FRANKLIN COUNTY MUNICIPAL COURT
CIVIL DIVISION, 3RD FLOOR
375 SOUTH HIGH STREET
COLUMBUS,OHIO 43215

MATTHEW MORGAN c/o JACKIE M JEWELL
200 CIVIC CENTER DR STE 800
COLUMBUS OH 43215

DATE ISSUED: September 25, 2017

STYLE: JOY D TAYLOR vs. MATTHEW MORGAN

CASE NO.: 2017 CVI 009916

TO: MATTHEW MORGAN c/o JACKIE M JEWELL
200 CIVIC CENTER DR STE 800
COLUMBUS OH 43215

NOTICE OF COURT ORDER

THE ABOVE NAMED PARTY IS HEREBY NOTIFIED THAT A COURT ORDER WAS FILED AND JOURNALIZED AS INDICATED ON ORDER, WHICH STATES IN PERTINENT PART:

(SEE COPY OF ORDER ATTACHED)

LORI M. TYACK, CLERK

BY:
DEPUTY CLERK
PHONE : 614-645-7220

A TRUE COPY OF THE FOREGOING WAS SENT TO THE ABOVE NAMED INDIVIDUAL BY ORDINARY U.S. MAIL THIS DATE 9/25/2017

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

Joy D. Taylor, **Plaintiff,**	:	
	:	**Case No. 2017 CVI 009916**
v.	:	
	:	**Magistrate Kirk A. Lindsey**
Capital Car Wash, LLC, **Defendant.**	:	

Magistrate's Decision

This matter went on for hearing before the magistrate on July 11, 2017. The Plaintiff appeared and offered testimony and other evidence and had her son, Isoni Taylor, as an additional witness. The Defendant also appeared, represented by attorney Jackie Jewell.

At the preliminary meeting before the hearing the parties all agreed that Defendant Matthew Morgan would be dismissed from the case and replaced with Captain Carwash, LLC, the proper Defendant in this case. The complaint is therefore deemed amended in this way.

Based upon the evidence presented at the hearing, the magistrate finds as follows[1]:

Findings of Fact

1. On the evening of February 11, 2017, the Plaintiff drove her 2005 Cadillac Escalade into the Defendant's automated car wash. After the vehicle was washed and during the time it was going through the drying process, the pressurized air from the Defendant's drying system caused a horizontal LED brake light from the top rear of

[1] This case will be decided based upon the evidence and arguments presented at the hearing on July 11, 2017. Counsel for the Defendant has filed a post-trial brief on July 14, 2017 but neither requested leave to do so nor was granted leave to do so. No evidence or additional legal argument will be permitted unless a party requests the permission to submit it and is granted that permission. Accordingly, Defendant's post-trial brief will not be considered.

the Plaintiff's vehicle to become dislodged, and it was left hanging by an electrical cord. The car wash was unattended by any agent for the Defendant at that time and so the Plaintiff notified the Defendant the next day.

2. The Defendant at that time, and since that time, has refused to repair the Plaintiff's vehicle, contending that its posted signs warned of this type of possible damage and that the Plaintiff assumed the risk of the damage when she used the carwash.
3. Although the LED fixture was initially still operational, days after the incident – while the vehicle was under the Plaintiff's exclusive control – it fell off the vehicle and completely broke and thereafter no longer worked. The Plaintiff then went and got an estimate for the complete replacement of the fixture from a Cadillac dealership for $510.55.
4. The Plaintiff brought this action in order to secure the cost of repairing her vehicle.

Conclusions of Law

The party who brings an action must prove the allegations in the complaint and their entitlement to the relief sought by a preponderance of the evidence. *See, e.g., Cooke v. Strader's Garden Centers, Inc.*, 10th Dist. No. 95APG08-961, 1996 Ohio App. LEXIS 1317 (March 28, 1996). This is called the burden of proof.

In this case, the Defendant initially contends that the Plaintiff failed to sufficiently establish her ownership of the vehicle in question. Although in some cases, the presentation of the certificate of title for the vehicle is necessary to establish the ownership of the vehicle if there is a bona fide dispute as to who owns it, courts in Ohio have routinely held — including the 10th District Court of Appeals — that when a party's testimony is unrebutted and uncontroverted that she is the sole owner of the vehicle, the court can accept that testimony, if it finds it to be

credible, that the party does, in fact, own the vehicle. *See, e.g., Howard v. Himmelrick*, 10th Dist. No. 03AP–1034, 2004-Ohio-3309, ¶ 13. In this case, the Plaintiff testified credibly that she is the sole owner of this vehicle and therefore has established by a preponderance of the evidence that this is so.

The Plaintiff's claims in this case sound in negligence. "[T]o establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulted therefrom." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 8. "[P]rimary assumption of risk, when applicable, prevents a plaintiff from establishing the duty element of a negligence case." *Stewart v. Urig*, 176 Ohio App.3d 658, 2008-Ohio-3215, 893 N.E.2d 245, ¶ 25 (9th Dist.) (*quoting Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 433, 659 N.E.2d 1232 (1996)). Thus, when this defense applies, it prevents a plaintiff from making a prima facie case and functions as a complete bar to a negligence claim as a matter of law. *Gallagher* at 432. Under the doctrine of primary assumption of the risk, a person assumes the inherent and obvious risks of certain activities and cannot recover for injuries in the absence of another's reckless or intentional conduct. *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, 2009-Ohio-6898, 924 N.E.2d 906, ¶ 13 (10th Dist.). Underlying this judicially-created doctrine is the notion that certain risks are so inherent in some activities that the risk of injury cannot be avoided. *Id.* Thus, "[a] plaintiff who reasonably chooses to proceed in the face of such risks is deemed to have relieved defendant of any duty to protect [her from them]." *Siglow v. Smart*, 43 Ohio App.3d 55, 59, 539 N.E.2d 636 (9th Dist. 1987).[2] "[P]rimary assumption of [the] risk requires an examination of the activity

[2] This concept has been traditionally applied to sporting events and recreational activities, *e.g., Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 659 N.E.2d 1232 (1996) (football); *Crace v. Kent State Univ.*, 185 Ohio App.3d 534, 2009-Ohio-6898, 924 N.E.2d 906 (10th Dist.) (cheerleading), but courts in Ohio have also applied the doctrine to other inherently activities posing inherent and obvious risks too. *See French v. New Paris*, 12th Dist. No.

itself and not plaintiff's conduct. If the activity is one that is inherently dangerous and from which the risks cannot be eliminated, then a finding of primary assumption of [the] risk is appropriate." *Crace* at ¶ 16.

Under the circumstances in this case, the risk of the specific type of damage that occurred to the Plaintiff's vehicle was open and obvious. A car wash relying on the pressurized application of water, cleaning agents, and air won't be effective in achieving its purpose of cleaning and then drying a vehicle without subjecting the vehicle to those pressurized forces, which obviously can result in the possibility of components of on a vehicle loosening or dislodging under the right conditions. Defendant's signage warns of this risk as it relates to protruding or loose components, and any reasonable consumer would know or should know that this risk exists, to at least some degree, when entering a car wash of this type.[3] The doctrine of primary assumption of the risk bars the Plaintiff's claims in this case as a matter of law.

But even if it didn't, the Plaintiff would still be unable to recover here for two additional reasons. First, the Plaintiff is seeking to recover here the full cost of the complete replacement of the LED fixture which was dislodged but still functioning after the incident at the carwash. The fixture later fell off and broke while the vehicle was under Plaintiff's control and not Defendant's, and reasonable efforts to mitigate damages on the part of the Plaintiff – like reattaching, temporarily removing, or even securing the fixture with duct tape – could have

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CA2010–05–008, 2011-Ohio-1309, 2011 WL 947037 (installation of an antenna in proximity to high-voltage electric lines); *Ballinger v. Leaniz Roofing, Ltd.*, 10th Dist. No. 07AP–696, 2008-Ohio-1421, 2008 WL 802722, ¶ 13 (ladder climbing); *Cafferkey v. Turner Constr. Co.*, 21 Ohio St.3d 110, 113, 488 N.E.2d 189 (1986) (activities on a construction site); *Young v. Miller Bros. Excavating Inc.*, 2d Dist. No. 11306, 1989 WL 83925 (July 26, 1989) (trenching).

[3] That is not to say that a consumer entering an automated car wash assumes *all* risks. For example, a consumer ought to be able to reasonably expect that her vehicle wouldn't be pummeled by robotic arms or that the system wouldn't malfunction and trap her in the car wash or something like that, but those hypothetical circumstances simply don't resemble what happened in this case.

prevented the ultimate destruction of the fixture, which was not directly caused by the Defendant.

Second, in any case where a Plaintiff seeks to recover the costs of repair to a vehicle, the Plaintiff must show that those costs do not exceed the change in fair market value caused by the incident or accident precipitating the repair. When proving damages to a vehicle with evidence of the cost of repairs, a plaintiff is "required to present evidence of the market value of the vehicle before and after the accident so that the court may ensure that the cost of repairs does not exceed the difference in market value." *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 528, 2007-Ohio-3739, 875 N.E.2d 993 (10th Dist. 2007). In *Allstate Ins. Co. v. Reep*, 7 Ohio App.3d 90, 454 N.E.2d 580 (10th Dist. 1982), the 10th District held that:

> While the usual measure of damages in a case such as this would be the difference between the fair market value of the car before and after the accident, an alternative method—the cost of repair—is an acceptable measure of damages if the cost of repair does not exceed the amount of damages that would be arrived at using the primary measure of damages. In other words, the cost of repair must not exceed the diminution in market value. Nor may the cost of repair exceed the fair market value of the property before the accident.

Id. at 91 (citation omitted).

The failure of the Plaintiff to present evidence of this nature constitutes a failure to properly prove the damages element of her claim in a case like this. And even when a defendant does not object to such a failure, the 10th District has held time and again that a Plaintiff must at the very least affirmatively prove the value of the vehicle before the incident in order to recover repair costs. In *Auto Owners Ins. Co. v. Santilli*, 10th Dist. No. 95APG06–771 (Jan. 23, 1996), the Tenth District Court of Appeals affirmed the trial court's finding that the plaintiffs failed to prove the damage element of their property-damage claim where they presented evidence of the cost to repair their vehicle but not of the market value of the vehicle immediately before the

incident necessitating the repairs. *See also Reasoner v. State Farm Mut. Auto. Ins. Co.*, 10th Dist. No. 01AP–490, 2002-Ohio-878 (stating that under the cost-of-repairs method for calculating damages, the plaintiff must at least present proof of the value of the vehicle immediately before the event that caused the damage sought to be repaired). Evidence of this nature was not presented at the hearing.

Based upon the foregoing, the Plaintiff has failed to prove by a preponderance of the evidence her entitlement to the relief sought in this case.

Conclusion

Judgment in favor of the Defendant on the Plaintiff's complaint. Costs assessed to the Plaintiff.

As set forth above, the complaint is deemed amended to dismiss Matthew Morgan as Defendant in the case and replace him with Capital Carwash, LLC. The Clerk is hereby directed to update court records to reflect this change.

The Clerk is also hereby directed to serve copies of this Magistrate's Decision upon both sides at the addresses set forth below.

September 22, 2017
Date

Kirk A. Lindsey
Magistrate Kirk A. Lindsey

A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law contained in this Decision unless the party timely and specifically objects to that finding or conclusion. Civ. R. 53(D)(3).

Copies to:

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Plaintiff

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Attorney for Defendant