[Cite as *Lemond v. Univ. of Akron*, 2021-Ohio-1123.]

FRANK LEMOND Plaintiff v. THE UNIVERSITY OF AKRON Defendant	Case No. 2020-00086JD Judge Dale A. Crawford Magistrate Gary Peterson ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On November 30, 2020, Defendant, The University of Akron (the University), filed a motion for summary judgment. On December 14, 2020, Plaintiff filed a response. On December 18, 2020, Defendant filed a reply. Pursuant to L.C.C.R. 4(D), the motion for summary judgment is now before the court for a non-oral hearing. For the reasons stated below, Defendant's motion for summary judgment is granted.

Standard of Review

{¶2} Motions for summary judgment are reviewed under the standard set forth in Civ.R. 56(C), which states, in part:

> 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 summary 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.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293.

{¶3} If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden outlined in Civ.R. 56(E), which states, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Factual Background

{¶4} Plaintiff brings this claim for negligence against Defendant for injuries he sustained after tripping on unsecured extension cords on the University's premises on February 12, 2018. Complaint, ¶ 3-6. At the time of this incident, Plaintiff, a student at the University, was attending the "intermediate life drawing" class.[1] Deposition of Frank Lemond, p. 35. According to Plaintiff, the purpose of the intermediate life drawing class is for students to learn how to draw the human figure, by focusing on both gesture and

[1]Plaintiff also refers to the class as "figure drawing", but the Court will use the title "intermediate life drawing" for purposes of this analysis.

anatomy of a human model. *Id.* at 35-37. As a general requirement for every class, students are responsible for setting up their own chairs, easels, and drawing boards around a podium located in the middle of the room on which the model sits. *Id.* at 34-37. During the class, students will have a period for drawing after which students walk around the room to see each other's drawings for a period of critique. *Id.* at 41-42. At the conclusion of class, students are responsible for cleaning up their workspace by picking up any trash and putting away the chairs, easels, and drawing boards. *Id.* at 42.

{¶5} On February 12, 2018, Plaintiff attended the intermediate life drawing class during which a nude model was posing. *Id.* at 33-35. To keep the model warm, there were space heaters along with extension cords that were plugged into "different outlets all around the room." *Id.* at 43. Additionally, extension cords were used to plug in spotlights around the room. *Id.* When returning his easel, as required, Plaintiff recalls that, as he was turning around from where the easels are stored, his foot got entangled in the extension cords and he fell face first onto the concrete floor. *Id.* at 43-45.

{¶6} Plaintiff acknowledges that he was aware of the extension cords and admits that he saw the extension cords. *Id.* at 45. Specifically, Plaintiff describes the extension cords as being "so obvious" and recalls that the only way to return his easel was to walk "through the maze of several extension cords." *Id.* at 44-45. Additionally, Plaintiff admits that these extension cords were used in every class. *Id.* at 45.

Law and Analysis

{¶7} In its motion, Defendant asserts that Plaintiff cannot prove his claim for negligence. Specifically, Defendant argues that it is entitled to summary judgment because the extension cords were an open and obvious condition and, as such, it owed no duty of care to Plaintiff. To prevail on a claim for negligence, plaintiff must prove by a preponderance of the evidence that "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, and (3) the breach of the duty proximately caused

the plaintiff's injury." *Jenkins v. Ohio Dept. of Rehab & Corr.,* 10th Dist. Franklin No. 12AP-787, 2013-Ohio-5106, ¶ 6.

{¶8} 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, 662 N.E.2d 287 (1996). It is undisputed that Plaintiff, as a student of a state university, was on Defendant's premises for purposes that would classify him 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, 550 N.E.2d 517 (10th Dist.1988).

{¶9} Generally, 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 v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. However, absent any attendant circumstances, an owner or occupier owes no duty to warn an invitee of "open and obvious dangers" on the premises because "the open and obvious nature of the hazard itself serves as a warning" and it is reasonable to expect that the invitees "entering the premises will discover those dangers and take appropriate measures to protect themselves." *Cordell v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 08AP-749, 2009-Ohio-1555, ¶ 6, 19 (internal citations omitted). A dangerous condition is considered "open and obvious" when the hazard is "neither hidden nor concealed from view and [is] discoverable by ordinary inspection." *McConnell v. Margello*, 10th Dist. Franklin No. 06AP-1235, 2007-Ohio-4860, ¶ 10. A dangerous condition is considered "discoverable by ordinary inspection" when "an invitee exercising ordinary care under the circumstances would have seen and been able to guard himself against the condition." *Id.*

{¶10} Indeed, such a hazard "does not actually have to be observed" by the invitee, it merely needs to be an "observable" condition for it to be considered open and obvious. *Id.* Moreover, the duty of ordinary care an invitee owes to himself under the circumstances requires some degree of attention to his own safety. *See Lydic v. Lowe's Cos., Inc.,* 10th Dist. Franklin No. 01AP-1432, 2002-Ohio-5001, ¶ 16. When an invitee is walking on the owner or occupier's premises, his "failure to avoid an obstruction because he or she did not look down is no excuse." *Id.* Moreover, when an invitee notices a "defect in a walkway while previously traversing the area, the defect is open and obvious." *Cooper v. Meijer Stores L.P.*, 10th Dist. Franklin No. 07AP-201, 2007-Ohio-6086, ¶ 20. Accordingly, "[c]ertain clearly ascertainable hazards or defects may be deemed open an obvious as a matter of law for purposes of granting summary judgment." *McConnell* at ¶ 11.

{¶11} However, it is inappropriate to find a hazard to be open and obvious as a matter of law when the record reveals attendant circumstances which raise "a genuine issue of material fact as to whether the danger was free from obstruction and readily appreciable by an ordinary person." *Id.* Attendant circumstances are facts surrounding the event that would "divert the attention of the pedestrian, significantly enhance the danger of the defect and contribute to the fall." *Id.* at 17 (internal citations omitted). Such circumstances "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.* Additionally, "[a]ttendant circumstances do not include the individual's activity at the time of the fall unless the individual's attention was diverted by an unusual circumstance of the property owner's making." *Id*.

{¶12} Upon review, the Court finds that the extension cords that injured Plaintiff were an open and obvious hazard and that no attendant circumstances exist to create a genuine issue of material fact regarding the observable nature of the extension cords. It is undisputed that Plaintiff was aware that extension cords are regularly used in the

intermediate life drawing class for heating and lighting purposes. It is also undisputed that Plaintiff knew of the presence and placement of the extension cords on the day of the incident. Indeed, Plaintiff admits in his deposition that he saw the extension cords and that the extension cords were obvious. Accordingly, the Court finds that the extension cords were a clearly ascertainable hazard, which Plaintiff, when exercising ordinary care, could have guarded himself against.

{¶13} Although Plaintiff argues that Defendant's motion should be denied because Plaintiff is disabled, the Court finds that there is no evidence in the record that Plaintiff's disability creates a genuine issue regarding Plaintiff's ability to readily appreciate the open and obvious nature of the extension cords. To the contrary, Plaintiff admits he saw the extension cords and that he knew he needed to navigate through them as he moved around the room on the day of the incident. Additionally, the Court is not persuaded by Plaintiff's argument that a genuine issue of material fact exists because Defendant's employee created the hazardous condition when it placed the extension cords after class had begun. Plaintiff offers no evidence to demonstrate that the placement of the extension cords was so unusual that it unreasonably increased the risk of harm or that it diverted Plaintiff's attention to an extent that it reduced the degree of care that he would have ordinarily exercised. The Court finds there is no genuine issue of material fact regarding Plaintiff's familiarity with how the extension cords were being used in the intermediate life drawing class, including why they were being used and where they were located on the day of the incident. Plaintiff's failure to avoid the observed obstruction does not change the open and obvious nature of the extension cords. Consequently, the Court finds that Defendant is entitled to judgment as a matter of law.

Conclusion

{¶14} A non-oral hearing was conducted in this case upon Defendant's motion for summary judgment. For the reasons set forth above, Defendant's motion for summary

judgment is GRANTED and judgment is rendered in favor of Defendant. All previously scheduled events are VACATED. Court costs are assessed against Plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

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Sent to S.C. Reporter 4/5/21