[Cite as *Ticknor v. Morgan House*, 2010-Ohio-3100.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
SHIRLEY TICKNOR, et al.,	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
Plaintiffs-Appellants	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CAE 12 0101
	:	
	:	
THE MORGAN HOUSE, et al.,	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Delaware County Court of Common Pleas Case No. 08 CVC 071043
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 29, 2010

APPEARANCES:

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Edwards, P.J.

{¶1} Plaintiffs-appellants, Shirley Ticknor and William Ticknor, appeal from the November 23, 2009, Judgment Entry of the Delaware County Court of Common Pleas granting summary judgment in favor of defendants-appellees The Morgan House, Stephen Heilen and Kendra Heilen.

STATEMENT OF THE FACTS AND CASE

{¶2} On July 31, 2006, appellant Shirley Ticknor (hereinafter "appellant"), her daughter and two friends went to The Morgan House, a restaurant and gift shop with many different rooms and levels. Appellant had visited The Morgan House twice before and the last time she visited had been over a year before.

{¶3} After eating in the restaurant, the four decided to look through the gift shop. Appellant went to an area that contained shelves with colorful cookbooks. The cookbooks were located on a narrow stand near a step that went down into another room of the gift shop. The edge of the step was marked by a black strip that did not traverse the entire length of the step.

{¶4} Appellant had never been in that area of The Morgan House before. As she was standing looking at the cookbooks, appellant fell from one level of The Morgan House to a different level. When asked during her deposition if she had taken a step, appellant testified as follows: "Not to my knowledge. I didn't –all I remember, I was standing there, and then—totally focused on the cookbooks, and then I realized, oh, I'm falling and I can't stop it." Appellant's Deposition at 37. Appellant indicated that she did not know what made her fall, but testified that she must have taken a step or else she would not have fallen. Appellant admitted that it was fair to say that if she had taken a

step, she was not looking where she was stepping because she was still looking at the cookbooks.

{¶5} The following testimony was adduced when appellant was asked about the area in which the cookbooks were located:

{¶6} "Q. As you approached the cookbooks when you were first walking through the shop - - you've already talked about you've been in this place before. There's (sic) many different levels throughout; is that true?

{¶7} "A. That's true.

{¶8} "Q. As you approached the area where the cookbooks were, it's my understanding - - I've been out there. It looks like you're looking through to another room right next to where the cookbooks are; is that right?

{¶9} "A. I wasn't looking in that room. I was looking at the cookbooks.

{¶10} "Q. So you didn't even notice that there was another room beyond the cookbooks?

{¶11} "A. I knew there was, but I wasn't - - I mean, I know the store goes on and there was another room there.

{¶12} "Q. And I asked you earlier if you had ever been in that area of the store before. And you told me you didn't remember. And now you're telling me that you did know that there was a room beyond that even as you approached or - - I'm trying to understand how you knew that there was a room beyond that.

{¶13} "A. I knew - - I have been in most of the rooms of The Morgan House. And there's (sic) lots of rooms. And to the best of my ability I tried to cover them all.

{¶14} "Q. Okay. You liked to be thorough, you went through as much of the shops as you could?

{¶15} "A. Right.

{¶16} "Q. All right. So as you're waking (sic) up to the cookbooks, were you aware at that point, at that particular time, not just generally, but as you're approaching the cookbooks were you aware there was another room beyond the cookbooks?

{¶17} "A. I wasn't thinking about anything but the cookbooks.

{¶18} "Q. All right. As you approached the area did you notice that just beyond the cookbooks that was another level?

{¶19} "A. I knew there was another room, but I wasn't thinking about moving on to another room. I saw the cookbooks and focused - - my focus was on that." Appellant's Deposition at 38-40.

{¶20} Appellant testified that she did not look beyond the cookbooks to see what was there.

{¶21} As a result of her fall, appellant sustained serious injuries. On July 29, 2008, appellant and her husband [hereinafter together referred to as "appellants"] filed a complaint against appellees The Morgan House, Inc. and Stephen and Kendra Heilen who own the real property on which appellant was injured. Appellants, in their complaint, alleged that appellant had fallen because she did not see the step. After appellees filed a Motion for Summary Judgment, the trial court, as memorialized in a Judgment Entry filed on November 23, 2009, granted the same. The trial court, in its Judgment Entry, found that appellant was unable to establish the reason for her fall and thus could not establish that appellees breached any duty of care. The trial court further

found that the step was open and obvious and that, therefore, appellees did not breach any duty of care to appellant or her husband.

{¶22} Appellants now raise the following assignments of error on appeal:

{¶23} "I. THE TRIAL COURT COMMITTED ERROR IN GRANTING SUMMARY JUDGMENT AND HOLDING THAT PLAINTIFFS DID NOT PROVE THE CAUSE OF SHIRLEY TICKNOR'S FALL.

{¶24} "II. THE TRIAL COURT COMMITTED ERROR BY GRANTING SUMMARY JUDGMENT AND HOLDING THAT THE STEP THAT CAUSED PLAINTIFF SHIRLEY TICKNOR'S FALL WAS OPEN AND OBVIOUS."

I

{¶25} Appellants, in their first assignment of error, argue that the trial court erred in granting summary judgment to appellees. Appellants specifically contend that the trial court erred in holding that appellants failed to prove the cause of appellant's fall. We disagree.

{¶26} 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, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C) which provides, in pertinent part:

{¶27} "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 the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶28} Pursuant to the above rule, a trial court may not enter 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*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶29} As an initial matter, we note that appellants contend that the trial court failed to consider all of the evidence as required by Civ.R. 56(C). Appellants note that the trial court did not refer to all of the evidence in its ruling. As stated above, we review a motion for summary judgment de novo. See *Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162, 703 N.E.2d 841. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Baker v. The Buschman Co.*

(1998), 127 Ohio App.3d 561, 566, 713 N.E.2d 487. Therefore, any failure by the trial court to review summary judgment materials is necessarily harmless. Assuming, arguendo, that the trial court did fail to review the materials submitted by the appellants, this Court's de novo review of this matter is sufficient to correct any alleged error.

{¶30} At issue in the case sub judice is whether or not appellees were negligent. In order to establish a claim for negligence, a plaintiff must show: (1) a duty on the part of defendant to protect the plaintiff from injury; (2) a breach of that duty; and (3) an injury proximately resulting from the breach. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. If a defendant points to evidence illustrating that the plaintiff will be unable to prove any one of the foregoing elements and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to judgment as a matter of law. *Aycock v. Sandy Valley Church of God,* Tuscarawas App. No.2006 AP 09 0054, 2008-Ohio-105, at paragraph 20.

{¶31} In a premises liability case, the relationship between the owner or occupier of the premises and the injured party determines the duty owed. *Aycock,* supra at at paragraph 21 citing *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315, 1996-Ohio-137, 662 N.E.2d 287; *Shump v. First Continental-Robinwood Assocs.* (1994), 71 Ohio St.3d 414, 417, 644 N.E.2d 291. Ohio adheres to the common-law classifications of invitee, licensee, and trespasser in cases of premises liability. *Shump v. First Continental-Robinwood Assoc.* (1994), 71 Ohio St.3d 414, 417, 1994-Ohio-427, 644 N.E.2d 291, 294; *Boydston v. Norfolk S. Corp.* (1991), 73 Ohio App.3d 727, 733, 598 N.E.2d 171, 175.

{¶32} In the case at bar, appellant was a business invitee. An invitee is defined as a person who rightfully enters and remains on the premises of another at the express or implied invitation of the owner and for a purpose beneficial to the owner. *Gladon*, supra at 315. The owner or occupier of the premises owes the invitee a duty to exercise ordinary care to maintain its premises in a reasonably safe condition, such that its invitees will not unreasonably or unnecessarily be exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474. A premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers. See *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 358, 390 N.E.2d 810. However, a premises owner is not, an insurer of its invitees' safety against all forms of accidents that may happen. *Paschal ,* supra at 204. Invitees are expected to take reasonable precautions to avoid dangers that are patent or obvious. See *Brinkman v. Ross*, 68 Ohio St.3d 82, 84, 1993-Ohio-72, 623 N.E.2d 1175; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus. Therefore, when a danger is open and obvious, a premises owner owes no duty of care to individuals lawfully on the premises. See *Armstrong v. Best Buy Co.,* 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088; *Sidle*, supra at paragraph one of the syllabus.

{¶33} The mere fact that appellant fell does not establish any negligence on the part of appellees; there must be evidence showing that some negligent act or omission caused appellant to slip and fall. *Green v. Castronova* (1966), 9 Ohio App.2d 156, 161, 223 N.E.2d 641. Negligence will not be presumed and cannot be inferred simply because the accident occurred. See *Beair v. KFC Nat. Mgmt. Co.,* Franklin App. No. 03AP-487, 2004-Ohio-1410, at paragraph 9. To establish negligence in a slip and fall

case, it is incumbent upon the plaintiff to identify or explain the reason for the fall. *Stamper v. Middletown Hosp. Assn.,* (1989), 65 Ohio App.3d 65, 67-68 582 N.E.2d 1040, citing *Cleveland Athletic Assn. Co. v. Bending* (1934), 129 Ohio St. 152, 194 N.E. 6. Where the plaintiff, either personally or by outside witnesses, cannot identify what caused the fall, a finding of negligence on the part of the defendant is precluded. *Id.*

{¶34} Upon our review of the evidence, we concur with the trial court that appellant cannot identify the cause of her fall. Appellants, in support of their argument that appellant fell as a result of not seeing the step, note that Marianne Moody, who was with appellant on the day in question, stated in her affidavit, in relevant part, as follows:

{¶35} "5. I turned to glance over to Mrs. Ticknor [appellant] and I saw her falling through the air and as she hit the floor.

{¶36} "6. It appeared to me that Mrs. Ticknor [appellant] missed the step and that caused her to fall because I saw no other reason for her to fall."

{¶37} Appellants also point out that Valerie Witter, an employee of The Morgan House, stated during her deposition and in a written statement attached to her deposition as Exhibit C, that appellant told her that appellant did not see the step because she was not paying attention and just stepped off the same and fell. Finally, appellants note that the Emergency Medical Services Report prepared by the squad that came to assist appellant states, in relevant part, as follows: "pt [appellant] stated she did not see the step and fell."

{¶38} However, what is significant is that none of the above individuals saw appellant fall and thus had no personal knowledge as to the reason for her fall. Marianne Moody, in her affidavit, speculated that appellant missed the step. Valerie

Witter, during her deposition, also testified that appellant indicated that she "had had hip replacement surgery that didn't go well. And so she seemed to think that that's why she fell." Deposition of Valerie Witter at 8. Thus, as noted by appellees, appellant gave Witter more than one possible reason for her fall: (1) she fell because she was not paying attention, and (2) she fell due to her hip surgery.

{¶39} While appellant, right after her fall, may have indicated to others who were present that she took a step and fell, as is stated above, appellant, during her deposition, testified that, to her knowledge, she never took a step. When asked what made her fall, appellant testified that she did not know. She further testified that she must have taken a step or else she would not have fallen and she agreed that she presumed that she took a step.

{¶40} We note that appellant, in her affidavit, which was filed with the trial court on August 12, 2009, stated, in relevant part, as follows:

{¶41} "11. I did not stumble, lose my balance, slip or trip on anything to cause me to fall.

{¶42} "12. No one pushed me to cause me to fall.

{¶43} "13. I did not faint or pass out from any medical condition to cause me to fall.

{¶44} "14. The only manner in which I could have fallen is to take a step to my left and since there was no floor to my left because of the step, I would have stepped off into the air and fallen."

{¶45} However, in *Byrd v. Smith,* 10 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, the Ohio Supreme Court held that, "[a]n affidavit of a party opposing summary

judgment that contradicts former deposition testimony of that party, may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment." *Id.* at paragraph three of the syllabus. Appellant does not provide any explanation why her affidavit contradicts the statements that she made during her deposition as to the cause of her fall. Moreover, as noted by the trial court, "[a]t most, [appellant] can only speculate that the step was the cause of her fall by attempting to eliminate [in her affidavit] other possible causes."

{¶46} Based on the foregoing, we find that the trial court did not err in holding that appellant was unable to establish the reason for her fall and that appellees, therefore did not breach a duty of care owed to appellant. We find, therefore, that the trial court did not err in granting appellees' Motion for Summary Judgment.

{¶47} Appellants' first assignment of error is, therefore, overruled.

II

{¶48} While appellants, in their second assignment of error, argue that the trial court erred in holding that the step was open and obvious, based on our disposition of appellants' first assignment of error, appellants' second assignment of error is moot.

{¶49} Accordingly, the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES

JAE/d0503

[Cite as *Ticknor v. Morgan House*, 2010-Ohio-3100.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

SHIRLEY TICKNOR, et al.,	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
THE MORGAN HOUSE, et al.,	:	
Defendants-Appellees	:	CASE NO. 09 CAE 12 0101

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to appellants.

s/Julie A. Edwards

s/Sheila G. Farmer

s/Patricia A. Delaney

JUDGES