[Cite as *George v. Miami Univ.*, 2022-Ohio-4837.]

IN THE COURT OF CLAIMS OF OHIO

NANCY GEORGE Plaintiff v. MIAMI UNIVERSITY Defendant	Case No. 2021-00187JD Magistrate Scott Sheets DECISION OF THE MAGISTRATE

{¶1} In this refiled case, plaintiff Nancy George seeks recovery for injuries she alleges were sustained when she fell and was hit by a Zamboni while leaving the Goggin Ice Center (the center) on defendant's campus on March 11, 2018. The following witnesses testified at trial: plaintiff, Andrew George (Mr. George), Donna Kramer (Ms. Kramer), Jonathan Elliott (Mr. Elliott), Kevin Ackley (Mr. Ackley), and Steve Mahlerwein (Mr. Mahlerwein). In lieu of offering testimony from medical experts and/or plaintiff's treating physicians, the parties offered written reports. Plaintiff offered the report of Dr. Joseph Scheidler (Dr. Scheidler), one of plaintiff's treating physicians, and defendant offered the written report of Dr. Arthur Lee (Dr. Lee), a retained expert. Close to 500 pages of plaintiff's medical records were admitted into evidence as were plaintiff's related medical bills. In addition, photographs of the area where plaintiff's fall occurred and photographs of plaintiff, including some of her injuries and torn clothing, were also admitted into evidence as was a video of plaintiff's fall. For the following reasons, the magistrate hereby recommends judgment for plaintiff.

Findings of Fact

{¶2} On March 11, 2018, Mr. George, who is plaintiff's son, played ice hockey at the center on defendant's campus as part of a men's hockey league. He had done so hundreds of times. On that day, plaintiff attended and observed her son's game as she

had stalwartly done for several years. Plaintiff routinely sat in the same area to observe Mr. George's games, about midway up in the first level of seating, and was in her usual spot. In addition, plaintiff normally utilized the same route to get to and depart from her seat. Plaintiff and Mr. George testified to the above.

{¶3} After Mr. George's game concluded on March 11, 2018, plaintiff began exiting the center. While walking along the bottom aisleway running parallel to the glass and the boards, a partial wall separating the seating area from the ice rink, plaintiff suddenly slipped and fell as she stepped down from a single step leading from the aisleway onto a lower floor below. After her initial fall as she stepped down, plaintiff immediately slid through an open door in the boards and onto the ice where she was struck by the Zamboni, a large vehicle used to resurface the ice. The Zamboni, several parts of which hit plaintiff, knocked plaintiff into the boards and continued resurfacing the ice. Plaintiff was able to exit the ice where other patrons and/or staff checked on her. With the help of her son, plaintiff sought treatment at the emergency room on the day of the incident and was discharged the following day. Plaintiff and Mr. George testified to the above. Mr. George testified he observed his mother on the ground on her hands and knees with torn clothes and visible blood immediately after the incident. One of the photographs contained in Exhibit 4 also depicts plaintiff sitting upright, off the ice, and adjacent to the doorway. Plaintiff's medical treatment is discussed in more detail *infra*.

{¶4} Exhibit B, video from the Goggin Ice Center, depicts the incident. It corroborates plaintiff's testimony and establishes that the entire incident unfolded in seconds. Though not easy to see initially, plaintiff is discernible walking along the boards and glass. The Zamboni is visible on the ice and the rink door is open as plaintiff walks toward the door. The Zamboni turns before rounding and coming out of the turn such that it continues in a straight path in the same direction that plaintiff is walking and parallel to plaintiff. As it does so, the Zamboni is directly adjacent, within what appears to be inches, of the boards as it approaches the open rink door. On the opposite side of the boards, plaintiff can be seen falling as she nears the open door. As plaintiff falls to the ground, she almost instantaneously falls through the rink door and onto the ice, directly into the Zamboni's path as it is just a few feet, at most, from her. Plaintiff falls in such a way that what appears to be her upper body is on the ice between the boards and the

Zamboni's left side. The Zamboni does not appear to slow down and runs directly into and/or over the portion of plaintiff's body that is on the ice. The Zamboni's back wheels can be seen momentarily moving away from the boards. After the Zamboni strikes plaintiff, it stops briefly before continuing and plaintiff can be seen, now with her body completely on the ice and on her hands and knees. As people approach her, plaintiff slowly makes her way off the ice.

{¶5} If the door to the ice was closed, plaintiff would not have fallen onto the ice and been struck by the Zamboni. In addition, plaintiff had no opportunity to protect herself from the Zamboni after she fell. As noted, the video shows plaintiff falling as she walks down the aisleway before she immediately falls through the open door and into the Zamboni's path, which is, at most, a few feet from her before it strikes her. Plaintiff also testified to the above.

{¶6} The step plaintiff was negotiating at the time she fell is approximately 18 inches high. The area was well-lit and a black and yellow sticker was affixed to the top of the step that warns "Watch Your Step." Plaintiff did not slip or trip on anything. Though the exact circumstances of how she fell were not established, there is also no basis upon which to conclude that some defect in the aisleway or step caused plaintiff's fall. In fact, during her great many trips to the center, plaintiff had traversed the same area where she fell. Thus, at a minimum, she did so dozens of times. Plaintiff, the only witness who offered testimony on how her fall occurred, testified that she did not notice any water in the area, that she did not know which of her feet may have slipped, and that she did not know how she fell. She also did not notice any problem in the area where she fell on her way to her usual seat and testified that it was well-lit. Mr. Elliott testified regarding the "Watch Your Step" sign and the step's height. In addition, Exhibits C and C-1 show the step, sign and aisleway approaching the step.

{¶7} The doorway through which plaintiff fell onto the ice is used to enter and exit the ice. When closed, the door is flush with the boards which separate the ice from the seating area. The door to the rink opens in one direction, towards the seating area. Though the door to the rink has a latch, it does not have a lock and does not automatically close once opened. At the time of plaintiff's fall, there was no sign informing patrons or players that they must close the door to the rink. Instead, as a customary matter, exiting

players were expected to close the door. Two players normally remained on the ice to move the nets for the Zamboni and these players would then shut the door. Thus, the rink door was routinely left open while the Zamboni was operating. Plaintiff knew that the door to the rink had previously remained open while the Zamboni was operating and also knew that players would remain on the ice to move the nets for the Zamboni. On March 11, 2018, plaintiff knew the Zamboni was being operated and the door was open as she exited the center. No other person had previously fallen in the area where plaintiff fell, fallen through the rink door and onto the ice, or been hit by the Zamboni. Exhibit C-3 shows the door as does Exhibit B, the video. Plaintiff and Messrs. George, Elliott, Ackley and Mahlerwein all testified to the above. Plaintiff testified that the door was open "all the time." Mr. Elliott testified that spectators are not expected to close or touch the door.

{¶8} Plaintiff, who was 69 years old at the time of her fall, experienced fear and anxiety as she watched the Zamboni approach her as well as when it struck her and immediately thereafter. Further, when it struck her, the Zamboni tore plaintiff's clothing and caused a substantial abrasion to a large part of plaintiff's back, leaving blood on some parts of plaintiff's clothing. As noted above, Mr. George took plaintiff to the emergency room on the day of her accident. Plaintiff and Mr. George testified to the above and the photographs comprising Exhibit 4 show the abrasions as well as plaintiff's torn clothing with blood stains. These injuries are also noted in plaintiff's medical records, Exhibit 3, including the emergency room records.

{¶9} At the Fort Hamilton Hospital emergency room, plaintiff was examined and x-rayed. Though x-rays revealed no fracture or dislocation, plaintiff was diagnosed with an internal derangement of her right shoulder and with abrasions. The emergency room physician referred plaintiff to orthopedics. Plaintiff testified to her injuries and the Fort Hamilton emergency records, contained in Exhibit 3, reflect the x-ray as well as the diagnoses plaintiff received at the emergency room.

{¶10} On March 12, 2018, plaintiff sought treatment from Dr. Scheidler, who ordered an MRI and refined plaintiff's diagnosis to a torn rotator cuff and torn labrum in her right shoulder. At that time, Dr. Scheidler recommended "RICE treatments and anti-inflammatories" as well as a muscle relaxer to be taken as needed. At this time, plaintiff rated her pain as a 7. Plaintiff testified to her torn rotator cuff and plaintiff's medical

records from Dr. Scheidler's office, contained in Exhibit 3, reflect the evaluation of plaintiff on March 12, 2018 as well as her diagnoses and treatment plan.

{¶11} Plaintiff underwent two MRIs, one on March 13, 2018 and one on May 1, 2018. The Impression portion of the March 13, 2018 MRI report states "[t]he biceps tendon remains intact" and that there is "no full thickness rotator cuff tear." It also notes the possibility of a muscle strain and/or "focal tear" in plaintiff's right deltoid.

{¶12} In contrast, the Impression section of plaintiff's May 1, 2018 MRI report states that plaintiff had a "[p]artial-thickness tear of the subscapularis tendon" and a "[m]edial dislocation of the long head biceps tendon with associated intrasubstance longitudinal split tear" as well as a "[m]uscle strain involving the lateral head of the deltoid muscle." Multiple copies of both reports are contained in Exhibit 3.

{¶13} Plaintiff's cuts and abrasions healed within a few weeks after her accident. Plaintiff continued to experience pain in her right shoulder and returned to Dr. Scheidler on May 18, 2018 for further evaluation and to discuss and compare the March 13 and May 1, 2018 MRI results. At this visit, Dr. Scheidler, in addition to a partial rotator cuff tear, diagnosed plaintiff with impingement syndrome in her right shoulder, a dislocation to her right long head biceps tendon, a strained deltoid muscle, and acute pain in her right shoulder. No mention is made of a labrum tear. Plaintiff rated her pain, at this time, as an 8 out of 10. Dr. Scheidler noted that, in addition to discussing the diagnoses with plaintiff, he also "explained to the patient that she may eventually require arthroscopic intervention to address subscularis tendon tear and biceps dislocation." Dr. Scheidler referred plaintiff to physical therapy and plaintiff was to continue with "RICE treatments as needed for pain and discomfort" and the use of anti-inflammatories. Plaintiff testified to undergoing physical therapy and also offered some testimony regarding her MRI results. Exhibit 3 contains plaintiff treatment records from her May 2018 visit to Dr. Scheidler.

{¶14} Plaintiff completed about two months of physical therapy, during which her symptoms improved. She eventually reported her pain as a 0 out of 10 and also reported that she was able to sand part of the floor of her home using a power hand sander. In addition to plaintiff's testimony, plaintiff's physical therapy records reflect the above and are contained in Exhibit 3.

{¶15} Plaintiff returned to Dr. Scheidler on July 23, 2018 as a follow-up visit after completing physical therapy; her diagnoses were unchanged. At this visit, plaintiff indicated that her shoulder had improved and that she had "more strength and the motion is good." She rated her pain level as a 0. Records from this visit indicate that plaintiff's symptoms are "most consistent with impingement syndrome, rotator cuff tendonitis with partial-thickness tear, dislocation of biceps tendon and deltoid muscle strain." Dr. Scheidler indicated plaintiff should "continue home and formal PT exercises for strengthening and ROM" and perform "RICE treatments as needed for pain and discomfort." Finally, the record from plaintiff's July 23, 2018 visit to Dr. Scheidler states "if no pain relief, we will proceed with steroid injection." This record is also contained in Exhibit 3.

{¶16} Plaintiff never returned to Dr. Scheidler and has not sought any further treatment for her shoulder. She never received a steroid shot and no further treatment is planned. Plaintiff testified to the above and no records or other evidence was presented of any treatment to plaintiff's right shoulder after July 23, 2018 or of any planned future treatment.

{¶17} In lieu of testimony, the parties presented expert medical opinions via written reports. Plaintiff presented the opinion of Dr. Scheidler. In addition to relating plaintiff's torn rotator cuff, dislocated biceps tendon, and contusions and abrasions to the March 11, 2018 accident, Dr. Scheidler opined that it is "within a high degree of medical certainty that [plaintiff] will have difficulty with her arm in the future because of the dislocated biceps tendon and partially torn subscapularis tendon." He further opined that "tendinosis to the remaining portion of the rotator cuff and further impinging of the cuff * * * is certainly anticipated as well." Finally, Dr. Scheidler opined that plaintiff "most likely will require * * * arthroscopic intervention for debridement and repair of torn muscle tendon units as well as probable acromioplasty to address the insufficiency of space because of the inflammation in the rotator cuff itself" and that plaintiff "will be at high risk of residual pain and limited function." Plaintiff testified at trial that she continues to experience pain and discomfort due to the injuries for which she sought treatment in 2018.

{¶18} However, despite Dr. Scheidler's opinion and plaintiff's testimony, the magistrate nonetheless finds that plaintiff failed to prove that she suffered any permanent

or continuing injury as a result of the March 11, 2018 accident. In addition, the magistrate finds that plaintiff failed to prove that the injuries she sustained as a result of the March 11, 2018 accident will require surgery in the future.

{¶19} Plaintiff testified at trial that her range of motion and pain improved within a couple of months. Plaintiff also rated her pain as a 0 out of 10 by the time of her last visit with Dr. Scheidler in July of 2018. She has sought no further treatment, no steroid shots or surgery, for her shoulder and no future treatment is planned. During the course of her physical therapy, she indicated that her pain was improving and that she was able to perform household tasks like carrying and lifting things around her home and using a power hand sander to sand part of her home's floor. All of the above is set forth in plaintiff's medical records in Exhibit 3.

{¶20} Further, though Dr. Scheidler opines that plaintiff will experience future pain and limitations and that she will "most likely" require surgery, Dr. Scheidler has not examined plaintiff since 2018 and, therefore, can only be relying on plaintiff's records and examination from almost 3 years before his report. In addition, he fails to explain how plaintiff, despite not seeking treatment since 2018 and, at that time, rating her pain as a 0 out of 10 will nonetheless experience pain and/or require surgery in the future. Finally, the opinions he expresses in his March 10, 2021 report are not detailed and are stated in conclusory terms and thus lack some foundational support. It also bears mentioning that Dr. Scheidler does not opine that plaintiff will need surgery as a matter of certainty. Further, plaintiff presented no evidence relative to the cost of surgery, its probable outcome, recovery time, likelihood of success or complications, or any other details regarding possible future surgery. Due to the above, the magistrate finds that Dr. Scheidler's opinion, admitted as Exhibit 12, is entitled to minimal weight.

{¶21} In contrast, the magistrate finds Dr. Lee's report and opinion is entitled to greater weight. Dr. Lee performed a physical exam of plaintiff on December 20, 2021 as well as an extensive review of plaintiff's medical records from the emergency room, physical therapy, and Dr. Scheidler. At the time of Dr. Lee's examination, plaintiff was 72 years old. Dr. Lee details several testing procedures and/or modalities he utilized in examining plaintiff and provides the results. Dr. Lee's examination of plaintiff's right shoulder demonstrated "essentially no objective findings." He found her "range of motion

of the right shoulder versus the left is almost identical and certainly within normal limits." He indicated that "provocative testing" indicated no rotator cuff inflammation and characterized her exam as "benign." Dr. Lee further opined "there is absolutely no indication of any long-term, surgical sequela" and that he "could not substantiate" any ongoing complaints of pain or other symptoms by plaintiff regarding her shoulder Throughout his report and opinion, he indicates that plaintiff's course of treatment and recovery is consistent with the course of treatment and recovery for similar injuries. In summary, Dr. Lee examined plaintiff more recently, provides a much more detailed opinion and his opinion is more consistent with the medical records, plaintiff's course of treatment, and plaintiff's reporting of her symptoms as she underwent treatment in 2018. The magistrate finds that Dr. Lee's report, admitted as Exhibit E and Exhibit 13, is entitled to greater weight than that of Dr. Scheidler.

{¶22} Consequently, the magistrate finds that plaintiff suffered cuts and abrasions which resolved within a few weeks, a partially torn rotator cuff, an injured biceps tendon, a strained deltoid, and impingement, all in her right shoulder and arm. As to these injuries, plaintiff experienced substantial pain which she rated between a 7 and 8 in March and May of 2018 before rating it as a 0 in July of 2018 after completing physical therapy. Plaintiff underwent physical therapy for two months but has not sought treatment since July of 2018, at which point she had recovered from her injuries. By this point, plaintiff had been reporting her pain as a 0 out of 10 during physical therapy and did so again during her last visit to Dr. Scheidler on July 23, 2018.

{¶23} Plaintiff's medical bills totaled $16,928.26. However, Medicare covered plaintiff's treatment. The medical bills and the itemization that were admitted into evidence as Exhibit 2 establish that all of plaintiff's medical expenses were paid by a third-party and that plaintiff did not pay anything "out-of-pocket" for her medical treatment. Plaintiff presented no evidence that she paid anything for her medical care.

{¶24} Plaintiff's injuries caused her to struggle with household chores as well as caring for her grandchild. Plaintiff also could not engage in yard work, which she previously enjoyed. She also had trouble sleeping. At the time of her injuries, plaintiff knit and cleaned for her church but was limited due to her injuries. Plaintiff has not

attended one of Mr. George's hockey games since her accident. Plaintiff, Mr. George, and Ms. Kramer testified to the above.

Conclusions of Law

{¶25} To meet her burden at trial, plaintiff needed to prove her claims by a preponderance of the evidence which "is 'the greater weight of the evidence * * * evidence that is more probable, more persuasive, or of greater probative value.'" *Brothers v. Morrone-O'Keefe Dev. Co., LLC,* 10th Dist. Franklin No. 06AP-713, 2007-Ohio-1942, 2007 Ohio App. LEXIS 1762, ¶ 49.

{¶26} To prevail on a negligence claim, plaintiff must establish 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 plaintiff's 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). Under Ohio law, the duty owed by an owner or occupier of a 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). It is undisputed that plaintiff was an invitee on March 11, 2018.

{¶27} As to duty, an owner or occupier of a 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* at ¶ 5. In order "to 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. Franklin No. 04AP-83, 2004-Ohio-3392, ¶ 6.

{¶28} However, under Ohio law, the open-and-obvious doctrine provides that premises owners do not owe a duty to persons entering those premises regarding dangers that are open and obvious. *Armstrong* at ¶ 14. The rationale underlying the doctrine is "that the open and obvious nature of the hazard itself serves as a warning.

Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." *Simmers v. Bentley Constr. Co*., 64 Ohio St.3d 642, 644, (1992). In general, "'[o]pen-and-obvious dangers are those not hidden, concealed from view, or undiscoverable upon ordinary inspection.'" *Thompson v. Ohio State Univ. Physicians, Inc.*, 10th Dist. Franklin No. 10AP-612, 2011-Ohio-2270, ¶ 12, citing *Lydic v. Lowe's Cos., Inc.,* 10th Dist. Franklin No. 01AP-1432, 2002-Ohio-5001, ¶ 10.

{¶29} An individual "does not need to observe the dangerous condition for it to be an 'open-and-obvious' condition under the law; rather, the determinative issue is whether the condition is observable." *Id*. at ¶ 10. When considering whether the danger is open and obvious, the focus is on the ability of a reasonable person to perceive the danger under the circumstances, not on the actions of the individual plaintiff. *Armstrong* at ¶ 11, 13. Furthermore, the open and obvious doctrine requires that the business invitee have some expectation of encountering the danger or have had a sufficient amount of time to perceive the danger before it was encountered in order to be able to take corrective action and avoid it. *Kraft v. Dolgencorp Inc.*, 7th Dist. Mahoning No. 06-MA-69, 2007-Ohio-4997, ¶ 35, 38, cited with approval in *Nichols v. Staybridge Suites*, 10th Dist. No. 08AP-773, 2009-Ohio-1381.

{¶30} As to causation, "an injury may have more than one proximate cause [and] 'when two factors combine to produce damage or illness, each is a proximate cause.'" (citations omitted.) *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St. 3d 585, 587-88, (1991). *See also Zavinski v. Ohio DOT*, 10th Dist. No. 18AP-299, 2019-Ohio-1735, ¶ 29. ("An injury may be the result of more than one proximate cause * * * 'Concurrent negligence consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury.'"

{¶31} As stated in *Zachariah v. Roby*, 178 Ohio App. 3d 471, 484, 2008-Ohio-4832, ¶ 44 (10th Dist.):

> To establish proximate cause, the plaintiff must prove that his injuries were the natural and probable consequence of the negligent act. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 287, 423 N.E.2d 467. The plaintiff must prove more than the fact that he was injured; he must prove that his

> injury was caused by some negligent act or omission by the defendant. *J. C. Penny Co. v. Robison* (1934), 128 Ohio St. 626, 193 N.E. 401, paragraph four of the syllabus. The injury must have been reasonably foreseeable; not that the defendant had to anticipate the particular injury that occurred, just that it could be reasonably anticipated that some type of injury would occur from the negligent act. *Strother,* supra.

See also Taylor v. Ohio Dep't of Rehab. & Corr., 10th Dist. No. 11AP-1156, 2012-Ohio-4792, ¶ 22; *Lewis v. Woodland*, 101 Ohio App. 442, 446, (6th Dist. 1955); *Zavinski, supra.*

{¶32} However, plaintiff also "has a duty to exercise ordinary care" for her own safety. *Monaco v. Ohio Expositions Comm'n*, 74 Ohio Misc. 2d 103, 109, (Ct. of Cl. 1995). Contributory negligence or contributory fault is an act or omission of a plaintiff that amounts to a "want of ordinary care" and that combines and concurs with a defendant's negligence to proximately cause a plaintiff's injuries. *May v. Dept of Rehab. & Corr.,* 10th Dist. No. 00AP-1327, 2001 Ohio App. Lexis 2859 at *5-6 (June 28, 2001). Contributory fault does not prevent a plaintiff from recovering unless his or her fault was "greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery." However, a plaintiff's compensatory damages shall be diminished "by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff as determined pursuant to section 2315.34 of the Revised Code." R.C. 2315.33; R.C. 2315.35. Pursuant to R.C. 2315.34, "the court in a nonjury action shall make findings of fact" specifying the total amount of compensatory damages to which plaintiff is entitled but for plaintiff's contributory fault, the portions of compensatory damages that represent economic loss and noneconomic loss, and the "percentage of tortious conduct attributable to all persons as determined pursuant to R.C. 2307.23 of the Revised Code." *See also* R.C. 2315.18(D). Economic loss refers to pecuniary harm such as lost wages, medical expenses, and other monetary expenditures resulting from one's injuries or loss. R.C. 2315.18(A)(2). Noneconomic loss refers to nonpecuniary harm such as pain and suffering, mental anguish and "any other intangible loss." R.C. 2315.18(A)(4).

{¶33} Further, R.C. 2307.23 provides, in pertinent part:

> (A) In determining the percentage of tortious conduct attributable to a party in a tort action under section 2307.22 or sections 2315.32 to 2315.36 of the

> Revised Code, the court in a nonjury action shall make findings of fact * * * that shall specify all of the following:
>
> (1) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this action;
>
> (2) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to each person from whom the plaintiff does not seek recovery in this action.
>
> (B) The sum of the percentages of tortious conduct as determined pursuant to division (A) of this section shall equal one hundred per cent.

See also Restatement of the Law 3d, Torts, Section 7 (2000).

{¶34} An award of prospective damages is "confined to those damages reasonably certain to follow from the claimed injury." *Hammerschmidt v. Mignogna*, 115 Ohio App. 3d 276, 281, 685 N.E.2d 281, 284 (8th Dist.1996) ("Given the uncertainty of whether plaintiff would eventually have the surgery and the uncertainty of plaintiff's condition after surgery is performed, it was not reasonably certain that there would be permanent damages in the future, and if so, what they would consist of.").

{¶35} Further, in actions against state universities or colleges seeking damage for injuries, R.C. 3345.40(B)(2) dictates that 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 the plaintiff."

Decision

{¶36} Based on the predicative facts set forth, *supra*, the magistrate makes the following additional factual findings as well his recommendation for judgment to the court. As noted, it is undisputed that plaintiff was an invitee on March 11, 2018.

{¶37} Defendant had actual and/or constructive knowledge that the rink door was left open while the Zamboni was being operated. Indeed, in addition to uncontroverted

evidence that the rink door was frequently left open, the center's informal custom or policy provided that players stayed on the ice while the Zamboni was operating before closing the door when they exited after moving the nets.

{¶38} In addition, the danger of the open door, more specifically that it presented the risk of being struck by the Zamboni was not open and obvious. As indicated, *infra*, the rationale behind the open and obvious doctrine is that the nature of the hazard itself serves as a warning such that persons will be expected to discover the danger *and* protect themselves. Here, while the open rink door certainly served as a warning that one could inadvertently end up on the ice, due to a fall or otherwise, the open door would not alert a reasonable person to the fact that he or she could be run over or struck by a Zamboni. In fact, unless the Zamboni is operating very near the open door at the same time that a person inadvertently falls into its path, as in this case, there is no obvious danger from the Zamboni as one exits the center. Further, that the Zamboni is observable does not change the magistrate's conclusion. The presence of the Zamboni might warn invitees of the danger of the machine itself and to stay off the ice and out of its path but it would not alert an invitee that there is a danger of falling directly into its path through an open rink door if one were to slip and fall while exiting the center. Finally, as noted, once plaintiff fell on the step, she almost immediately ended up in the Zamboni's path and had no opportunity to try to avoid it. The open rink door simply did not alert plaintiff that she might be almost instantly hit by the Zamboni if she accidentally fell in the aisleway. Having viewed the video many times, in the magistrate's opinion, there is no way that plaintiff could have protected herself from the Zamboni after she fell given the speed with which she came through the door and ended up in its path.

{¶39} Further, the magistrate finds defendant breached its duty in failing to ensure that the door remained closed while the Zamboni was being operated. Allowing an open rink door while the Zamboni is operating, one that is directly adjacent to a path used by invitees for ingress and egress to a seating area and in an area where invitees must negotiate an 18-inch step, is certainly a dangerous condition. Defendant's attempt to delegate the responsibility to close the door to exiting players did not discharge its burden. Moreover, invitees, such as plaintiff, cannot be expected to remedy such conditions themselves. Indeed, Mr. Elliott testified that exiting spectators are not expected to close

or touch the door. Quite simply, doors exist for a reason. The fact that the door has a latch (and the ability to close) suggests that it ought to be closed at certain times, such as when players are playing hockey and/or the Zamboni is operating while people are exiting the stands. Finally, the burden to remedy the condition is minimal; the door simply needs to be shut.

{¶40} The magistrate also finds that plaintiff's own contributory negligence in failing to negotiate the step and/or exercise ordinary care for her own safety was a concurrent, proximate cause of her injuries. Plaintiff failed to establish that she fell due to some defect in the premises. Indeed, she admitted that she did not know how she fell. Further, plaintiff had been to the center countless times and had taken the exact path she took on March 11, 2018. She had extensive experience at the center and knew that the door was left open "all the time." In short, plaintiff failed to establish that she fell due to defendant's negligence as opposed to her own and the evidence instead established that she failed to exercise ordinary care when she fell on the step.

{¶41} The magistrate also finds that plaintiff's fall from the step and defendant's failure to ensure the rink door was closed while the Zamboni was operating constitute concurrent proximate causes, which combined to produce plaintiff's injuries, discussed in more detail *infra*. Further, the magistrate finds that it is reasonably foreseeable that someone could fall while exiting the center and/or fall through the open rink door and sustain injury while the Zamboni was operating. Therefore, the presence of the open door while the Zamboni was operating was also one of the proximate causes of plaintiff's injuries.

{¶42} Now, the magistrate turns to what are, in the magistrate's opinion, the most difficult issues in this case, the allocation of fault and plaintiff's damages. The magistrate allocates the tortious conduct attributable to each party as follows: 30% to plaintiff and 70% to defendant. While plaintiff failed to establish that anything beyond her own negligence caused her to fall, the video and plaintiff's testimony both establish that plaintiff would not have fallen into the Zamboni's path if the door were closed. Only defendant could maintain a policy that the door should remain shut while the Zamboni is operating or direct employees to shut the door. Plaintiff had no ability to maintain the premises herself and had nothing to do with how the Zamboni operated and under what conditions.

Plaintiff fell quickly, which was her fault, but played no part in the open door which led to her sliding directly into the Zamboni's path and being struck by it.

{¶43} Moreover, the evidence overwhelmingly established that the Zamboni, as opposed to plaintiff's initial fall, caused plaintiff's injuries. The video shows the Zamboni directly strike plaintiff and, afterward, it shows that the Zamboni dragged her farther onto the ice. In addition, the size of the Zamboni, the way it pushed her against the boards, and the fact that, as plaintiff testified, several parts of it struck her, all further establish the Zamboni as the cause of plaintiff's injuries. The photographs also show plaintiff's stunned appearance, torn clothing with visible blood, and large abrasions caused by the Zamboni.

{¶44} Plaintiff established medical expenses totaling $16,928.26. However, the same evidence and plaintiff's testimony established that Medicare and/or insurance paid plaintiff's medical expenses. Therefore, pursuant to R.C. 3345.40(B)(2), the magistrate finds that plaintiff received benefits for the injuries from a collateral source, the amount paid, also totaling $16,928.26 must be "deducted from any award" against defendant. Plaintiff failed to introduce any other evidence of economic damages and, therefore, plaintiff's economic damages total $16,928.26 but must be reduced to $0.

{¶45} However, plaintiff also established that she suffered non-economic damages. In addition to the understandable fear and anxiety she experienced, plaintiff's life activities

were limited from March of 2018 until July of 2018, a little over 4 months. She also experienced severe pain from March until her symptoms began to improve in physical therapy before resolving in July and actually reported an increase in pain during her May appointment with Dr. Scheidler. In addition, plaintiff underwent physical therapy for about two months, which itself involves some level of discomfort and challenge. In the magistrate's view and in sum, several months of pain and treatment, the trauma of being struck by a Zamboni, and the limitations imposed on plaintiff's life including not being able to participate in her usual activities all have value. The magistrate finds that plaintiff's non-economic damages total $50,000.

{¶46} Thus, plaintiff incurred compensatory damages totaling $66,928.26, the total of her $16,928.26 in economic damages and $50,000.00 in non-economic damages. However, R.C. 3345.40 requires that plaintiff's damages be reduced by the collateral benefits she received, totaling $16,928.26. This results in an award of $50,000. Taking into account the allocation of fault, 30% to plaintiff and 70% to defendant, and the application of plaintiff's comparative fault, the magistrate finds that plaintiff's compensatory damages should be reduced by $15,000.00 ($50,000.00 x .3 = $15,000.00). Thus, plaintiff is entitled to $35,000.00 in compensatory damages. Plaintiff is also entitled to her filing fee of $25.00. For all of the reasons set forth above, the magistrate recommends judgment for plaintiff in the amount of $35,025.00.

{¶47} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

SCOTT SHEETS
Magistrate

Filed December 21, 2022
Sent to S.C. Reporter 1/12/23