grounds. Although Jameson did not check concrete and asphalt surfaces on a regular basis, he testified that he was aware of the location of deteriorated concrete and asphalt because he was required to compile such data each year and make recommendations for repairs. He further testified that in his experience, if the sidewalks showed signs of "spauling," or cracking, measuring one half-inch or deeper, his crew would fill the cracks with a patching compound. He agreed that the photographs depict a typical deterioration of concrete.

{¶14} Jameson testified that prior to May 12, 1996, he was not made aware of any specific defect in the walkway to Millett Hall, although he was aware that the sidewalks and driveways around Millett Hall had been deteriorating. He further testified that the maximum capacity for Millett Hall was approximately seventeen thousand people and that defendant usually conducted two graduation ceremonies to accommodate all of the graduates and their families. He also stated that before graduation ceremonies were held, the grounds department paid special attention to the sidewalks and driveways in the vicinity of Millett Hall with street sweepers or power blowers, and that the grounds keepers were supposed to either fix or report safety concerns or potential hazards.

{¶15} The court finds that due to the size and location of the defect, defendant should have discovered it during preparations for graduation. Therefore, the court finds that defendant had constructive notice of the defect. The court further finds that due to the location of the defect and the crowded conditions on the walkway, the defect was not an open and obvious condition.

{¶16} Ohio's Comparative Negligence Statute, R.C. 2315.19, bars plaintiff from recovery if her contributory negligence is greater than defendant's negligence. Plaintiff testified that had she looked downward, she would have seen the defect. Although plaintiff does not have a duty to constantly look downward, she does have a duty to exercise reasonable care for her own safety. The court finds that plaintiff failed to exercise reasonable care for her own safety and measures plaintiff's own negligence at twenty percent. Therefore, any compensatory damages recoverable by plaintiffs shall be reduced by twenty percent.

{¶17} Judgment shall be rendered in favor of plaintiffs.

FRED J. SHOEMAKER
Judge

Entry cc:

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