**[Cite as *Segebart v. Univ. of Cincinnati*, 2019-Ohio-3695.]**

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| DAWN SEGEBART, et al.<br><br>Plaintiffs<br><br>v.<br><br>UNIVERSITY OF CINCINNATI<br><br>Defendant | Case No. 2018-01367JD<br><br>Judge Patrick M. McGrath<br>Magistrate Holly True Shaver<br><br>DECISION |

**{¶1}** On March 25, 2019, defendant filed a motion for summary judgment pursuant to Civ.R. 56(B). With leave of court, on May 30, 2019, plaintiffs filed a response. The motion for summary judgment is now before the court for a non-oral hearing pursuant to Civ.R. 56 and L.C.C.R. 4.

**{¶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).

**Facts**

**{¶4}** On June 14, 2017, plaintiffs, Dawn and Steven Segebart, along with their niece, Shawn McCloud, traveled from the Dayton area to Cincinnati to watch a soccer match between FC Cincinnati and the Columbus Crew. Plaintiffs paid a fee to park their vehicle in the Woodside Parking Garage located on the campus of defendant, University of Cincinnati. Both Dawn and Shawn had noticed a "Porta-John" which was located on the ground floor when they entered the parking garage. Plaintiffs parked their vehicle on either the third or fourth floor and descended a stairwell to exit the garage. Both Dawn and Shawn intended to use the Porta-John before they headed to the soccer match. The weather conditions were clear and sunny.

**{¶5}** Shawn was the first to exit the stairwell. She opened the metal door which swung out to the left and walked to her left toward the Porta-John. Steven next exited the stairwell and began to walk forward, in search of the stadium. Dawn was the last to exit the stairwell. When Dawn opened the metal door, she looked to her left and saw the Porta-John. While walking toward the Porta-John, Dawn tripped and fell on a curb in the parking garage. The curb at its highest point measured approximately 8 inches, then gradually sloped downward to become level with the floor of the parking garage. Steven took photos of the area shortly after Dawn's fall. (Deposition of Steven Segebart, p. 15.) The photos depict the condition of the curb. (Complaint, p. 4; Plaintiff's Exhibit 2, p. 3.) Plaintiffs assert that the photos show that at some earlier time, a "pipe guard," or handrail made of metal pipe existed along the edge of the curb where Dawn tripped and fell. (Plaintiff's Exhibit 2, p. 3.) However, on the day that Dawn fell, no handrail existed. (Id.) Plaintiffs assert that if a handrail had been in place, it would have served as a physical barrier to prevent Dawn from stepping on the curb in the area where she fell. Dawn sustained injuries to her left knee, hands, and teeth as a result of her fall.

**{¶6}** Plaintiffs bring claims for 1) negligence, 2) negligence per se/strict liability (violation of the Ohio Administrative Code, Building Code, Administrative Code of

Accessibility, R.C. 3781, and the National Bureau of Standards, Building Officials Code Administrators International), 3) "violation of statutory requirements for elderly and handicap access," 4) nuisance "resulting in strict liability," and 5) loss of consortium.

**{¶7}** Defendant asserts that it is entitled to summary judgment in that the curb was an open and obvious condition, and, as such, it owed no duty of care to plaintiffs.

## Law and Analysis

### I. Negligence

**{¶8}** In order for plaintiff[1] 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).

**{¶9}** 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 would 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 (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.

**{¶10}** Plaintiff submitted the affidavit of Gerald Noe, a licensed architect in the State of Ohio, who avers, in part:

[1]"Plaintiff" shall be used to refer to Dawn Segebart throughout this decision.

"5. It is my opinion that the original design of the Woodside parking garage stairwell where Dawn Segebart tripped utilized a pipe guard to prevent trips at the subject location by redirecting pedestrians around the curb.

"6. It is my opinion that due to the high volume of pedestrian traffic in this area, the pipe guard was, and still is a key element in directing pedestrians safely thru [sic] the subject area.

"7. It is my opinion that I would not have expected a prudent person exiting the stairwell to notice that the safety rail was missing as it was on June 14, 2017 when Dawn Segebart tripped and fell.

"8. It is my opinion that the safety rail acts as a 'notifying device' for pedestrians that a curb is present. Without the safety rail present any pedestrian exiting the stairwell would not have noticed the curb immediately to the left since the concrete curb tapers down to zero inches in differential height before the focal or peripheral vision points that are considered as human factors analysis points for the safety and design of ingress and egress points of a structure.

"9. It is my opinion that Defendant UC failed to maintain the safety guard in a safe condition or erect some type of temporary barrier or warning device as would be prudent for a premises owner in accordance with accepted standards of building maintenance.

"10. It is my opinion that Defendant UC's failure to maintain the safety guard and/or failure to erect a temporary barrier that [sic] created an unreasonably dangerous condition that caused the Plaintiff to trip and fall.

"11. It is my opinion that the lack of the safety rail and attendant circumstances surrounding the curb created an unreasonably dangerous condition that caused Plaintiff to trip and fall.

"12. It is my opinion that Defendant UC should have inspected the premises and known about the missing safety rail and defective condition of the curb prior to the time that Dawn Segebart tripped and fell on June 14, 2017."

**{¶11}** Plaintiffs assert that Noe's affidavit creates issues of fact which preclude the granting of summary judgment. However, even if the absence of a handrail were to be determined to be in violation of the Ohio Building Code, the Supreme Court of Ohio has stated that "[t]he open-and-obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code." *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, paragraph one of the syllabus.

**{¶12}** Under the open and obvious doctrine, a property owner "'owes no duty to warn invitees * * * of open and obvious dangers on the property. * * * The rationale behind the doctrine is that the open and obvious nature of the hazard itself serves as a warning, and that the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.'" (Citations omitted.) *Duncan v. Capitol S. Cmty. Urban Redevelopment Corp*., 10th Dist. Franklin No. 02AP-653, 2003-Ohio-1273, ¶ 27, quoting *Anderson v. Ruoff*, 100 Ohio App.3d 601, 604 (1995).

**{¶13}** "Open-and-obvious hazards are those hazards that are neither hidden nor concealed from view and are discoverable by ordinary inspection. '[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.' Put another way, the crucial inquiry is whether an invitee exercising ordinary care under the circumstances would have seen and been able to guard [herself] 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." *McConnell v. Margello*, 10th Dist. Franklin No. 06AP-1235, 2007-Ohio-4860, ¶ 10. (Internal citations omitted.)

Furthermore, plaintiff has a duty to exercise some degree of care for her own safety while walking. *See Lydic v. Lowe's Cos., Inc.,* 10th Dist. Franklin No. 01AP-1432, 2002-Ohio-5001, at ¶ 16. "A pedestrian's failure to avoid an obstruction because he or she did not look down is no excuse." *Id.* "[U]nless the record reveals a genuine issue of material fact as to whether the danger was free from obstruction and readily appreciable by an ordinary person, it is appropriate to find that the hazard is open and obvious as a matter of law." *McConnell*, at ¶ 11, citing *Freiburger v. Four Seasons Golf Ctr., L.L.C.*, 10th Dist. Franklin No. 06AP-765, 2007-Ohio-2871, ¶ 11.

**{¶14}** Dawn testified that she was not distracted by anything when she opened the door to the parking garage. (Deposition of Dawn Segebart, p. 25.) She stated that she opened the door, took a few steps, turned to the left, tripped and fell. (Id., p. 33.) She estimated that the curb in the area where she tripped measured approximately 3 to 4 inches in height. (Id., p. 32.) She denied that she could have seen the curb if she had looked because "everything was just all cement." (Id., p. 33.) However, she admitted that "you can see [the curb] * * * in this picture" that she was shown during her deposition. (Id., p. 32.) She testified that the lighting conditions depicted in the photographs were the same lighting conditions as when she fell. (Id., p. 32-33.) She stated she was looking at the Porta-John, not down at her feet, when she fell. (Id. p. 33-34.)

**{¶15}** Jack McMahon, Building Maintenance Superintendent II, testified that he has worked for defendant for 35 years in the maintenance department. McMahon did not know when the old handrail had been removed, but he agreed that the photographs depict two circular areas with rusty metal fragments that look like a handrail used to be in place in that area. (Deposition of McMahon., pgs. 12-13.) McMahon testified that the old handrail had been gone for "quite some time" before plaintiff's fall. (Id., p. 28.) McMahon also testified that the curb in question was not painted yellow. McMahon testified that other areas of the garage were painted yellow to indicate a fire lane. (Id.,

p. 15.) McMahon was working in the garage when Dawn fell; he heard her yell and went to see if he could help her after she had fallen. (Id., p. 25.) McMahon took a stool over to Dawn and called for medical assistance. (Id., p. 26.) McMahon testified that there is no formal inspection process that his department conducts of the parking garage, but when workers perform their daily duties, such as collecting trash, they are expected to report any repairs that need to be performed.

**{¶16}** Jim Marpert testified that he worked as a Maintenance Repair Worker 2 for defendant, where his duties include maintenance of the Woodside Parking Garage. He testified that his housekeeping responsibilities include reporting to his supervisor anything that is out of place or in need of repair in the garage. (Deposition of Marpert, p. 16-17.) Marpert had no personal knowledge of when the old handrail had been removed but agreed that the photographs show that some sort of structure had existed in that location sometime in the past. (Id. p. 9-10; 31-32.) Marpert testified that, although he was aware that there was no handrail in place prior to plaintiff's accident, he did not view the curb as a hazard; rather, he viewed it as a "step up." (Id., p. 18.)

**{¶17}** Ephrem Tefera testified that at the time of the accident, he was defendant's Assistant Director of Parking Services. Tefera became aware of plaintiff's fall shortly after it happened. Tefera testified that he was not aware that there had previously been a handrail in the area where plaintiff fell, but he acknowledged that after plaintiff's fall, he discovered the markings that indicated a structure had been in place in the past. (Deposition of Tefera, p. 15.) Tefera estimated that the handrail had been gone for approximately 10 to 15 years, but he had no direct knowledge of when it had been removed. (Id., p. 17.)

**{¶18}** Plaintiff's argument for finding defendant liable for negligence is that the absence of a handrail allowed her to traverse the curb, which caused her fall. However, the dispositive issue is whether the defect that caused her to trip and fall was free from obstruction and readily appreciable by an ordinary person. The defect that caused

plaintiff's fall was a 3 or 4-inch curb in the parking garage. "[T]he landowner's duty is not to be determined by questioning 'whether the [condition] could have been made perfect or foolproof. The issue is whether the conditions that did exist were open and obvious to any person exercising reasonable care and watching where she was going.'" *Jackson v. Bd. of Pike County Comm'rs*, 4th Dist. Pike No. 10CA805, 2010-Ohio-4875, ¶ 18, quoting *Orens v. Ricardo's Restaurant*, 8th Dist. Cuyahoga No. 70403, 1996 Ohio App. LEXIS 4944 (Nov. 14, 1996.) The photographs provided with the complaint and depositions show that the curb was neither hidden nor concealed from view and was discoverable by ordinary inspection. A business owner must warn an invitee of "unreasonably dangerous latent or hidden conditions that the invitee cannot reasonably be expected to discover." *Cummin v. Image Mart, Inc.*, 10th Dist. Franklin No. 03AP-1284, 2004-Ohio-2840, ¶ 5, citing *Flowers v. Penn Traffic Co.*, 10th Dist. Franklin No. 01AP-82, 2001 Ohio App. LEXIS 3585, * 7-8. "A latent danger is hidden, concealed, and not discoverable by ordinary inspection." *Id*.

**{¶19}** Plaintiff asserts that attendant circumstances at the time of her fall create an issue of fact as to whether the curb was an open and obvious hazard. "[A]ttendant circumstances can serve as an exception to the open and obvious doctrine." *Mayle v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-541, 2010-Ohio-2774, ¶ 20. "[A]n attendant circumstance must be 'so abnormal that it unreasonably increased the normal risk of a harmful result or reduced the degree of care an ordinary person would exercise.'" *Id.*, citing *Cummin, supra*, ¶ 10.

**{¶20}** Specifically, plaintiff argues that the fact that the curb was the same color as the floor of the parking garage was an attendant circumstance. However, plaintiff also testified that the weather conditions were sunny, and that the photographs depict the same weather conditions that existed when she fell. Furthermore, plaintiff asserts that she was focused on the Porta-John and that it would be unreasonable to expect that she could have noticed the curb when she exited the stairwell. However, attendant

circumstances do not include plaintiff's activity at the moment of the fall, unless her attention was diverted by an unusual circumstance of the property owner's making. *See McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d 494, 498 (1st Dist.1996). The court finds that the existence of a Porta-John in a parking garage is not an unusual circumstance. Indeed, plaintiff was aware of the existence of the Porta-John before she exited the stairwell.

**{¶21}** Lastly, Noe contends in his affidavit that there was a "high volume of pedestrian traffic in this area." Affidavit, ¶ 6. However, neither plaintiff nor her husband testified that plaintiff's view of the curb was obstructed by a high volume of pedestrian traffic.

**{¶22}** Construing the evidence most strongly in plaintiff's favor, the court finds that the curb outside the stairwell in the parking garage was free from obstruction and readily appreciable by an ordinary person. Thus, it was an open and obvious condition. Furthermore, plaintiff's deposition testimony establishes that her attention was not diverted by any unusual circumstance of defendant's making when she walked toward the Porta-John. Accordingly, defendant owed no duty to plaintiff, and plaintiff's claim of negligence is barred as a matter of law.

**II. Plaintiff's claims of negligence per se/strict liability**

**{¶23}** As stated above, even if the absence of a handrail were to be determined to be in violation of the Ohio Building Code, the Supreme Court of Ohio has stated that "[t]he open-and-obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code." *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, paragraph one of the syllabus. Therefore, plaintiff's various claims of negligence per se and strict liability fail as well. *See Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 568 (1998) (the violation of administrative rules does not constitute negligence per se.)

**III. Nuisance**

**{¶24}** Although plaintiffs also assert a claim of "nuisance" in their complaint, and seek strict liability therefor, "'[n]uisance' is a term used to designate 'the wrongful invasion of a legal right or interest.'" *Hurier v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 01AP-1362, 2002-Ohio-4499, ¶ 8, quoting *Taylor v. Cincinnati*, 143 Ohio St. 426, 432 (1944). "The liability of the defendant, as well as the plaintiff's entitlement to relief, will depend upon both the nature of the alleged nuisance and the conduct of the defendant. Nuisance may be first designated as 'private' or 'public' * * * Both of these types of nuisances may then be further categorized as 'absolute nuisance' (nuisance per se) or 'qualified nuisance.'" *Id.* Under a claim of qualified nuisance, the allegations of nuisance merge to become a negligence action. *Allen Freight Lines, Inc. v. Consol. Rail Corp.*, 64 Ohio St.3d 274 (1992). Inasmuch as defendant is entitled to summary judgment as a matter of law on plaintiffs' negligence claims, any claims of qualified nuisance fail as well. Furthermore, any claim regarding strict liability under a theory of absolute nuisance is without merit inasmuch as the evidence does not support a finding of culpable and intentional conduct, unlawful conduct, or inherently dangerous activity. *Hurier v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 01AP-1362, 2002-Ohio-4499, ¶ 11. Construing the evidence most strongly in plaintiffs' favor, reasonable minds can conclude only that plaintiffs' claims of nuisance fail as a matter of law.

**IV. Loss of Consortium**

**{¶25}** With respect to Steven's claim for loss of consortium, such claims are "derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the [family member] who suffers bodily injury." *Bowen v. Kil-Kare, Inc.,* 63 Ohio St.3d 84, 93 (1992). Since plaintiff's claims of negligence fail, Steven's loss of consortium claim also must fail.

**{¶26}** Based upon the foregoing, defendant's motion for summary judgment shall be granted and judgment shall be rendered in favor of defendant.

PATRICK M. MCGRATH
Judge

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| DAWN SEGEBART, et al.<br><br>Plaintiffs<br><br>v.<br><br>UNIVERSITY OF CINCINNATI<br><br>Defendant | Case No. 2018-01367JD<br><br>Judge Patrick M. McGrath<br>Magistrate Holly True Shaver<br><br>JUDGMENT ENTRY |

**{¶27}** 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 plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

**Filed August 22, 2019**
**Sent to S.C. Reporter 9/13/19**