[Cite as *Nimis v. Miami Univ.*, 2014-Ohio-5885.]

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

SARA NIMIS

Plaintiff

v.

MIAMI UNIVERSITY

Defendant

Case No. 2013-00674-AD

Interim Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Sara Nimis, filed a complaint against defendant, Ohio University ("OU"), alleging that she was injured while "bouldering" on an indoor rock-climbing wall located on defendant's property. Plaintiff asserted that this injury occurred on September 1, 2012 at approximately 6:00 pm.

{¶2} Plaintiff contended that she was bouldering on the day in question, which is "climbing laterally across the wall up to a limited safe height (indicated by yellow spots running along the climbing wall) without a harness and rope." Plaintiff had taken defendant's required "Climbing Fundamentals" class which teaches participants the "rules and regulations of the climbing wall," as well as basic skills necessary to climb safely. "Since having passed the 'Fundamentals' test earlier that spring, I had been bouldering as many as thirty sessions, which would mean that I had dropped safely off the wall well over 200 times without incident." Plaintiff described the moment she fell: "[a]bout two thirds of the way along that particular section of wall, I made an ambitious reach and was unable to manage my weight on it, so I dropped off the wall. I could tell

immediately that my landing was harder than usual, but I was shocked to look down and see my left ankle twisted gruesomely inward."

{¶3} Plaintiff asserted that the area she fell onto was not the "inches-thick foam pads (the bouldering mat) that had always, in my experience, been in place during open hours, but on a cool surface of the industrial rubber padding that is only slightly softer than the concrete below it." She contended that only one mat was out of place along the entire wall. Unfortunately, she fell at that particular location.

{¶4} Plaintiff averred that the employee on staff at the time, a student, Terrance Ganser, told her: "I am so sorry. I had just opened up, and I was about to put it down when you checked in. I glanced at my computer screen for a second and you were on the ground."

{¶5} Plaintiff was taken to the emergency room and spent 3 days in the hospital being treated for her broken ankle. She attached copies of all of her medical bills, totaling more than $55,000, of which $3,790.48 was left unpaid by insurance and, therefore, patient responsibility.

{¶6} Plaintiff asserted that this injury had a substantial impact on her career, causing her to miss deadlines for applying to jobs beginning the fall of 2013, leaving her unemployed while she searched for jobs starting in 2014. She also contended that she is still in pain, her "joint becomes stiff and sore when the weather is rainy and cold, and when I travel." She also, "ha[s] a newfound fear of heights, high-heeled shoes, and running anywhere where I might trip or otherwise twist that ankle." Plaintiff seeks damages in addition to her medical expenses for pain, inconvenience, and lost opportunities for employment, but she provided no supporting evidence for these losses and admitted, "I have not attempted to calculate the injury in terms of pain, inconvenience, and oppotunities (sic) for employment."

{¶7} Plaintiff provided a copy of the incident report, including an addendum signed by the climbing wall staff member, Terrance Ganser, which stated: "On the Injury

Report following the accident with Sarah (sic.) Nimis, I made an inaccurate statement regarding padding at the site of the accident. Sarah (sic.) Nimis fell on the padding installed by the manufacturer; however, the patron hadn't moved an additional bouldering mat beneath where she was bouldering." In response, plaintiff stated: "[w]hen I took the 'Fundamentals' course at the climbing wall, I was instructed to check several items before allowing a climber to approach the wall: are they wearing proper shoes? Is their harness tight enough? Are the ropes crossed? Are you anchored? Is the knot dressed? There was no indication that it was my responsibility as a patron to make sure that the bouldering mats were properly placed. On the contrary, once before having been trained, I approached the climbing 'cave' (another section of the facility) when it was closed and a female staff member told me that climbing required check-in, that the area was closed, and that additional safety equipment (the bouldering mats in question) had to be put in place by staff members before the area could be opened." Plaintiff argued: "[t]he mats were in fact in place at the position I got ON the wall, just not at the place where I fell. because [sic] I always bouldered with the clear understanding that mat placement was the responsibility of the climbing wall staff, it did not occur to me then as any previous time to make sure that mats were in place all the way along the surface of the climbing wall before beginning to climb." She also stated: "I understand that efforts have been made to make the wall safer through shifts in policy. Most notably, the requirement of a spotter for patrons wishing to boulder has been put in place. Although the Basic course included a brief discussion of how to spot someone while they were bouldering, this was not a requirement at the time of my injury."

{¶8} Defendant filed an investigation report denying liability for plaintiff's injuries on the contention that: "Ms. Nimis participated in the climbing activity on September 1, 2012 with full knowledge of the risks associated with that type of activity as evidenced in the Acknowledgment of Risk section of the Release of all Claims and Covenant Not to Sue, which she signed on August 22, 2012."

{¶9} In response to plaintiff's assertion that the floor was not properly padded, defendant contended: "a picture is attached showing the depth of the floor padding provided by the manufacturer. The facility does provide extra pads in an effort to further enhance the safety at the wall; and for those participating in bouldering, the spotter can move the extra pads as they and the climber see fit."

{¶10} Defendant denied plaintiff's contention that Terrance Ganser, immediately following the incident, said: "I am so sorry. I had just opened up, and I was about to put it down when you checked in. I just glanced at my computer screen for a second and you were on the ground." Defendant contended: "Mr. Ganser denied having said that in a face to face interview December 9, 2013 to Risk Manager, Dennis Fleetwood. The Accident or Injury Report submitted by the claimant puts the time of the accident at 6:00 PM that day. The climbing wall hours of operation on September 1, 2012 were 2:00 PM to 7:00 PM, and Mr. Ganser had been working for several hours before the accident occurred."

CONCLUSIONS OF LAW

{¶11} Plaintiff's cause of action is grounded in negligence. In order to prevail, plaintiff must establish: 1) a duty on the part of defendant to protect her from injury; 2) a breach of that duty; and 3) injury proximately resulting from the breach. *Huston v. Konieczny*, 52 Ohio St. 3d 214, 556 N.E. 2d 505 (1990); *Jeffers v. Olexo*, 43 Ohio St. 3d 140, 539 N.E. 2d 614 (1989); *Thomas v. Parma*, 88 Ohio App. 3d 523, 624 N.E. 2d 337 (8th Dist. 1993); *Parsons v. Lawson Co.*, 57 Ohio App. 3d 49, 566 N.E. 2d 698 (5th Dist. 1989).

{¶12} Based on plaintiff's status as an adjunct professor and patron of the climbing facility, she was classified as an invitee and defendant owed her a duty to exercise reasonable care in keeping the premises in a safe condition and warning her of any latent or concealed dangers which defendant had knowledge. *Perry v. Eastgreen Realty Company*, 53 Ohio St. 2d 51, 52-53, 372 N.E. 2d 335 (1978); *Presley v. Norwood*,

36 Ohio St. 2d 29, 31, 303 N.E. 2d 81 (1973); *Sweet v. Clare-Mar Camp, Inc.*, 38 Ohio App. 3d 6, 9, 526 N.E. 2d 74 (8th Dist. 1987). However, a property owner is generally under no duty to protect an invitee plaintiff from hazards which are so obvious and apparent that the plaintiff is reasonably expected to discover and protect against them herself. *Sidle v. Humphrey*, 13 Ohio St. 2d 45, 233 N.E. 2d 589 (1968), at paragraph one of the syllabus; *Paschal v. Rite Aid Pharmacy*, 18 Ohio St. 3d 203, 480 N.E. 2d 474 (1985).

{¶13} An unreasonably dangerous condition does not exist in situations where persons who are likely to encounter a condition may be expected to take good care of themselves without exercising any further precautions. *Baldauf v. Kent State Univ.*, 49 Ohio App. 3d 46, 48, 550 N.E. 2d 517 (10th Dist. 1988). Plaintiff was made aware of the dangers of bouldering during the "Fundamentals" and "Basics" training courses. Further, plaintiff signed a "Release of All Claims and Covenant Not to Sue" which included an "Acknowledgment of the Risk" section detailing the various potential dangers and injuries associated with the use of the climbing wall facility.

{¶14} Defendant contended plaintiff, by voluntarily engaging in the bouldering, was aware of the potential for injury and, consequently, assumed the risk for any foreseeable injury that may have arisen from the activity. "Ordinarily, assumption of the risk is a question of fact, to be resolved by the factfinder." *Carrel v. Allied Prods. Corp.*, 78 Ohio St. 3d 284, 289, 1997-Ohio-12, 677 N.E. 2d 795 (1997). Assumption of the risk bears three elements: 1) one must have full knowledge of a condition; 2) such condition must be patently dangerous to her; and 3) she must voluntarily expose herself to the hazardous condition. *Briere v. Lathrop Co.*, 22 Ohio St. 2d 166, 174-175, 258 N.E. 2d 597 (1970). While the defense of assumption of the risk, where applicable, is no longer a complete bar to recovery, primary assumption of the risk does act as complete bar to recovery since defendant owes no duty to a plaintiff injured during involvement in an obviously dangerous activity. *Anderson v. Ceccardi*, 6 Ohio St. 3d 110,114, 451 N.E. 2d

780 (1983). Plaintiff acknowledged the risk of injury associated with the activity of bouldering when she read and signed the "Release of All Claims and Covenant Not to Sue." Further, she was climbing without the assistance of a "spotter" as required by the defendant's posted policy.

{¶15} "The mere fact that plaintiff fell does not establish any negligence on the part of defendant. *Green v. Castronova* (1966), 9 Ohio App. 2d 156, 161, 223 N.E. 2d 641; *Kimbro v. Konni's Supermarket, Inc.* (June 27, 1996), 1996 Ohio App. LEXIS 2737, Cuyahoga App. No. 69666, unreported; *Costidakis v. Park Corporation* (Sept. 1, 1994),1994 Ohio App. LEXIS 3894, Cuyahoga App. No. 66167 (Sept. 1, 1994), unreported. It is incumbent upon a plaintiff to show that there was a dangerous or latent condition on the premises that was the cause of the fall. *Paschal*, supra." *Orens v. Ricardo's Restaurant*, 8th Dist. No. 70403 (November 14, 1996), unreported. As has been mentioned, a premises owner ordinarily owes no duty to protect invitees, such as plaintiff, from dangerous conditions that are open and obvious. *Sidle*. Furthermore, a property owner has no duty to inform an invitee about open and obvious dangers on the property. "[T]he open and obvious nature of the hazard itself serves as a warning." *Simmers v. Bentley Constr. Co.*, 64 Ohio St. 3d 642, 644, 597 N.E. 2d 504 (1992). Here, the picture shows padding in the area of the incident which is approximately 4-6 inches in depth. Therefore, when padding on the end of the wall is missing the substantial difference in height between a padded area and a non-padded area is certainly immediately discernable upon a brief inspection of the premises. Therefore, the court finds this condition to be open and obvious and plaintiff's claim must be denied.

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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.

_____
DANIEL R. BORCHERT
Interim Clerk

Entry cc:

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