[Cite as *Porter v. Ohio State Univ.*, 2013-Ohio-5949.]

Court of Claims of Ohio
The Ohio Judicial Center
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MARSHA PORTER

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2012-05398

Judge Patrick M. McGrath
Magistrate Holly True Shaver

DECISION

{¶ 1} On July 25, 2013, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). On August 12, 2013, plaintiff filed a response. Defendant's motion is now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶ 2} Civ.R. 56(C) states, in part, as follows:

{¶ 3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also*

Gilbert v. Summit Cty., 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶ 4} On July 14, 2010, plaintiff and her daughter, Brooklyn Porter, visited defendant's Newark campus for Brooklyn's student orientation. The weather conditions were clear and sunny. After attending the morning session of orientation, plaintiff and Brooklyn walked to the financial aid office located in Hopewell Hall. The north entrance of Hopewell Hall has two glass doors that open into a carpeted foyer, followed by a set of two glass doors that open into a lobby with two floor mats. As plaintiff walked into the carpeted foyer, she tripped and fell, sustaining personal injury. According to plaintiff's complaint, she "tripped and fell on a protruding piece of carpet."

{¶ 5} Defendant asserts that plaintiff cannot show that an unreasonably dangerous condition existed at the time of her fall, and as a consequence, she cannot establish that defendant was negligent.

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

{¶ 7} Under Ohio law, the duty owed by an owner or occupier of premises generally depends on whether the injured person is an invitee, licensee, or trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137. Plaintiff was on defendant's premises for purposes that classify her as an invitee, defined as a person who comes "upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Baldauf v. Kent State Univ.*, 49 Ohio App.3d 46, 47 (10th Dist.1988). An owner or occupier of premises 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."

Armstrong, supra, at 80. "[T]o establish that the owner or occupier failed to exercise ordinary care, the invitee must establish that: (1) the owner of the premises or his agent was responsible for the hazard of which the invitee has complained; (2) at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its existence or to remove it promptly; or (3) the hazard existed for a sufficient length of time to justify the inference that the failure to warn against it or remove it was attributable to a lack of ordinary care." *Price v. United Dairy Farmers, Inc.*, 10th Dist. No. 04AP-83, 2004-Ohio-3392, ¶ 6.

{¶ 8} According to plaintiff, as she walked through the front doors of Hopewell Hall, her foot "caught something that was in the carpet area underneath the carpet." (Defendant's Exhibit E, p. 13, lines 20-22.) When questioned by defense counsel during her deposition, plaintiff stated:

{¶ 9} "A: When I walked, walking through, there was something that caught my foot and made me fall.

{¶ 10} "Q: Do you know what it was that caught your foot?

{¶ 11} "A: It was something that was metal because it was hard.

{¶ 12} "* * * And there was something that kind of pushed me in, so it was kind of like a – something metal, like a bar or something, too.

{¶ 13} "* * *

{¶ 14} "Q: * * * So you're not saying it was the carpet you tripped on?

{¶ 15} "A: Something underneath. It was –

{¶ 16} "Q: So your foot was – where did the carpet start?

{¶ 17} "A: The carpet started by where the door was. It was all carpeted, you know.

{¶ 18} "Q: So if I understand you, you're saying the carpet must have been lifted up and you tripped on something underneath it?

{¶ 19} "A: No. There was no carpet – not it was underneath. It was like you'd have, I guess, where you would have the padding or it was in the ground underneath the – I'm not probably explaining my * * *

{¶ 20} "Q: So was the carpet itself that was ripped up in any way or was there a bulge?

{¶ 21} "A: It was just when you're walking, it was something underneath in the floor area. * * *

{¶ 22} "Q: * * * At this point it sounds like you're saying that there was something that was underneath the floor itself?

{¶ 23} "A: It was in the carpet. It was in the carpet, sir.

{¶ 24} "Q: So it was something underneath the rug, there?

{¶ 25} "A: It was in the carpet underneath, yes." (Defendant's Exhibit E, p. 15, line 14 through p. 24, line 11.)

{¶ 26} Plaintiff also testified that the object created a "bulge" in the carpet, which was not visible in the photos that were taken after she fell. Plaintiff admitted that she did not return to the area where she fell to determine what caused her to trip.

{¶ 27} According to Brooklyn, plaintiff was walking ahead of her and when they went through the entrance of the building, plaintiff tripped and fell. Brooklyn testified:

{¶ 28} "A: * * * and as I looked back, there was something underneath the carpet, something where you couldn't have saw. And if I would have went first, I would have fell." (Defendant's Exhibit D, page 10, lines 7-10.) She further stated:

{¶ 29} "Q: Okay. Did you ever get to take a look at what was underneath the carpet?

{¶ 30} "A: I know something was sticking out. I remember looking at something sticking out.

{¶ 31} "Q: Can you describe it?

{¶ 32} "A: No. It just looked like a metal piece.

{¶ 33} "Q: Describe how it was sticking out.

{¶ 34} "* * *

{¶ 35} "A: I can't remember. I'm not really sure.

{¶ 36} "* * *

{¶ 37} "A: I'm sure there was something underneath the carpet. I just don't know what exactly it was, but it was definitely something. When I stepped over it, it was something hard. It wasn't – it was something very tough.

{¶ 38} "Q: And when did you step over it?

{¶ 39} "A: When I went back to see what exactly happened and how she fell.

{¶ 40} "Q: So you examined it after?

{¶ 41} "A: Quickly.

{¶ 42} "Q: Can you describe how big it was or –

{¶ 43} "A: No. I can't remember." (Defendant's Exhibit D, p. 21, line 19 through p. 23, line 2.)

{¶ 44} Brooklyn testified that there was construction work going on near the entrance of the building, and that the receptionist in Hopewell Hall told her that someone "almost fell" in the same area shortly before plaintiff's fall.

{¶ 45} Plaintiff also filed the deposition of Douglas Warthen, Director of Business Affairs, for defendant's Newark campus. Warthen testified that in the summer of 2010, Hopewell North was undergoing construction to renovate certain offices. He stated he went to the scene of the accident a day or two after it occurred and found nothing unusual.

{¶ 46} Defendant filed the affidavit of Stephanie Hughes, a first responder to the scene, who averred as follows:

{¶ 47} "6. On July 14, 2010, I was working as a security officer and was one of the first responders to an incident that involved Marshá Porter in Hopewell Hall;

{¶ 48} "7. Upon arriving to the scene, I immediately looked around and observed nothing dangerous in the area of the incident;

{¶ 49} "8. I observed a woman sitting on a bench, who was holding a paper towel to her forehead;

{¶ 50} "9. She told me that she had fallen in the doorway and felt something 'metal' underneath her foot, as she entered the carpeted foyer area, and that she felt a little dizzy, but was overall fine and did not want an ambulance;

{¶ 51} "10. I verify that a true, fair and accurate photograph of the carpeted foyer area, as it appeared immediately after Ms. Porter's incident, is attached to Defendant's Motion for Summary Judgment as Exhibit B;

{¶ 52} "11. I verify that a true, fair and accurate photograph of the rug area, which immediately proceeds the foyer area, as it appeared immediately after Ms. Porter's incident, is attached to Defendant's Motion for Summary Judgment as Exhibit C;

{¶ 53} "12. Ms. Porter's daughter, who was there at the time of the incident, did not stay with her mother after she fell. Instead, Brooklyn left her mother on the bench and headed into the direction of the financial aid office;

{¶ 54} "13. After speaking with Ms. Porter, I immediately and thoroughly checked the foyer area at the north entrance of Hopewell Hall and the surrounding area to insure there was nothing dangerous in the area;

{¶ 55} "14. I got down onto my hands and knees and felt around on the carpet in the foyer area with my hands, as depicted in Exhibit B, and found nothing out of the ordinary in, on, or around the carpet in the area where Ms. Porter indicated that she had fallen;

{¶ 56} "15. The only 'metal' object in the foyer area was the threshold to the foyer doorway which is approximately one-half of an inch in height and is clearly visible upon ordinary inspection;

{¶ 57} "16. I verify that [I] have circled, in red pen, the metal threshold in Exhibit B;

{¶ 58} "17. I did notice, that on the 'handicap button' pole that protrudes from the wall, see [E]xhibit B, there was two small 'dots' of wet blood and I verify that I have marked with a red 'x' where I saw the blood;

{¶ 59} "18. I then examined the rug area, see [E]xhibit C, which immediately proceeded the second set of doors and saw no protrusions or bulges in the rugs nor did I find anything underneath the rugs;

{¶ 60} "19. I regularly travel the Hopewell Hall grounds, and did so several times on July 14, 2012 [sic] prior to the incident involving Ms. Porter;

{¶ 61} "20. Prior to this incident there was no construction work, or construction workers near the Hopewell Hall's North Entrance nor was there any going on when I arrived immediately after the incident at issue."

{¶ 62} In her deposition, Hughes testified as follows:

{¶ 63} "Q: Did Ms. Porter, the injured person, tell you what had caused her to fall?

{¶ 64} "A: She said she had tripped, and I went to look to see what would have been in the way. She told me that there was some construction, but there was nothing down there at that end of the building. And I double-checked the doorways, the entryway going in and out. The only thing that I could see that she would have tripped over was the threshold that's only about maybe half an inch tall." (Plaintiff's Exhibit 3, p. 12, lines 3-13.) Hughes further testified that she took photos of the area where plaintiff fell "right after" plaintiff reported the fall.

{¶ 65} Defendant asserts that if plaintiff tripped on the metal threshold, the existence of the threshold was an open and obvious condition, which precludes liability. Defendant further asserts that inasmuch as its staff did not find any defect in or around

the carpet immediately after plaintiff's fall, that plaintiff has failed to identify any unreasonably dangerous condition.

{¶ 66} "'To establish negligence in a slip and fall case, it is incumbent upon the plaintiff to identify or explain the reason for the fall.' *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 67-68 (12th Dist.1989). 'Where the plaintiff, either personally or by outside witnesses, cannot identify what caused the fall, a finding of negligence on the part of the defendant is precluded.' *Id*. at 68. Negligence cannot be established by the mere fact that a person slipped and fell." *Hess v. One Americana Ltd. Partnership*, 10th Dist. No. 01AP-1200, 2002-Ohio-1076, ¶ 11.

{¶ 67} Construing the evidence most strongly in favor of plaintiff, the only reasonable conclusion is that plaintiff has failed to identify the cause of her fall. Plaintiff has presented no evidence, other than her own assertions, to support that she tripped over a hidden metal object that was located under the carpet. Plaintiff did not return to the area to identify the hazard. Although Brooklyn testified that she returned to the area to identify the hazard she stated: "I'm sure there was something underneath the carpet. I just don't know what exactly it was, but it was definitely something." (Defendant's Exhibit D, *supra*.) Upon further questioning, Brooklyn could not recall what the hazard looked like. Stephanie Hughes testified that no unusual condition was found under the rugs or carpet in the foyer immediately after plaintiff's fall, and the photographs taken immediately after the fall do not depict any unusual condition on the premises.

{¶ 68} Assuming that plaintiff tripped on the metal threshold of the doorway at the entrance of Hopewell Hall, the photographs and testimony of Hughes show that the metal threshold is an open and obvious condition.

{¶ 69} "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong* at syllabus. "Open and obvious dangers are those not hidden, concealed from view, or undiscoverable upon ordinary inspection." *Early v. Damon's Restaurant*, 10th Dist. No. 05AP-1342, 2006-Ohio-3311,

¶ 8. "'[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.' *Lydic v. Lowe's Cos., Inc.*, 10th Dist. 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." *McConnell v. Margello*, 10th Dist. No. 06AP-1235, 2007-Ohio-4860, ¶ 10.

{¶ 70} Plaintiff has failed to rebut the testimony of Hughes regarding the open and obvious nature of the threshold, and the fact that no unusual condition was found on defendant's premises.

{¶ 71} For the foregoing reasons, the court concludes that there are no genuine issues as to any material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment shall be granted and judgment shall be granted in favor of defendant.

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PATRICK M. MCGRATH
Judge

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JUDGMENT ENTRY

{¶ 72} A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. All previously scheduled events are VACATED. 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.

_____
PATRICK M. MCGRATH
Judge

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