**[Cite as *Kalemba-Sims v. Kent State Univ.*, 2006-Ohio-5669.]**

**IN THE COURT OF CLAIMS OF OHIO**

www.cco.state.oh.us

| | | |
|---|---|---|
| STEPHANIE KALEMBA-SIMS | : | |
| Plaintiff | : | CASE NO. 2004-10973<br>Judge Joseph T. Clark |
| v. | : | DECISION |
| KENT STATE UNIVERSITY | : | |
| Defendant | : | |

: : : : : : : : : : :

**{¶ 1}** Plaintiff brought this action against defendant alleging negligence. The case came to trial on the issue of liability after the parties submitted a stipulation as to plaintiff's damages. (Plaintiff's Exhibit 9.)

**{¶ 2}** Plaintiff testified that on January 10, 2001, she arrived at Kent State University (KSU) to sign up for classes. Plaintiff stated that she completed financial aid paperwork at the Schwartz Center and that she then proceeded across a parking lot toward the student center to meet with a counselor regarding registration for classes. According to plaintiff, she was injured when she stepped into a pothole located adjacent to a marked crosswalk as she attempted to cross the street separating the parking lot from the student center. Plaintiff recalled that she was crossing the street with a large group of people whose presence obscured her view of the pavement. In addition, plaintiff stated that the street was heavily traveled and that she maintained a lookout for approaching vehicular traffic as she stepped off the curb. Plaintiff described the pothole as approximately five inches deep and water-filled. Plaintiff submitted photographs depicting the pothole, although plaintiff admitted that the pictures were taken a few days to a week after the incident. (Plaintiff's Exhibits 1-4.)

**{¶ 3}** 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 Company, Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

**{¶ 4}** 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 a duty to exercise reasonable care in keeping the premises in a safe condition and to warn her of any latent or concealed dangers of which defendant had knowledge. *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St. 2d 51, 52-53; *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31. However, a property owner is under no duty to protect a business invitee from hazards that are so obvious and apparent that the invitee is reasonably expected to discover and protect against them herself. *Sidle v. Humphrey* (1983), 13 Ohio St.2d 45, paragraph one of the syllabus, *Brinkman v. Ross*, 68 Ohio St.3d 82, 84, 1993-Ohio-72.

**{¶ 5}** It is undisputed that plaintiff suffered injuries and incurred medical expenses as a result of her fall. (Plaintiff's Exhibit 9.) 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. 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.

**{¶ 6}** Plaintiff testified that the hole measured approximately five inches deep and that it was filled with water. According to plaintiff, the walkway was crowded that day with pedestrian traffic, forcing her to travel outside the marked crosswalk. Plaintiff also testified that she did not see the hole before she stepped into it; she admitted that she was not looking down. "[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.*, 81 Ohio St.3d 677, 1998-Ohio-602 quoting *Grossnickle v. Germantown* (1965), 3 Ohio St.2d 96, paragraph two of the syllabus. Although plaintiff does not have a duty to constantly look downward, she does have a duty to exercise reasonable care for her own safety.

**{¶ 7}** The court finds that due to the location of the defect, the crowded conditions on the walkway, and other attendant circumstances, the defect was not an open and obvious condition. Based upon the size 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. Nevertheless, plaintiff must further prove that defendant had notice of the defect.[1] "The liability of an owner or occupier for failure to protect an invitee against dangers on the premises must be predicated on superior knowledge of such dangerous conditions." *Howard v. J.C. Penny Co.* (Nov. 3, 1994), Franklin App. Nos. 94APE04-469, 94APE05-629, citing *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38.

**{¶ 8}** The legal concept of notice is of two distinguishable types: actual and constructive. "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

[1]To the extent that plaintiff attempted to support her position with case law referencing the duty of a political subdivision, such arguments have been disregarded inasmuch as KSU does not qualify as a political subdivision as that term is defined in R.C. 2743.01.

substitute for actual notice." *In re Estate of Fahle* (1950), 90 Ohio App. 195, paragraph two of the syllabus.

**{¶ 9}** The court finds that the size of the defect does not impart notice to defendant. "Before a fact-finder can conclude whether a pothole was existing for a certain or reasonable period of time he must first make a judgment as to when it developed. The mere fact that the pothole did not develop overnight does not justify the conclusion that the defendant had constructive notice and was thereby negligent." *Spires v. Ohio Highway Dep't* (1988), 61 Ohio Misc.2d 262, 263. See, also, *O'Neil v. Ohio Department of Transportation* (1988), 61 Ohio Misc.2d 287, 287-288 wherein another judge of the Court of Claims stated as follows: "I concur with Judge Shoemaker's well-reasoned opinion in *Spires* wherein he held that the evidence was insufficient to justify a finding that defendant had knowledge, actual or constructive, of the defect in the roadway. The defendant must have notice in order to act, or otherwise incur liability."

**{¶ 10}** Defendant's Director of Campus Environment and Operations, Michael McDonald, testified that the crosswalk is approximately eight to ten feet wide and spans 40 feet across the roadway. However, McDonald also testified that the area where plaintiff fell was not an area that his staff traveled regularly. McDonald stated that he manages approximately 300 workers and that the grounds crew is comprised of approximately 28 laborers, of whom eight employees are regularly engaged in pothole patching operations on defendant's campus. McDonald related that his staff conducts a full inspection of the streets and sidewalks once or twice a year, usually after spring semester. According to McDonald, there is no record of this defect in the pavement being reported to his office. He described the usual procedure to be followed once a call is placed to his office concerning a pothole; i.e., the person taking the call places a phone call or generates an electronic mail communication to effectuate the repair. However, McDonald asserted that in the event that notice of a large hole was received, a written record would be prepared.

McDonald noted that there were no records requesting that any potholes be patched during the period from January to March 2001.

**{¶ 11}** Defendant denies receiving actual notice of the roadway defect prior to plaintiff's fall. Based upon the testimony presented, the court finds that plaintiff failed to provide sufficient evidence as to the length of time that the pothole existed prior to her fall. Therefore, the court finds that plaintiff failed to prove defendant had actual or constructive notice of the defect. For the foregoing reasons, the court finds that plaintiff cannot prevail on her claim of negligence. Accordingly, judgment shall be entered for defendant.

**[Cite as *Kalemba-Sims v. Kent State Univ.*, 2006-Ohio-5669.]**

**IN THE COURT OF CLAIMS OF OHIO**

www.cco.state.oh.us

| | | |
|---|---|---|
| STEPHANIE KALEMBA-SIMS | : | |
| Plaintiff | : | CASE NO. 2004-10973<br>Judge Joseph T. Clark |
| v. | : | |
| | | JUDGMENT ENTRY |
| KENT STATE UNIVERSITY | : | |
| Defendant | : | |

: : : : : : : : : : :

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. 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.

_____

JOSEPH T. CLARK_
Judge

Entry cc:

Anthony N. Palombo
55 Public Square, Suite 1020
Cleveland, Ohio 44113-1901

Attorney for Plaintiff

Randall W. Knutti
Jana M. Brown
Assistant Attorneys General
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3130

Attorneys for Defendant

SJM/cmd
Filed September 18, 2006
To S.C. reporter October 27, 2006