IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ROCHELLE COLLIER	)	**CASE NO. CV 10 744066**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
LIBATIONS LOUNGE, LLC, *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

On December 21, 2010, plaintiff Rochelle Collier filed this premises liability lawsuit alleging that the negligence of the defendants caused an injury she sustained in a parking lot adjacent to Libations Lounge at 9108 Aetna Road in Cleveland. The defendants each filed a motion for summary judgment; the plaintiff has opposed the motions and the defendants filed reply briefs. This entry follows.

STATEMENT OF FACTS

Libations Lounge, LLC operates a bar at 9102 Aetna Road known as Libations Lounge. Defendant Tyson Mitchell is the majority member of the limited liability company. He testified that the unpaved parking lot next to the building at 9102 Aetna has the separate address of 9108 Aetna and is part of permanent parcel number 133-24-003. That parcel was granted to him by a deed from the defendant City of Cleveland on March 4, 2010.[1] However, because Mitchell did not pay for the land until late July and

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commissioner of purchases and supplies on February 24 and delivered to Mitchell with a cover letter dated

the deed was not recorded until July 21, the City of Cleveland has been named as a defendant by virtue of being record owner of the land at the time of the plaintiff's injury.

On April 3, about a month after the deed to Mitchell was delivered, the plaintiff arrived at Libations Lounge around 9:00 p.m. She parked on parcel number 133-24-003 in the lot next to the bar, walked across the parking lot, and entered the building without incident. She left about two hours later. It was dark as she traversed the lot with a friend. She stepped into a hole that she did not see and fractured her ankle.

LAW AND ANALYSIS

To establish a cause of action in negligence, a plaintiff must show that a defendant had a duty of care, breached that duty, and caused injury to the plaintiff as a result of the breach.[2] The common law duty of care owed to another with respect to premises varies depending on the person's status on the property as either a trespasser, licensee or business invitee.[3] A trespasser is a person who enters on the land of another without the owner's consent and for her own purposes.[4] A licensee is a person who is on another's premises by acquiescence or permission, but not by invitation of the landowner, and is there for her own benefit.[5] A business invitee enters property at the owner's express or implied invitation and for a purpose that is beneficial to the owner.[6]

There is no evidence that the plaintiff was in the parking lot with the city's permission or for any purpose beneficial to it. With respect to the City of Cleveland then, the plaintiff was a trespasser or, at best, a licensee. But the duty that property owners

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signature was not affixed until March 4, so the court will consider March 4 as the date of delivery.

[2] *Menifee v. Ohio Welding Products* (1984), 15 Ohio St. 3d 75, 77.

[3] *Hensley v. Salomone*, 2005-Ohio-187, Cuyahoga App. No. 84456, ¶ 15.

[4] *Id.*

[5] *Id.*

[6] *Id.*

owe trespassers and licensees is the same: to refrain from willful, wanton or reckless conduct that is likely to injure a person.[7] Assuming the city retained ownership and control of the premises as of April 3, the record is devoid of any evidence that the defendant city engaged in willful, wanton or reckless conduct. As a result, there is no genuine issue of material fact to prevent summary judgment in the city's favor on the plaintiff's common law premises liability claim.

The common law cause of action against the other defendants is more complicated. First, defendants Mitchell and Libations claim to be entitled to summary judgment as a matter of law because they did not own or control the land until the deed was recorded more than three months after Collier's injury. Rule 56 of the Ohio Rules of Civil Procedure requires the court, when considering a motion for summary judgment, to construe all of the evidence most strongly in favor of the party opposing summary judgment. Here, there is evidence that the deed was delivered almost a month before the alleged negligence, and a deed is considered effective upon delivery.[8] Not only that, but there is evidence that Mitchell, as an agent of Libations, for years exercised control over the premises and implicitly encouraged the bar's patrons to park in the lot. Construing all of the evidence of ownership and control by Mitchell and Libations in favor of Collier, there is a genuine issue of material fact precluding summary judgment for those defendants on the basis that they owed no duty at all by dint of not owning, occupying or possessing the property.

Taking as true that Mitchell and Libations owned or controlled the parking lot, then the plaintiff, who conferred a benefit on Libations and, indirectly, its owner

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[7] , 2011-Ohio-3693, Cuyahoga App. No. 96144, ¶ 12.

[8] See, *e.g.*, *Kniebbe v. Wade* (1954), 161 Ohio St. 294, 297.

Mitchell, by patronizing the lounge, was a business invitee. A business invitee is owed the common law duty of ordinary care: an owner must maintain the premises in a reasonably safe condition and warn of latent or hidden dangers.[9] However, where a danger is open and obvious, business owners owe no duty of care to their patrons.[10] The rationale underlying this doctrine is that the open and obvious nature of the hazard itself serves as a warning and that a business owner may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.[11] Even when the invitee does not see the hazard until after she falls, no duty exists where the invitee could have seen the hazard if she had looked.[12] Whether a hazard is open and obvious is a matter of law to be determined by the court, and when applicable, the open and obvious doctrine alleviates the duty to warn and acts as a complete bar to negligence claims.[13]

Collier testified that on the night of the incident, she left Libations Lounge late and walked into a "big old field" in complete darkness.[14] She said that despite the darkness, neither she nor her friend paid any attention to the ground beneath them before falling.[15]

Ohio courts have consistently recognized that darkness is an open and obvious condition and should not be disregarded.[16] Darkness serves as a warning of danger, and

[9] *Witt v. Saybrook Investment Corp.*, 2008-Ohio-2188, Cuyahoga App. No. 90011 , ¶ 19.
[10] *Hunter v. Jamin Bingo Hall*, 2008-Ohio-4485, 6th Dist. App. No. L-08-1084, ¶8.
[11] *Simmers v. Bentley Constr. Co* (1992)., 64 Ohio St.3d 642, 644.
[12] *Haymond v. B.P. America*, 2006-Ohio-2732, Cuyahoga Cty. App. No. 86733, ¶16.
[13] *Armstrong v. Best Buy Co., Inc.*, 2003-Ohio-2573, 99 Ohio St.3d 79, 80.
[14] Collier depo., p. 24, l. 19; p. 34, l. 2-4; and p. 39, l. 2-11.
[15] Collier depo., p. 38, l. 22-24 and p. 64, l. 18-19.
[16] See, e.g., *Rezac v. Cuyahoga Falls Concert, Inc.*, 2007-Ohio-703, 9th Dist. App. No. 23313; *Leonard v. Modene and Assoc., Inc.*, 2006-Ohio 5471, 6th Dist. App. No. WD-05-085; see also, *McCoy v. Kroger Co.*, 2005-Ohio-6965, 10th Dist. App. No. 05AP-7, at ¶16 ("darkness increases rather than reduces the degree of

"for one's own protection, it may not be disregarded."[17] Moreover, since darkness is a sign of danger, one that disregards darkness does so at her own peril.[18] There is no doubt that whatever danger the plaintiff confronted in the parking lot that night – darkness, a "big old hole,"[19] or a combination of both – was open and obvious.

Yet the plaintiff claims that attendant circumstances should bar the application of the open and obvious doctrine in this case. Although not precisely defined, attendant circumstances generally include any distraction that would come to the attention of a person in the same circumstances and reduce the degree of care an ordinary person would exercise at the time.[20] Attendant circumstances do not include the plaintiff's own activity at the time of the fall unless her attention was diverted by a circumstance of the defendants' making.[21] The plaintiff specifically points to the lighting conditions and the presence of cars throughout the lot as attendant circumstances that imposed a duty to protect her from any open and obvious hazard.

Putting aside the curious logic that would render the lack of artificial light a distraction from the hazard of darkness, the defendants did not create the absence of light and owed no duty to provide lighting. In Ohio, "one who maintains a private motor vehicle parking area, for the accommodation of those he serves in a professional or business way, is generally under no legal obligation to illuminate the same at night."[22] Furthermore, an owner who provides some lighting for a parking area is under no obligation to provide adequate lighting.[23] As to the parked cars being a distraction to the

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[17] *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, at syllabus 3.
[18] *Swonger v. Middlefield Village Apts.*, 2005-Ohio-941, 11th Dist. App. No. 2003-G-2547, ¶13.
[19] Collier depo., p. 85, l. 24-25.
[20] *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 499.
[21] *Ray v. Wal-Mart Stores, Inc.*, 2009-Ohio-4542, 4th Dist. App. No. 08 CA 41, ¶ 31.
[22] *Gates v. Speedway Super America, L.L.C.*, 8th Dist. No. 90563, 2008-Ohio-5131, ¶17.
[23] *Meilink v. AAA Northwest Ohio*, Lucas App. No. L-98-1139, 2.

plaintiff, this court is unwilling to find that the presence of cars in a parking lot is an attendant circumstance that imposes a duty of care on the property owner to protect against otherwise open and obvious dangers in that parking lot. Parked cars are not out of the ordinary in a parking lot; they are to be expected.

As a matter of law, then, there are no genuine issues of material fact to prevent summary judgment for Mitchell and Libations on the plaintiff's common law premises liability claim. However, the common law is not the only source of a legal duty of care to others. Legislative enactments may establish a legal duty that, if violated, imposes tort liability.[24] In this case, Collier asserts that the defendants were negligent *per se* by violating City of Cleveland Ordinance section 457.09. That law provides:

> (c) In outdoor parking lots the operator shall at all times be required to keep the lot in good order and condition and free from nuisance, and if the lot is not a hard surface, to take the necessary precautions to prevent the raising of dust and dirt by the movement of cars thereon.

The plaintiff claims that this statute specifically requires parking lot operators "to prevent holes and uneven surfaces from forming in their lots."[25]

But violation of a statute is only negligence *per se* where the law commands a specific act.[26] Where a law sets down a rule of conduct only in general or abstract terms then a defendant's negligence is gauged under the common law standard of ordinary care.[27] Section 457.09(c) requires in general terms that parking lots must be kept in "good order and condition and free from nuisance." No specific act is commanded and a violation is not negligence *per se*.

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[24] See, *e.g.*, *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, at syllabus one.
[25] Brief in opp., p. 16.
[26] *Eisenhuth*, supra, at syllabus 3.
[27] *Id.*

The plaintiff argues that the reasoning of the Eighth District Court of Appeals in *Zaslov v. The May Dept. Stores*[28] should prevail. In *Zaslov*, the plaintiff was injured when he rode his bike through a pothole in the defendant's parking lot. A local ordinance provided as follows:

> All paved areas and surfaces of parking lots and driveways shall be maintained free of holes, loose materials such as stones or cinders or littler, and shall be free of scaling or pitting; repaired areas shall be made level and smooth and match in conformity and color with the materials of adjacent areas.

The court of appeals found that the statute was specific in its directive to keep the parking lot "free of holes" and to ensure that repaired areas were "level and smooth."[29] Those differences from the Cleveland statute here make *Zaslov* inapplicable. This case is closer to *Abbuhl v. Orange Village*.[30] Abbuhl was hit by a car in a parking lot owned by Orange Village. He claimed the municipality was negligent *per se* for failing to light the parking lot where a local ordinance required parking lots to be "properly illuminated." The court of appeals held that the statute only generally suggests a rule of conduct.[31] And so it is in this case, where Cleveland requires broadly that parking lots be maintained in good order and free from nuisance. To find otherwise would in essence impose strict liability, since the occurrence of an injury can always be claimed as evidence that the parking lot was not in good order or free from nuisance.

Finally, the defendant city also claims sovereign immunity as grounds warranting summary judgment. Given the court's decision to this point, the issue of immunity need not be discussed in detail, but it should not be ignored so as to avoid the possibility of

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[28] Cuyahoga Cty. App. No. 74030, 1998 Ohio App. LEXIS 4654, unreported.
[29] Not only that, but the defendant had previously been cited for violations of the statute.
[30] 2003-Ohio-4662, Cuyahoga Cty. App. No. 82203.
[31] *Id.*, ¶ 19.

serial appeals. Hence, the court also finds that the city, under the circumstances of this case, is entitled to summary judgment because it is statutorily immune pursuant to R.C. §2744.01 *et seq*.

CONCLUSION

For all of the foregoing reasons, the defendants' motions for summary judgment are granted.

IT IS SO ORDERED:

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Date