[Cite as *Henline v. Dover Restaurant Mgt., Inc.*, 2004-Ohio-574.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NORA HENLINE, ET AL.

Plaintiff-Appellants

-vs-

DOVER RESTAURANT MANAGEMENT, INC., ET AL.

Defendant-Appellees

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2003AP050042

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2002CT060391
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	February 9, 2004

APPEARANCES:

For Plaintiff-Appellants	For Defendant-Appellees
MICHAEL D. DEMCHAK 116 Cleveland Avenue Nw, Ste. 717 Canton, Ohio 44702	MATTHEW P. MULLEN 158 North Broadway Street New Philadelphia, Ohio 44663

Hoffman, P.J.

{¶1} Plaintiffs-appellants Nora and Burlen Henline appeal the April 30, 2003 Judgment Entry of the Tuscarawas County Court of Common Pleas which granted summary judgment against them. Defendant-appellee is Dover Restaurant Management, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 14, 2000, appellants, as business invitees, entered a Wendy's Restaurant located in Bolivar, Ohio. At the time, the restaurant was owned by appellee. A rainstorm had ended approximately thirty to thirty-five minutes prior to appellants entering the restaurant. The outside door to the restaurant opens into a vestibule approximately five feet by eight feet. Inside the vestibule is a second door which leads into the restaurant. The floor in both the vestibule and the dining area is ceramic tile. Appellee did not place a mat on the tile floor inside the vestibule, but did place a non-slip mat behind the second door to step onto when entering the dining area.

{¶3} After the rain ended, but prior to appellants arriving at Wendy's, appellee's employee, Steven Wise, dry mopped the vestibule. He then placed "Caution: wet floor" cones in the dining area of the restaurant. He did not place a similar cone in the vestibule area. At deposition, he testified, water continued coming in under the door even after he mopped the vestibule area, and he was told to wait a few minutes and dry mop again.

{¶4} Appellants arrived at Wendy's at approximately 7:30 to 8:00 p.m. prior to a second dry mop. Burlen Henline opened the door to the vestibule and stepped in ahead of Nora, holding the door for her. Nora placed her lead foot on the tile floor in the vestibule, slipped and fell to the ground. This was Nora's first visit to the Wendy's in Bolivar. She

testified at deposition she did not know the tile floor was wet and a non slip mat was not in place behind the entrance door.

{¶5} Steven Wise testified at deposition no one had come into the store in front of the Henlines, it was between 10 and 30 minutes since anybody had walked into the vestibule ahead of the Henlines, and no one came into the restaurant while it was raining.

{¶6} On June 10, 2002, appellants filed their complaint. Appellee filed a motion for summary judgment on January 21, 2003. On February 24, 2003, appellants filed a cross motion for partial summary judgment and memorandum in opposition to appellee's motion for summary judgment. On April 16, 2003, appellants filed a supplemental brief in support of their cross motion. On April 18, 2003, appellee's filed a reply brief. In an April 30, 2003 Judgment Entry, the trial court granted summary judgment in favor of appellee and denied appellants' cross motion.

{¶7} It is from this judgment entry appellants prosecute their appeal, assigning the following errors:

{¶8} "I. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND OVERRULED THE MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS-APPELLANTS, NORA HENLINE AND BURLEN HENLINE AND THEREBY DETERMINED THAT APPELLEE HAD NOT BREACHED ITS LEGAL DUTY OF CARE TO APPELLANTS.

{¶9} "II. THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND OVERRULED THE MOTION OF SUMMARY JUDGMENT OF PLAINTIFFS-APPELLANTS AND THEREBY DETERMINED THAT PLAINTIFFS-APPELLANTS HAVE FAILED TO PRODUCE A

SUFFICIENT QUANTUM OF EVIDENCE ON THE ISSUES POSTURED FOR SUMMARY JUDGMENT FOR WHICH THE PLAINTIFFS-APPELLANTS BEAR THE BURDEN OF PRODUCTION AT TRIAL."

{¶10} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36.

{¶11} Civ.R. 56(C) states, in pertinent part:

{¶12} "Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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 judgment as a matter of law....A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶13} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. 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. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party

satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

{¶14} It is based upon this standard we review appellants' assignments of error.

I, II

{¶15} Appellants' assignments of error raise common and interrelated issues; accordingly, we will address the arguments together.

{¶16} As business invitees, appellee owed appellants a duty of ordinary care to maintain the premises in a reasonably safe condition to prevent customers from being exposed to unnecessary and unreasonable dangers. However, where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises.

{¶17} Where an injury is due to a hazardous condition not created by the business owner, a plaintiff must show the business owner had, or in the exercise of ordinary care, should have had, notice of the hazard for a sufficient time to enable the owner to remove it or warn patrons about it. Evidence of the length of time the hazard existed is necessary to support an inference an owner had constructive notice. Accordingly, to establish a property owner's negligence, appellants herein had the burden of proving one of three things: 1) appellee or its employee caused the substance to be placed on the floor; 2) appellee or its employees knew of the presence of the foreign substance on the floor and failed to remove it; or 3) the substance had been on the floor long enough that appellee should have discovered and removed it in the exercise of ordinary care.

{¶18} Vicki Hafers, General Manager of the Wendy's restaurant in Bolivar, testified she would agree the tile floor was slippery when wet. Also, employee Steven Wise stated in his deposition:

{¶19} "A. * * * I know that when these floors get slick that it's very slippery because a few times after I had got done mopping I would be walking back and sometimes I would slip myself.

{¶20} "Q. Okay.

{¶21} "A. Even with big thick-tread work boots or shoes that I had.

{¶22} "Q. And that, or course, we've got this tile all the way through this area, right?

{¶23} "A. Yes."

{¶24} Tr. at 11.

{¶25} Steve Mastin, owner and operator of the Wendy's, testified at times mats are placed in the vestibule to make "footing a little better." He testified at deposition:

{¶26} "Wendy's International provides written policies on floor care, which read "Use the 'Caution: wet floor' cones anytime the floors are wet." Further "let the floor thoroughly air dry prior to removing the 'Caution: wet floor' cones", "place 'Caution: wet floor' cones out to warn people floors are wet", and "after dry mopping let the floor thoroughly air dry prior to removing 'Caution: wet floor' cones". This policy provided to appellee may be considered as evidence in determining whether appellee breached its duty of care.

{¶27} After dry mopping the vestibule area, appellee did not place "Caution: wet floor" cones in the vestibule prior to appellants' arrival. Rather, the cones were placed inside the restaurant's dining area, outside the view of entering patrons.

{¶28} Appellee maintains the danger created by the wet tile was open and obvious; therefore, no duty was owed to appellants. Appellee asserts water tracked into the entrance of a retail establishment by patrons due to rain or snow is considered an open and obvious condition. However, appellee does not offer evidence demonstrating the water was tracked in by restaurant patrons. Rather, the testimony of employee Steven Wise demonstrates the water was coming in under the door:

{¶29} "A. The two vestibules. Because there was a lot of water because when a lot of water hits the sidewalks outside it will sometimes start to go under the doors. And people will track it in and then track it up to the front register. And it's just as slippery in the vestibules as it is up here if it does get as wet out there so they had me run a dry mop up through here and then in the vestibules.

{¶30} "Q. Had you dry mopped after it had stopped raining?

{¶31} "A. After it was completely done, yes, and that was - -

{¶32} "Q. Had she fallen yet?

{¶33} "A. No. She had not fallen yet.

{¶34} "Q. Okay. So you had gone out with a dry mop. Are you taking a bucket with you?

{¶35} "A. Yeah, to wring it out and then start again. But also after I got done I noticed that still some water was getting down under the door and they just told me to wait a few minutes and get ready to do it and that's when she had came in and then fell down." Tr. at 17.

{¶36} The testimony demonstrates the water came in under the door, rather than being tracked in. Upon review of the above, genuine issues remain and reasonable minds

could come to varying conclusions relating to appellee's duty of care to maintain its business premises in a reasonably safe condition for the intended use of its invitees. Accordingly, we find the trial court erred in granting summary judgment in favor of appellee.

{¶37} Appellants' assignments of error are sustained.

{¶38} The April 30, 2003 Judgment Entry of the Tuscarawas County Court of Common Pleas is reversed and the case is remanded to that court.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur