[Cite as *Carbary v. Cleveland State Univ.*, 2009-Ohio-1586.]

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

CAROL L. CARBARY

Plaintiff

v.

CLEVELAND STATE UNIVERSITY

Defendant

Case No. 2008-03823-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Carol L. Carbary, filed this claim against defendant, Cleveland State University ("CSU"), alleging negligence on the part of defendant proximately caused property damage to her automobile. Plaintiff, an employee at CSU, related the rear bumper of her 2008 Mercury Milan was damaged as she was backing the vehicle out of a parking space at defendants' Main Classroom parking garage at approximately 5:05 p.m. on March 3, 2008. In her complaint, plaintiff offered a description of the damage incident. Plaintiff noted, "[u]pon backing out of my parking space in (the) Main Classroom garage *** I rear-ended some sawhorses that were being stored perpendicular to the rear wall and were below the line of sight." Plaintiff pointed out the rear bumper of her vehicle was punctured by "[n]ails protruding from the sawhorses." Plaintiff implied the damage to the bumper of her car was caused by defendant's negligence in maintaining a latent defective condition in the CSU parking garage. Plaintiff seeks recovery of $1,245.92, the total cost of automotive repair incurred resulting from the March 3, 2008 property damage incident. In her complaint, plaintiff acknowledged she has insurance coverage for the damage repairs to her car. Plaintiff did not list any deductible provision amount for her automobile coverage. Pursuant to

R.C. 2743.02(D) and R.C. 3345.40(B)(2)[1], plaintiff's damage claim for automotive repair is limited to the amount of her insurance coverage deductible; whatever that amount happens to be. Plaintiff submitted photographs taken by a CSU police officer depicting a sawhorse positioned against the block wall of the Main Classroom parking garage. The sawhorse appears from the photograph to be at least three feet in height and has a piece of plywood resting on top. Another photograph depicts the damage-causing nails protruding several inches from the leg of the sawhorse. The nails protruding from the sawhorse leg appear to be approximately eighteen inches above ground level. The $25.00 filing fee was paid.

{¶ 2} Defendant denied liability in this matter based on the contention that CSU did not owe any duty to protect plaintiff from any hazard presented by the nails protruding from the sawhorse. Defendant asserted any danger presented by the protruding nails was so open, obvious, and apparent that CSU owed no duty to protect plaintiff from such a condition as a matter of law. See *Sidle v. Humphrey* (1968), 13 Ohio St. 2d 45, 42 O.O. 2d 96, 233 N.E. 2d 589. Defendant pointed out plaintiff was classified under the law as a business invitee and therefore, a duty was owed to warn her of hidden dangers in the CSU parking garage. See for example *Paschal v. Rite Aid Pharmacy* (1985), 18 Ohio St. 3d 45, 18 OBR 267, 480 N.E. 2d 474. However, defendant maintained the damage-causing condition in the instant claim was so "open and obvious" in character that under the facts established CSU is provided with an absolute defense to liability based on the nature of the condition itself. See *Armstrong v. Best Buy Company, Inc.* (2003), 99 Ohio St. 3d 79, 2003-Ohio-2573, 788 N.E. 2d 1088.

{¶ 3} Plaintiff was present on defendant's premises for such purposes which would classify her under law as an invitee. *Scheibel v. Lipton* (1985), 156 Ohio St. 308,

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[1] R.C. 2743.02(D) provides:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances."

Also, R.C. 3345.40(B)(2) sates in pertinent part:

"If a plaintiff receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against the state university or college recovered by plaintiff."

46 O.O. 177, 102 N.E. 2d 453. Consequently, defendant was under a duty to exercise ordinary care for the safety of invitees such as plaintiff and to keep the premises in a reasonably safe condition for normal use. *Presley v. City of Norwood* (1973), 36 Ohio St. 2d 29, 65 O.O. 129, 303 N.E. 2d 81. The duty to exercise ordinary care for the safety and protection of invitees such as plaintiff includes having the premises in a reasonable safe condition and warning of latent or concealed defects or perils which the possessor has or should have knowledge. *Durst v. VanGundy* (1982), 8 Ohio App. 3d 75, 8 OBR 103, 455 N.E. 2d 1319; *Wells v. University Hospital* (1985), 85-01392-AD. As a result of plaintiff's status, defendant was also under a duty to exercise ordinary care in providing for plaintiff's safety and warning her of any condition on the premises known by defendant to be potentially dangerous. *Crabtree v. Shultz* (1977), 57 Ohio App. 2d 33, 11 O.O. 3d 31, 384 N.E. 2d 1294.

{¶ 4} Additionally, it has been previously held "the liability of an owner or occupant to an invitee for negligence in failing to render the premises reasonably safe for the invitee, or in failing to warn him of dangers thereon, must be predicated upon a superior knowledge concerning the dangers of the premises to persons going thereon." 38 American Jurisprudence, 757, Negligence, Section 97, as cited in *Debie v. Cochran Pharmacy Berwick, Inc.* (1967), 11 Ohio St. 2d 38, 40, 40 O.O. 2d 52, 227 N.E. 2d 603.

{¶ 5} However, an owner of a premises has no duty to warn or protect an invitee of a hazardous condition, where the condition is so obvious and apparent that the invitee should reasonably be expected to discover the danger and protect herself from it. *Parsons v. Lawson Co.* (1989), 57 Ohio App. 3d 49, 566 N.E. 2d 698; *Blair v. Ohio Department of Rehabilitation and Correction* (1989), 61 Ohio Misc. 2d 649, 582 N.E. 2d 673. This rationale is based on principles that an open and obvious danger is itself a warning and the premises owner may expect persons entering the premises to notice the danger and take precautions to protect themselves from such dangers. *Simmers v. Bentley Constr. Co.*, 64 Ohio St. 3d 642, 1992-Ohio-42, 597 N.E. 2d 504.

{¶ 6} In the instant claim, evidence has shown that the danger presented by the sawhorse positioned against the parking garage wall was neither concealed nor hidden from view. "[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." *Ruz-Zurita v.*

Wu's Dynasty, Inc., Franklin App. No. 07AP-616, 2008-Ohio-300, ¶7, quoting *Lydic v. Lowe's Cos., Inc.*, Franklin App. No. 01AP-1432, 2002-Ohio-5001, ¶10. "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." *Ruz-Zurita* at ¶7. (Citations omitted.) Accordingly, defendant in the present claim was under no duty to warn or protect plaintiff from any danger associated with the open and obvious condition presented by the sawhorse. In fact, the court determines the sole cause of plaintiff's damage was her own failure to exercise reasonable care in backing her vehicle from the parking space in defendant's lot. See *Luong v. Schulz* (1994), 97 Ohio App. 3d 472, 646 N.E. 2d 1164.

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ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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