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October 15th | Columbus

Premises. Liability? Or Asset?

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Premises. Liability? Or Asset?

1. ATM's – helpful resources
 - Robbery at Automated Teller Machines; www.cops.usdoj.gov/pdf/e05021551.pdf
 - Automatic Teller Machine Robberies: Theories of Liability. Fordham Urban Law Journal, Volume 14, Issue 1, 1985.
 - http://www.aba.com/Consumers/Pages/CNC_contips_atm.aspx. American Bankers Association, “ATM Safety Tips.”
 - Trial. March 1998. “Direct Examination of Security Experts.”
 - Trial. March 1998. “Investigating Inadequate Security Cases.”
 - AAJ, Inadequate Security litigation group

2. Defective doors – helpful resources
 - An Automatic Sliding Door Litigation Primer, Essentials for the Plaintiff's Lawyer, Warren F. Davis, Ph.D., August 1993
 - Cases [none of these are cases in which I was involved]
 - *Virginia C. Turek vs. Sargent Manufacturing Company, Automatic Door Systems, Inc., and Town of West Hartford*; Superior Court, Judicial District of Hartford, Connecticut; Docket No.: HHD CV 13 6039180 S; 90 year old woman struck by low energy door as she stood on walk outside the building after exiting. Settled in December, 2014, for \$75,000.
 - *Mary F. Holland v. Red Robin International, Inc., et al.*, Hillsborough, SS, Southern District; Superior Court, State of New Hampshire; Docket No.: 226-2012-C-00284. Door closed on woman while exiting from restaurant, causing serious injuries. Settled on 9/3/14 for an amount confidential at the request of the plaintiff.
 - *Jean Louise Tennihill v. Delta Airlines, Inc.*, Cause No. 93-5079-B. District Court, Nueces County, TX, 117th Judicial District. Middle aged woman sustained brain damage when struck on head due to sudden reversal of door as a result of security stop and reversal sequence. Settled in mediation on 10/12/95 in favor of Plaintiff for approximately \$250,000.
 - *Kellee Movizzo vs. Wawa, Inc.*; Superior Court of New Jersey, Law Division Seq. Hunterdon County; Docket No.: HNT-L-412-11. Woman's toes fractured by a manual swinging door while exiting through an exterior door of the Wawa store. Settled on May 19, 2014, for \$200,000.

3. Civil Assault and Battery
 - CV 429.01 Civil Assault – Plaintiff alleges that Defendant committed an assault upon her. An assault is the intentional offer or attempt, without authority or consent, to harm or offensively touch another that reasonably places the other in fear of such contact. Words alone do not constitute assault, but must be coupled with some definite act by one with apparent ability to carry out the offensive act. If you find by the greater weight of the evidence that Plaintiff proved her claim for assault, then you must further decide the amount of damages caused by the assault. If you find by the greater weight of the evidence

that Plaintiff failed to prove any part of her claim for assault, then you will find for defendant on that claim.

– CV 429.03 Battery [and comment]. In order to prove a claim for battery against Defendant, Plaintiff must show by a preponderance of the evidence that Defendant made an intentional, unconsented, contact with Plaintiff. A battery may occur without actual physical harm. An action for battery will not lie if the plaintiff expressly or impliedly consents to a lawful act resulting in the bodily contact, unless the act is different in nature or degree from the consented to intrusion, e.g., a friendly tussle is not consent to mayhem, or consent to an operation on a foot is not consent to amputate the leg. One cannot consent to an unlawful act. Consent means acquiescence to the touching, with sufficient knowledge and understanding. If you find by the greater weight of the evidence that Plaintiff proved her claim for battery, then you must further decide the amount of damages caused by the battery. If you find by the greater weight of the evidence that Plaintiff failed to prove any part of her claim for battery, then you will find for defendant on that claim.

4. Ice and Snow Prisons – a different view on slips and falls during inclement weather
5. The Case of the Rippled Rug
– See attached decision: *Mirosława Biggs v. Schrock Road Markets*, Decision and Entry Denying MSJ

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

MIROSLAWA BIGGS, et al., :
 :
 Plaintiffs, : CASE NO. 06 CVC 7480
 v. :
 : JUDGE TIMOTHY S. HORTON
 SCHROCK ROAD MARKETS, INC, et al., :
 :
 Defendants. :

DECISION AND ENTRY

DENYING DEFENDANTS' SCHROCK ROAD MARKETS, INC. AND
JUBILEE FOODS MOTION FOR SUMMARY JUDGMENT
FILED JULY 2, 2007

Dated this 1st day of October, 2007

This matter is before the Court upon Defendants Schrock Road Markets, Inc. and Jubilee Foods' Motion for Summary Judgment filed July 2, 2007. Plaintiffs filed a memorandum contra on July 30, 2007. Defendants filed a reply on August 20, 2007. The motion is considered submitted to the Court for decision pursuant to Loc. R. 21.01 and Loc. R. 57.01.

Factual History

Plaintiff Mirosława Biggs ("Mrs. Biggs") fell as she entered Defendant Jubilee Foods grocery store in Worthington, Ohio on May 14, 2005 at approximately 8:00 p.m. Mrs. Biggs went to the store that evening with her friend Anita Max. As the electronic door opened, Mrs. Biggs entered and fell on the carpet/mat due to a bubble from a tear in the rubber border. She filed a complaint against Defendants asserting that she and her husband suffered damages as a result of Defendants' negligence.

Summary Judgment Procedure

When considering a motion for summary judgment, a court must determine 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

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genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Civ.R. 56(C). “The moving party has the burden of showing that there is no genuine issue as to any material fact as to critical issues.” *Stockdale v. Baba*, 153 Ohio App. 3d 712, 2003-Ohio-4366, 795 N.E.2d 727, at ¶23. When a party moves a court for summary judgment and supports its motion pursuant to Civ.R. 56, “an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response *** must set forth specific facts showing that there is a genuine issue for trial.” *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 65, 375 N.E.2d 46 (quoting Civ.R. 56(E)).

As a procedural device “to terminate litigation and avoid a formal trial,” summary judgment must be awarded with caution. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2, 433 N.E.2d 615. All doubts and evidence must be construed against the moving party. *Stockdale*, 2003-Ohio-4366, at ¶31. Accordingly, “[s]ummary judgment may not be rendered unless it appears that reasonable minds can come to but one conclusion and that conclusion is adverse to the parties against whom this motion is made.” *Id.* at ¶32.

Application of Law

Defendants argue that there are no genuine issues of material fact and that it is entitled to summary judgment as a matter of law. Specifically, Defendants contend that there is no genuine issue of fact that the bubble in the carpet was open and obvious. Plaintiffs respond that summary judgment should be denied as there are genuine issues of material fact as to whether defect was open and obvious to Mrs. Biggs. Both parties rely on the deposition testimony of Mrs. Biggs to support their contentions. Plaintiffs also submitted pictures of the store entrance to support their arguments.

After careful review of the record and the law, the Court determines that this matter contains genuine issues of material fact as to whether the danger was open and obvious. It appears that reasonable minds could conclude that the carpet defects were not open and

obvious. Construing all doubts and evidence against Defendants, summary judgment is inappropriate. Therefore, Defendants' motion for summary judgment is not well taken. Based on the forgoing, this Court finds that Defendants are not entitled to summary judgment as a matter of law.

Accordingly, it is hereby

ORDERED that Defendants Schrock Road Markets, Inc. and Jubilee Foods' Motion for Summary Judgment, filed July 2, 2007 is hereby **DENIED**.

IT IS SO ORDERED.



TIMOTHY S. HORTON, JUDGE

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