[Cite as *Sims v. Marren*, 2015-Ohio-2232.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Meredith O. Sims	Court of Appeals No. OT-14-035
Appellant	Trial Court No. 13CV200C
v.	
Tabitha Marren, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: June 5, 2015

* * * * *

Edward Cohen and Mackenzie M. Farmer, for appellant.

James J. Turek and Brian D. Sullivan, for appellees, Tabitha Marren, Edgewater Investment Group, Inc., and S.B. Delaware Cart, LLC.

Kelly M. Jackson, for appellee, Progressive Direct Insurance Company.

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, Meredith Sims, appeals the August 28, 2014 judgment of the Ottawa County Court of Common Pleas granting summary judgment in favor of

defendants-appellees, Tabitha Marren, Progressive Direct Insurance Company, Edgewater Investment Group, and Delaware Cart, LLC. For the reasons that follow, we affirm.

I. BACKGROUND

{¶ 2} From September 8-10, 2008, kitchen managers and market partners of Texas Roadhouse attended "Kitchen Managers University" ("KMU") on the island of Put-in-Bay, in Ottawa County, Ohio. An itinerary was distributed to attendees with instructions and a schedule of events. They were informed that the event was "BYOB," and they were instructed to arrive at the Miller Ferry at 2:00 p.m. They were told not to bring their vehicles to the island.

{¶ 3} Texas Roadhouse rented cabins at the Island Club resort. Sims and Marren were assigned to the same cabin, cabin #81, along with several other women. Texas Roadhouse also rented the Admiral Perry House, located near the cabins, where many of the group activities took place. It stocked the Admiral Perry House with food and beverages—including alcoholic beverages—for consumption by KMU attendees.

{¶ 4} Golf carts are the primary mode of transportation on the island and they are driven on the streets. During a meeting at the Admiral Perry House, KMU attendees were told that cabin-mates could rent golf carts. They were advised that a scavenger hunt had been planned and a golf cart would be needed for that activity. While the cabin rentals and dinners were paid for by Texas Roadhouse, golf cart rentals were not. The women assigned to cabin #81 decided they would pool their money and rent a cart. A

representative from the cart rental company brought the carts to the resort. A credit card was required for the cart rental, so Amanda Hall, who was also assigned to cabin #81, provided her credit card. They received instructions on how to operate the cart. At her deposition, Hall described the transaction as informal. No documents have been produced evidencing the transaction.

{¶ 5} The last item on the itinerary each night indicated that the group would be going to downtown Put-in-Bay at 8:00 p.m., following dinner. On September 9, 2008, the women from cabin #81 went to three downtown bars after dinner then drove back to the Island Club. Between dinner and the bars, Marren consumed somewhere between four and six beers and one shot of liquor. Once back at their cabin, market partner, Mark Thornburg, invited them back downtown to continue socializing with the other Texas Roadhouse kitchen managers and market partners. The women of cabin #81 had taken turns driving the golf cart. Hall testified that she did not want to drive back downtown because it was commonly known that Put-in-Bay police officers patrolled for drunk drivers. Marren volunteered to drive.

{¶ 6} Marren and her passengers started out following Thornburg's cart, but they lost sight of him. When they got downtown, they drove down the main strip where many of the island's bars and restaurants are located. Someone thought they saw Thornburg in one of the bars, and the passengers in the cart turned their heads to look. When Marren turned to look, she swerved and drove the cart up a curb, causing it to tip over onto the driver's side. Most of the passengers escaped the cart without injury. Sims' leg,

however, was trapped under the cart. Some of the women lifted up the cart and found Sims in a pool of blood, having suffered an open fracture of her ankle. She also suffered facial injuries.

{¶ 7} Police and emergency personnel arrived on the scene. As they tended to Sims, Thornburg allegedly told Marren to return to the cabin and that the situation would be handled. Officers eventually determined that Marren had been driving the cart and they tracked her down at cabin #81. They arrested her for leaving the scene of the accident and for failure to control. Her blood alcohol content was not tested and she was not cited for operating the cart while impaired.

{¶ 8} Following the accident, Texas Roadhouse, a self-insured employer for workers' compensation purposes, certified a workers' compensation claim on Sims' behalf. Through workers' compensation benefits, Sims was compensated for medical treatment and lost wages attributable to the September 9, 2008 accident.

{¶ 9} On August 16, 2010, Sims filed a complaint in the Ottawa County Court of Common Pleas, which she voluntarily dismissed on June 18, 2012. On May 30, 2013, she re-filed the matter against Marren, Edgewater, Delaware Cart, and Progressive, her auto insurer with which she maintained uninsured/underinsured motorist coverage. She claimed that Marren was negligent and reckless in her operation of the cart and was negligent per se for violating R.C. 4511.202(A) (failure to control) and 4549.02(A) (failure to remain at the scene of an accident). She claimed that Edgewater and Delaware Cart were negligent in failing to maintain and enforce procedures to verify who would be

responsible for operating the cart, and to ensure that all potential drivers were capable, properly licensed, insured, and fit to operate the cart. And with respect to Progressive, she sought UM/UIM benefits under her insurance policy.

{¶ 10} All defendants moved for summary judgment on Sims' claims. Marren contended that Sims' injuries were incurred in the scope and course of employment and were determined to be compensable under the workers' compensation statutes. As such, she argued, Sims was limited to the rights afforded under the workers' compensation statutes and Marren was immune from suit under R.C. 4123.741 as Sims' fellow employee. She also argued that due to Sims' acceptance of workers' compensation benefits, she was estopped from asserting that she was not in the course and scope of employment at the time the injury occurred.

{¶ 11} Sims countered that the accident did not occur in the scope and course of employment. She argued that Texas Roadhouse did not require carts to be rented and did not pay for them and that Marren's operation of the cart after drinking cannot be said to have been in the scope of or in the interest of Texas Roadhouse. She claimed that the purpose of the drive downtown was to visit bars and listen to music—not to conduct Texas Roadhouse business or to act for its benefit.

{¶ 12} Edgewater in its motion for summary judgment argued that it was merely a landlord of Delaware Cart, owned no golf carts, had no role in the operation of Delaware Cart, and had no involvement in the rental or usage of golf carts. It, therefore, denied that it owed any duty to Sims. Delaware Cart claimed that although it owned and rented the

golf carts, there was no evidence that Marren was incompetent to operate the cart. To the contrary, Delaware Cart argued, Marren possessed a valid driver's license and testified that she operated her father's golf cart on many occasions.

{¶ 13} Delaware Cart also argued that there was no evidence that Marren was intoxicated. It claimed that as employees who serve alcohol to customers, Texas Roadhouse instructed Sims and the other passengers how to identify when a person is intoxicated. Sims was unable to say that Marren was intoxicated and, in fact, testified that she would not have gotten in the cart if she thought Marren was drunk.

{¶ 14} Finally, both Edgewater and Delaware Cart contended that there is no duty under Ohio law—and there is no possible way—to determine the identity and insurance status of everyone who may potentially drive the cart. Even if that duty existed, they argued, Marren's was the only status material to Sims' claims.

{¶ 15} Sims countered that it was foreseeable to Edgewater and Delaware Cart that the cart could be operated by an intoxicated person, yet they failed to enact or follow procedures to address this predictable risk. She contrasted the informality of the rental procedure to the formality and documentation required to rent an automobile. She also claimed that despite the assertions that Marren was not drunk, Marren admitted to drinking approximately six beers and one shot of liquor before driving the cart. As to the relationship between Edgewater and Delaware Cart, Sims urged that both defendants have the same address, the sole member of Edgewater is also an employee of Delaware

Cart, and the declarations page of the insurance policy covering the carts named "Edgewater Investment Group, Inc." as the insured under the policy.

{¶ 16} In its motion for summary judgment, Progressive argued that Sims' policy excluded coverage for injuries arising out of the use of a golf cart. It also argued that Sims was injured at a company-sponsored event, she accepted workers' compensation benefits, she never disputed that the incident occurred in the scope and course of employment, and she is estopped from taking a contrary position here. It argued that Marren was immune from suit as a co-employee, and since Sims cannot legally recover from Marren, she is precluded from recovering under the UM/UIM policy. Finally, Progressive argued that because Delaware Cart's liability limits exceed Sims' UM/UIM coverage, there is no coverage under the Progressive policy.

{¶ 17} In response to Progressive's motion, Sims contended that there was a question of fact as to whether the cart was a "golf cart" under the policy because it is a vehicle licensed by the state of Ohio, is significantly larger than a golf cart, was being driven on a public road, and was intended to be used as transportation and not for use on a golf course. She also claimed that the language of the policy is inconsistent with a blanket requirement that the insured be "legally entitled to recover" because co-employee immunity is not specified as an exclusion in the policy. Finally, Sims claimed that it was premature for Progressive to assert that Delaware Cart's liability limits exceed the UM/UIM coverage because it has not yet been determined whether Sims will recover against Delaware Cart.

{¶ 18} The trial court ruled in favor of all defendants. First, it held that Sims cannot recover against Marren because her accident qualified her for workers' compensation benefits, thus Marren was immune under R.C. 4123.741. Next it held that Edgewater did not own the cart and cannot be held liable for negligence, and Marren was a capable and competent driver, thus there was no evidence that Delaware Cart breached any duty. Finally, it held that the Progressive policy excluded coverage for accidents arising out of the use of a golf cart.

{¶ 19} Sims appealed the trial court judgment and assigns the following errors for our review:

> **APPELLANT'S FIRST ASSIGNMENT OF ERROR**
>
> The Trial Court Erred to the Prejudice of Appellant, Meredith Sims, by granting Defendant Marren's Motion for Summary Judgment[.]
>
> **APPELLANT'S SECOND ASSIGNMENT OF ERROR**
>
> The Trial Court Erred to the Prejudice Of Appellant, Meredith Sims, by granting Defendant S.B. Delaware and Edgewater's Motion for Summary Judgment[.]
>
> **APPELLANT'S THIRD ASSIGNMENT OF ERROR**
>
> The Trial Court Erred to the Prejudice Of Appellant, Meredith Sims, by granting Defendant Progressive's Motion for Summary Judgment[.]

II. STANDARD OF REVIEW

{¶ 20} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 21} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A

"material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

III. ANALYSIS

A. First Assignment of Error

{¶ 22} In her first assignment of error, Sims challenges the trial court's conclusion that she is barred from recovering against Marren under R.C. 4123.741 because her injury was already determined to have been sustained in the course of her employment for workers' compensation purposes.

{¶ 23} R.C. 4123.741 provides, in pertinent part:

> No employee of any employer, as defined in division (B) of section 4123.01 of the Revised Code, shall be liable to respond in damages at common law or by statute for any injury * * * received or contracted by any other employee of such employer *in the course of and arising out of the latter employee's employment* * * * on the condition that such injury * * * is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code. (Emphasis added.)

{¶ 24} Sims argues that Marren is not automatically entitled to fellow employee immunity. She insists that in determining whether Marren may take advantage of this

protection, it must be determined whether Marren, if injured, would have been entitled to workers' compensation benefits. To be entitled to workers' compensation benefits, Sims explains, Marren must have been acting for the benefit of Texas Roadhouse and she must have been acting consistently with her work activities. Sims stresses that because Marren was drinking, was on her way to go "bar-hopping," and fled the scene of the accident, it cannot be said that her actions were for the benefit of Texas Roadhouse and consistent with her work activities. She contends that at the very least, this constitutes a question of fact that cannot be resolved on a motion for summary judgment.

{¶ 25} Marren claims that the issue of whether the injury occurred in the scope and course of employment was conclusively established when Texas Roadhouse certified Sims' workers' compensation claim and Sims accepted those benefits. She claims that this conclusion was appropriate because the Put-in-Bay trip was a Texas Roadhouse-sponsored event, the company arranged for the golf cart rentals, and the women returned to downtown Put-in-Bay at the request of Texas Roadhouse's market partner. She also insists that she was competent to drive the cart, was not intoxicated, and drove the cart responsibly.

{¶ 26} In *Donnelly v. Herron*, 88 Ohio St.3d 425, 727 N.E.2d 882 (2000), syllabus, the Ohio Supreme Court established that "R.C. 4123.741 extends immunity to a coemployee only when the actionable conduct occurs 'in the course of, and arising out of,' the co-employee's employment, within the meaning of that phrase in the Workers' Compensation Act." To be an "employee," one must be "in the service of" his or her

employer. R.C. 4123.01(A)(1)(b). The court explained that "nothing more is required of the employee seeking immunity to be 'in the service of' the employer than is required of the injured employee in obtaining compensation coverage." *Donnelly* at 428.

{¶ 27} In arguing their respective positions as to whether Marren's conduct was in the course of and arising out of her employment, Sims relies on *Callahan v. P&G,* 3d Dist. Allen No. 1-08-19, 2008-Ohio-4954, and Marren relies on *Kohlmayer v. Keller,* 24 Ohio St.2d 10, 263 N.E.2d 231 (1970).

{¶ 28} In *Callahan,* the plaintiff was at a training conference in New Orleans. After attending two receptions sponsored by vendors, the plaintiff and others were invited out by a vendor for drinks on Bourbon Street. After parting ways with the vendor, plaintiff and her co-workers were standing outside a club trying to figure out what song was playing. A club bouncer chasing someone down the sidewalk ran into the plaintiff, injuring her. The court considered whether, for purposes of plaintiff's workers' compensation claim, the injury arose out of and was in the course of her employment.

{¶ 29} The *Callahan* court explained that the "arising out of" element of a workers' compensation claim requires consideration of: "(1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident." (Internal quotations and citations omitted.) *Id.* at ¶ 21. As to the "course of employment" element, it stated that the injury must have been sustained while the employee was engaging in activity consistent with

and logically related to the employer's business. (Citations omitted.) *Id. at* ¶ 22. This, it explained, requires a sufficient nexus between the employment and the injurious activity, taking into account the time, place and circumstances of the injury. *Id.* It recognized that workers' compensation cases are fact-specific and that no one test can apply to every factual possibility. *Id.* at ¶ 21.

{¶ 30} The *Callahan* court ultimately found the relationship between the trip to Bourbon Street and the employer's business too tenuous and upheld the decision denying workers' compensation benefits to the employee.

{¶ 31} Marren cites *Kohlmayer,* 24 Ohio St.2d 10, 263 N.E.2d 231, where the plaintiff broke his neck while swimming at a company picnic. In determining whether the court erred in granting judgment notwithstanding the verdict in favor of plaintiff on his claim for workers' compensation benefits, the court acknowledged that the plaintiff was not paid for his attendance at the picnic. However, it recognized:

> Improved employee relationships which can, and usually do, result from the association of employees in a recreational setting produce a more harmonious working atmosphere. Better service and greater interest in the job on the part of the employees are its outgrowths. The expense of the picnic may furnish the basis for an income tax deduction as a business expense. Tangible business benefits are even more likely to be realized where, as here, a small business is involved.

> Thus, business-related benefits, even though not immediately measurable, which may be expected to flow to the employer from sponsoring a purely social event for his employees, are sufficiently related to the performance of the required duties of the employee so that it is correct to say that the Legislature intended the enterprise to bear the risk of injuries incidental to that company event. (Internal quotations and citations omitted.) *Id.* at 12.

{¶ 32} Because a "swimming injury is one which can reasonably be expected to occur at a company picnic at which swimming facilities are provided," the court found that "the danger to plaintiff was a natural risk of the activity in which he was involved." *Id.* at 13. It, therefore, concluded that workers' compensation benefits should have been awarded.

{¶ 33} "Ordinarily, the issue of whether an employee is acting within the course of employment is a question of fact." *Saunders v. Holzer Hosp. Found.,* 176 Ohio App.3d 275, 2008-Ohio-1032, 891 N.E.2d 1202, ¶ 15 (4th Dist), citing *Osborne v. Lyles*, 63 Ohio St.3d 326, 334, 587 N.E.2d 825 (1992); *Posin v. A.B.C. Motor Court Hotel, Inc.* 45 Ohio St.2d 271, 278, 344 N.E.2d 334 (1976). "Only when the facts are undisputed and no conflicting inferences are possible does it become a question of law." (Internal quotations and citations omitted.) *Id.*

{¶ 34} Here, there is no dispute that Marren was on the island for purposes of attending KMU; the activities for the event were set forth in an itinerary distributed to

attendees; Texas Roadhouse paid for accommodations and dinners while on the island and stocked the Admiral Perry House with alcoholic beverages for employees' consumption; Texas Roadhouse had at least some involvement in facilitating employees' cart rentals; and Marren drove downtown at Thornburg's invitation. The itinerary stated that the activity beginning at 8:00 p.m. was to spend time in downtown Put-in-Bay, presumably to frequent the bars and restaurants there. These facts would tend to suggest that Marren's activities that night arose out of and were in the course of her employment. But Sims points to several factors that she believes removes the conduct from the course of employment: (1) the voluntary nature of the cart rental; (2) the voluntary nature of Marren's alcohol consumption; (3) the voluntary nature of the decision to return downtown after the women had gone back to the cabin for the night; (4) Marren's alleged overconsumption of alcohol before agreeing to drive the cart; and (5) Marren's conduct in fleeing the scene, albeit at Thornburg's suggestion.

{¶ 35} Marren claims that Sims has no proof that Marren was intoxicated at the time of the accident. She insists that the passengers in the cart—including Sims—had been trained by their employer on how to recognize signs of intoxication. Hall testified that Marren did not seem drunk and followed the rules of the road. Sims testified that she would not have gotten in the cart with Marren had she thought she was too drunk to drive. Marren's blood-alcohol level was not tested by Put-in-Bay police and she was not cited for driving under the influence.

{¶ 36} We conclude that under the circumstances of this case, Marren's alleged intoxication did not render her conduct outside the course of her employment. Before explaining this conclusion, we address *Sanders v. Fridd*, 2013-Ohio-4338, 998 N.E.2d 526 (10th Dist.), relied on by Sims.

{¶ 37} In *Sanders*, the plaintiff was injured when her co-worker jumped out of his office to scare her. The trial court originally granted summary judgment to the co-employee without determining whether he was acting within the scope of his employment. *Id.* at ¶ 11. The appellate court reversed and remanded and the matter went to a jury. One of the issues for the jury's resolution was whether the co-employee was immune from liability. Sims summarizes the holding in *Sanders* as follows:

> The court noted that only when the actionable conduct occurs "in the course of, and arising out of," the coemployee's employment, within the meaning of that phrase in the Ohio Workers' Compensation Act does the immunity shield the coworker from liability. * * * Even though the injured worker and the coemployee were on the employer's premises and 'on the clock', as it were, the coemployee's behavior which caused the injury had nothing to do with his employer or the employer's interest and therefore the immunity not available [sic].

{¶ 38} But this was not *Sanders'* holding.

{¶ 39} The trial court instructed the jury that an employee who causes an injury while engaged in "horseplay," is not "in the service of" his employer and does not qualify

for immunity, *unless his employer consents to or acquiesces in the horseplay*. *Id.* at ¶ 20. Applying the trial court's instructions, the jury found that horseplay was common in the parties' workplace and was carried on with the knowledge of their employer, thus the employee-tortfeasor was immune from liability. *Id.* at ¶ 40. In affirming the jury's verdict, the appellate court concluded that the evidence supported the jury's finding that "[the employer] consented to or acquiesced in horseplay occurring at the office, rendering [the co-employee's] horseplay within the course of his employment and entitling [the co-employee] to immunity under R.C. 4123.74."

{¶ 40} Here, we reach a similar conclusion. The undisputed evidence establishes that Texas Roadhouse not only consented to or acquiesced in the consumption of alcohol and the use of carts to provide transportation between the resort and the bars, it *encouraged* such conduct. The itineraries supplied to attendees announced "We can't wait to see all of you and have a kick ass time in the Key West of the North!!!!". Employees were invited to "BYOB" (the common abbreviation for "bring your own booze"). Drinking was accepted and encouraged by Texas Roadhouse during KMU as evidenced by its stocking the Admiral Perry House with alcohol. The agenda called for the evening's activities to continue at the bars and restaurants of downtown Put-in-Bay. Sims' and Marren's superior encouraged them to return downtown at around 10:30 p.m. after a night of drinking. And it was clear that employees were using carts to transport themselves around the island. As such, Texas Roadhouse consented to and acquiesced in Marren's conduct, leading us to the inevitable conclusion that Marren's conduct was in

the course of and arising out of her employment with Texas Roadhouse. She is therefore entitled to immunity against Sims' suit under R.C. 4123.741.

{¶ 41} We find Sims' first assignment of error not well-taken.

B. Second Assignment of Error

{¶ 42} In her second assignment of error, Sims challenges the trial court's conclusion that (1) Edgewater did not own the cart, (2) Marren was a competent driver who was familiar with and understood how to drive the cart, and (3) Edgewater owed no duty and Delaware breached no duty.

{¶ 43} Sims argues that the record does not support Edgewater's contention that it did not own the cart. She emphasizes that the rental agreement and insurance declaration page indicate ownership by Edgewater. What's more, she argues, Edgewater and Delaware Cart have the same address, and Edgewater's sole member is an employee of Delaware Cart.

{¶ 44} Sims explains that her claim against Edgewater and Delaware Cart are for simple negligence—not negligent entrustment—in failing to exercise caution in their procedures to prevent what she claims was the predictable risk which resulted in Sims' injuries. She contends that Delaware Cart and Edgewater took no steps to ensure that only capable, competent, licensed, insured drivers were renting and operating the vehicles, and they failed to recognize the reality that one of the primary activities on the island is drinking and bar-hopping. She complains that they encouraged sharing of the carts among numerous unidentified drivers and did nothing to advise renters and potential

drivers as to safety or risks associated with operation of the cart. She also points out that Edgewater and Delaware Cart were unable to produce any type of receipt or signed papers evidencing the transaction, which, she says, bolsters her point that the rental process was deficient.

{¶ 45} Edgewater and Delaware Cart counter that Delaware Cart has admitted ownership of the carts, thus Edgewater is an unnecessary party to this action. They point out that Sims' theory on appeal as to Edgewater and Delaware Cart's alleged negligence is different than that which she alleged in her complaint. Focusing on the allegations in the complaint, they contend that Sims has provided no authority imposing a duty upon Edgewater and Delaware Cart to enact policies to verify which individuals would be responsible for the cart, to determine that all potential drivers have insurance, and to ensure that all potential drivers are capable, properly licensed, insured, and otherwise fit to operate a motor cart. Finally, they claim that Marren was competent, capable, licensed, fit and experienced in operating golf carts. They also insist that she was not intoxicated at the time she operated the cart.

{¶ 46} Sims claims that Edgewater's and Delaware Cart's attempts to disprove that Marren was drunk must be rejected given the evidence that Marren had consumed approximately six beers and a shot before operating the cart.

{¶ 47} In a negligence action, a plaintiff must prove (1) the existence of a duty, (2) breach of that duty, (3) injury, and (4) proximate cause. *Anderson v. Toeppe*, 116 Ohio App.3d 429, 437-38, 688 N.E.2d 538 (6th Dist.1996), citing *Keister v. Park Centre*

Lanes, 3 Ohio App.3d 19, 443 N.E.2d 532 (5th Dist.1981). "A defendant's duty to a plaintiff depends on the relationship between the parties and the foreseeability of injury in the plaintiff's position." *Delta Fuels, Inc. v. Consol. Environmental Servs., Inc.*, 2012-Ohio-2227, 969 N.E.2d 800, ¶ 27 (6th Dist.). Injury is foreseeable when a defendant knows or should have known that its act or omission was likely to cause harm. *Id.* The existence of a duty is a question of law. *Id.*

{¶ 48} At her deposition, Marren testified that she and her cabin-mates gave Hall cash towards rental of the golf cart. They listened as the representative from the rental company explained how to operate the cart, cautioned them against driving the cart while intoxicated, and encouraged them to wear their seat belts. Marren also testified that she possessed a driver's license, maintained automobile insurance, and had experience driving a golf cart owned by her father. Although Edgewater and Delaware Cart were unable to produce documentation relating to the particular rental transaction at issue, they produced a form rental agreement requiring the renter to acknowledge (1) that operators must be 18 or older and possess a valid driver's license; (2) all traffic laws must be obeyed; (3) drinking alcoholic beverages and operating the cart is prohibited; (4) injuries will result if an accident occurs; (5) operators must maintain insurance; and (6) if careless or reckless driving is observed, the rental agreement may be terminated.

{¶ 49} Sims cites to no case law setting forth particular procedures or policies that must be followed before renting out a golf cart. She also cites nothing in the record to

suggest that had there been a requirement that all potential drivers establish that they were licensed, insured, and competent, Marren would not have qualified to operate the cart.

{¶ 50} Accordingly, we find Sims' second assignment of error not well-taken.

C. Third Assignment of Error

{¶ 51} In her third assignment of error, Sims challenges the trial court's conclusion that no UM/UIM coverage is available because Sims' injuries arose out of the use of a golf cart. Sims claims that the vehicle at issue was an eight-passenger cart, licensed by the state of Ohio, driven on a public road, and rented for the purpose of navigating the island—not for the purpose of transporting golf clubs. As such, she argues, the cart was not a "golf cart." In addition, although not addressed by the trial court, Sims argues that the requirement in the UM/UIM policy that an insured be "legally entitled to recover" is in conflict with other policy language, and that Progressive's assertion of fellow servant immunity is premature since there remains a question of fact as to whether Marren may avail herself of that protection.

{¶ 52} Progressive's policy provides:

> If **you** pay the premium for this coverage, **we** will pay for damages that an **insured person** is legally entitled to recover from an **uninsured motorist** or **underinsured motorist** because of **bodily injury**:
>
> 1. sustained by the **insured person**;
> 2. caused by an accident; and

3. arising out of the ownership, maintenance, or use of a **motor vehicle** by an **uninsured motorist or underinsured motorist**. (Emphasis in original.)

{¶ 53} The section goes on to define "uninsured motorist," and specifies that an "uninsured motorist" does not include an owner or operator of a motor vehicle "that is owned by any governmental unit or agency unless the operator of the motor vehicle has immunity under Chapter 2744 * * *." Sims claims that because the policy specifically references R.C. Chapter 2744 immunity, the failure to reference R.C. 4123.741 immunity means that coverage exists under the policy even where there is fellow employee immunity.

{¶ 54} "According to Ohio law, the phrase 'legally entitled to recover' means the insured must be able to prove the elements of his or her claim." (Citations omitted.) *Taylor v. Kemper Ins. Co.*, 8th Dist. Cuyahoga No. 81360, 2003-Ohio-177, ¶ 13. "An insured cannot recover damages unless he proves the uninsured tortfeasor is legally liable to pay him." *Id.* As recognized in *Kobak v. Sobhani*, 8th Dist. Cuyahoga No. 94764, 2011-Ohio-13, ¶ 33, where the plaintiff cannot maintain a claim against the tortfeasor due to co-employee immunity, the plaintiff is not "legally entitled to recover" under the uninsured motorist policy. Contrary to Sims' position, we conclude that if Progressive had intended to provide UM/UIM coverage despite the applicability of R.C. 4123.741 fellow employee immunity, it would have specifically referenced R.C. 4123 as it did with R.C. 2744. Since it did not, the plain language of the UM/UIM insurance policy

precludes coverage due to the applicability of fellow employee immunity. In light of this conclusion, we need not consider whether the cart was a "golf cart" for purposes of the policy.

{¶ 55} We find Sims' third assignment of error not well-taken.

IV. CONCLUSION

{¶ 56} We find Sims' assignments of error not well-taken and affirm the August 28, 2014 judgment of the Ottawa County Court of Common Pleas granting summary judgment in favor of all appellees. The costs of this appeal are assessed to Sims pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE