[Cite as *Hopkins v. Greater Cleveland Regional Transit Auth.*, 2019-Ohio-2440.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

FATIHA HOPKINS, :

Plaintiff-Appellant, : No. 107623

v. :

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 20, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-888140

Appearances:

Cavitch, Familo & Durkin Co., L.P.A., Komlavi Atsou, Spencer E. Krebs, and Cory J. Martinson, *for appellant.*

Shawn M. Mallamad, *for appellee.*

LARRY A. JONES, SR., J.:

{¶ 1} Plaintiff-appellant, Fatiha Hopkins ("Hopkins"), appeals the trial court's decision granting summary judgment in favor of defendant-appellee, Greater Cleveland Regional Transit Authority ("RTA"). For the reasons that follow, we affirm.

{¶ 2} Hopkins filed suit against RTA alleging that it was liable to her as the result of a slip and fall on an RTA bus. RTA moved for summary judgment and the matter proceeded to a hearing on RTA's motion. The court subsequently granted RTA's motion for summary judgment, with a written opinion, finding that there were no genuine issues of material fact precluding summary judgment.

{¶ 3} On March 3, 2017, Hopkins walked from work to the RTA bus stop at East 93rd Street and Euclid Avenue. Hopkins said that it was "raining a little bit" during her walk and the ground was wet. Hopkins boarded the bus, but did not remember whether the steps were wet when she boarded. Hopkins likewise could not remember if the bus floor was wet when she paid her fare or when she walked to her seat. She testified that nothing prevented her from looking down at the floor to assess its condition; she just "didn't look down." She also did not notice the wet floor during the 15 - 20 minute bus ride. She testified that she "didn't pay attention to" the bus floor.

{¶ 4} As the bus approached her stop, but prior to the bus stopping, Hopkins rose from her seat and walked toward the front of the bus. As Hopkins walked to the bus door, she slipped and fell and sustained injuries.

{¶ 5} RTA buses are equipped with mobile video system CCTV cameras and digital recorders. The cameras are stationary and positioned in eight locations, capturing views of the interior and exterior perimeter of the bus. The surveillance video that was submitted into evidence showed that there was patchy snow on the

ground outside. The floor near the front of the bus appears wet, but there is no visible accumulation of water, such as a puddle.

{¶ 6} David Coleman testified at deposition that he was the second driver of the bus on the day in question. As a replacement driver, he was not required to conduct a full precheck inspection of the bus. Coleman initially testified that he did not see the wet floor in his bus on the day Hopkins fell. He knew, however, that the floor was wet "because of the weather." He assumed his passengers would see the wet floor themselves, but if he had seen water on the floor that appeared unsafe, "I would tell my passenger."

{¶ 7} After viewing the video of the incident during his deposition, Coleman clarified that when he got on the bus to relieve the other driver, he looked "up and down" the bus to inspect it and did not see anything wrong. He could see from the video, however, that the bus floor was wet. He further testified that he often tells his passengers to stay seated until he stops, "but they don't listen." He did not tell Hopkins on the day of the accident to "stay seated" because he did not see her walking to the front of the bus before he stopped the bus. In his opinion, Hopkins would not have slipped and fell even though the floor was wet if she had waited until he stopped to get up from her seat. Finally, Coleman testified that he did not warn passengers of the wet floor because he did not consider the wet floor an unsafe condition: "It's normal * * * [p]eople are going to track snow in and it's going to melt and it's going to set in between [the grooves] on the floor."

Assignments of Error

> I. The trial court erred by ruling that the open and obvious doctrine discharges Greater Cleveland Regional Transit Authority ("RTA" or "GCRTA"), a common carrier, from its duty to remove and/or warn Plaintiff-Appellant, Fatiha Hopkins ("Hopkins"), a passenger, of dangerous conditions known to RTA.
>
> II. The trial court erred in granting RTA's Motion for Summary Judgment on Hopkins's claim for negligence because there was a genuine issue of material fact regarding whether the wet floor of the bus "was open and obvious."
>
> III. The trial court erred by granting summary judgment to RTA on Hopkins's negligent retention claim.

Law and Analysis

{¶ 8} Summary judgment is granted where the trial court, viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to a judgment as a matter of law; and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ.R. 56(C); *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996).

{¶ 9} The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47 (1978). The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Id.*

The "open-and-obvious" nature of the water on the bus floor obviates RTA's duty to warn

{¶ 10} In the first assignment of error, Hopkins contends that the trial court erred in finding that the "open-and-obvious" doctrine relieved RTA from its duty to warn. In the second assignment of error, Hopkins argues that there was a genuine issue of material fact about whether the wet bus floor was open and obvious.

{¶ 11} RTA contends that the trial court correctly determined that the bus operator was not negligent in his operation of the bus because he owed no duty to warn Hopkins about the "open-and-obvious" wet floor or to keep the bus floor dry.

{¶ 12} In order to establish a cause of action for negligence, appellant must show: (1) the existence of a duty; (2) a breach of that duty; and (3) an injury proximately resulting therefrom. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 8. First, we examine whether RTA owed a duty to Hopkins. '"If there is no duty, then no legal liability can arise on account of negligence. Where there is no obligation of care or caution, there can be no actionable negligence."' *Jeffers v. Olexo*, 43 Ohio St.3d 140, 142, 539 N.E.2d 614 (1989), quoting 70 Ohio Jurisprudence 3d, Negligence, Section 13, at 53-54 (1986). The existence of a duty is a question of law. *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 22.

{¶ 13} RTA is a common carrier. A common carrier's duty is to "exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its business." *Petrasek v. TC3 Operations, Inc.*, 8th Dist. Cuyahoga No.

95519, 2011-Ohio-1962, ¶ 24, citing *Bodley v. U.S. Air, Inc.*, 10th Dist. Franklin No. 97APE03-430, 1997 Ohio App. LEXIS 5608 (Dec. 9, 1997). Included in this duty is to provide a reasonably safe place for passengers to alight and a duty to warn passengers against dangerous agents or conditions known to or reasonably ascertainable by the carrier. *Petrasek* at *id.*, citing *Feldman v. Howard*, 10 Ohio St.2d 189, 192, 226 N.E.2d 564 (1967). However, the foregoing duty applies "only to perils which the passengers [themselves] should not be expected to discover or protect themselves against." *James v. Wright*, 76 Ohio App.3d 493, 495, 602 N.E.2d 392 (10th Dist.1991), citing *Baier v. Cleveland Ry. Co.*, 132 Ohio St. 388, 392-393, 8 N.E.2d 1 (1937).

{¶ 14} Although RTA owes a duty of the highest degree to its passengers, as a common carrier, it is not an insurer of the safety of its passengers. *Williams v. Greater Cleveland Regional Transit Auth.,* 8th Dist. Cuyahoga No. 87038, 2006-Ohio-3157, ¶ 18, citing *Rahman v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 66166, 1994 Ohio App. LEXIS 2379 (8th Dist.1994). Instead, common carriers owe a duty to passengers to exercise the highest degree of care consistent with the practical operation of the system. *Dietrich v. Community Traction Co.*, 1 Ohio St.2d 38, 41, 203 N.E.2d 344 (1964), paragraph one of the syllabus. These duties only apply to perils that passengers should not be expected to discover or protect themselves against. *Dietrich* at 43. "Reference must always be given to the surrounding circumstances when determining whether, as a matter of law, the common carrier exercised the highest degree of care toward the

passenger." *Banks v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 72468, 1997 Ohio App. LEXIS 4868, 2 (Nov. 6, 1997), citing *Cleveland Ry. Co. v. Featherstone*, 8th Dist. Cuyahoga No. 10711, 1930 Ohio Misc. LEXIS 970 (June 23, 1930.)

{¶ 15} In *Armstrong*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, the Ohio Supreme Court held that the open-and-obvious doctrine relates to the threshold issue of duty in a negligence action. By focusing on duty, "the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it." *Id.* at ¶ 13. When the open-and-obvious doctrine is applicable, it obviates the duty to warn and acts as a complete bar to recovery. *Id.*

{¶ 16} The question of whether a danger is open and obvious is an objective one. *Goode v. Mt. Gillion Baptist Church*, 8th Dist. Cuyahoga No. 87876, 2006-Ohio-6936, ¶ 25. The fact that a plaintiff was unaware of the danger is not dispositive of the issue. *Id.* Instead, the trial court must consider whether, in light of the specific facts and circumstances of the case, an objective, reasonable person would deem the danger open and obvious. *Cintron-Colon v. Save-A-Lot*, 8th Dist. Cuyahoga No. 100971, 2014-Ohio-4574, ¶ 9. If so, even if the individual does not actually notice the open-and-obvious condition until after the fall, no duty exists if the individual could have observed the condition had they only looked. "The bench mark for the courts is not whether the person saw the object or danger, but whether

the object or danger was observable." *Haymond v. BP Am.*, 8th Dist. Cuyahoga No. 86733, 2006-Ohio-2732, ¶ 16.

{¶ 17} In this case, Hopkins admitted that the weather was inclement on the day of her fall. Patchy snow was present on the ground outside. Accordingly, a passenger should have expected to discover that the other passengers of the bus tracked in snow, slush, or water.

{¶ 18} Hopkins cites *Kokinos v. Ohio Greyhound, Inc.*, 153 Ohio St. 435, 92 N.E.2d 386 (1950), to support her claim that the water on the bus was not "open and obvious." In *Kokinos*, the court held that it was not essential in an action by a passenger against a bus company for injuries the passenger suffered from slipping on a substance on the bus station's stairs that the passenger prove the exact time the nuisance was created. Testimony that the substance had dried and that it had been approximately one and one-half hours since the steps had last been observed by a company employee was sufficient to create a question of fact as to whether the condition was present long enough to charge the bus company with constructive notice. Thus, the controlling issue in *Kokinos* was whether the substance that remained on the stairs for one and one-half hours was sufficient for an inference of constructive notice, not whether the hazard itself was open and obvious. We further note that the court considered the fact that the plaintiff came upon the dried substance suddenly while walking down the steps.

{¶ 19} We find the cases from this district where the plaintiff fell on accumulated snow or ice on a bus are more analogous to the case at bar. In *Rahman*,

8th Dist. Cuyahoga No. 66166, 1994 Ohio App. LEXIS 2379, this court affirmed summary judgment, finding that:

> Appellee met its duty of care by providing its drivers with ice scrapers and rock salt to keep the steps clear of slush. As appellant admits, the driver of this bus did undertake to keep the steps clear. The high degree of care required of common carriers is qualified by the phrase, "consistent with the practical operation of the system." As those who are familiar with life in Cleveland during the winter months [know], it would be an impossible task to keep the steps completely free of slush and remain responsible for driving the bus route.

(Citation omitted.) *Id.* at 4.

{¶ 20} In *Fixel v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 67298, 1995 Ohio App. LEXIS 74 (Jan. 12, 1995), this court affirmed summary judgment for RTA on a passenger's action for slip and fall on a bus. This court stated that it could not be "inferred from appellant's statement that she slipped on dirty, crusted snow, that appellee failed to remove snow from the bus in a manner consistent with the practical operation of the system." *Id.* at 1. The court also found that it was "questionable whether appellee had a duty, because a common carrier has no duty to warn against perils a passenger should reasonably be expected to discover or protect himself [or herself] against." *Id.*; *see also Jones v. Youngstown Mun. Ry. Co.*, 133 Ohio St. 118, 12 N.E.2d 279 (1937) (passenger may not reasonably foresee a banana peel on bus floor, but should foresee snow on the floor in the winter).

{¶ 21} In determining whether a hazard is open and obvious, some courts consider whether the plaintiff had a sufficient advance opportunity to perceive the

hazard before encountering it and whether a reasonable person would have some expectation of encountering such a hazard. *Jacobsen v. Coon Restoration & Sealants, Inc.*, 5th Dist. Stark No. 2011-CA-00001, 2011-Ohio-3563, ¶ 26; *see also Kraft v. Dolgencorp Inc.,* 7th Dist. Mahoning No. 06-MA-69, 2007-Ohio-4997, ¶ 30, 35.

{¶ 22} Hopkins testified that she was on the bus for 15 - 20 minutes before she got up to walk to the front of her bus for her stop. Thus, unlike the plaintiff in *Kokinos*, she had sufficient advance opportunity to see the wet floor. Hopkins testified that nothing prevented her from looking down at the floor to assess its condition. We also find that a reasonable person would expect that the floor would be wet near the bus entrance on a rainy winter day in Cleveland where there is snow still present on the ground. The conditions on the day at issue should have alerted Hopkins to the likely presence of a wet floor; therefore, the wet bus floor was a peril that Hopkins should be expected to have discovered and protected herself against. RTA had no duty to warn.

{¶ 23} Applying all of the foregoing, we conclude that there are no genuine issues of material fact and that RTA was properly awarded judgment as a matter of law. Accordingly, the first and second assignments of error are overruled.

Negligent Retention

{¶ 24} In the third assignment of error, Hopkins argues that the trial court erred in granting summary judgment on her negligent retention claim. To support her assignment of error, Hopkins states "the granting of summary judgment on the

negligent retention claim should be reversed if this Court reverses the trial court's decision on [the] negligence claim."

{¶ 25} We found under the first and second assignments of error that the trial court properly granted summary judgment to RTA. Thus, the court likewise properly granted summary judgment to RTA on Hopkins's negligent retention claim. *See Young v. Cuyahoga Cty. Bd. of Mental Retardation*, 8th Dist. Cuyahoga No. 97671, 2012-Ohio-3082, ¶ 26.

{¶ 26} The third assignment of error is overruled.

{¶ 27} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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LARRY A. JONES, SR., JUDGE

MARY EILEEN KILBANE, A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR