[Cite as *Freeman v. Value City Dept. Store*, 2010-Ohio-4634.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
IDA FREEMAN	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellant	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2010 CA 00034
	:	
	:	
VALUE CITY DEPARTMENT STORE, et al.,	:	O P I N I O N
Defendants-Appellees		

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas Case No. 2009-CV-02323
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 27, 2010

APPEARANCES:

For Plaintiff-Appellant

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Edwards, P.J.

{¶1} Plaintiff-appellant, Ida Freeman, appeals from the January 14, 2010, Judgment Entry of the Stark County Court of Common Pleas granting the Motion for Summary Judgment filed by defendants-appellees Value City Department Store, Metro Door, Inc. and Faircrest Door, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} On December 8, 2005, at approximately 8:00 p.m., appellant went to appellee Value City Department Store to do some shopping. Appellant regularly shopped at the particular store.

{¶3} During the few weeks since appellant had last been at the store, appellee Value City had done some remodeling to one of the front doors. Appellant had been in and out of the same doors before with no problems. As appellant walked through the front door to the store, her foot got caught on the door threshold, causing her to fall. According to appellant, the threshold was approximately two and one half inches high.

{¶4} On June 12, 2009, appellant filed a complaint against appellees Value City Department Store and Metro Door, Inc.[1] Appellant, in her complaint, alleged that appellee Metro Door, Inc. had repaired/renovated the threshold. Appellee Metro Door, Inc., on August 12, 2009, filed a Third Party Complaint against appellee Faircrest Door, Inc., the entity subcontracted by appellee Metro Door.

{¶5} Subsequently, on November 9, 2009, appellees filed a Joint Motion for Summary Judgment. Pursuant to a Judgment Entry filed on January 14, 2010, the trial court granted such motion. The trial court, in its Judgment Entry, found that the threshold was an open and obvious danger and that there was no duty to warn

[1] The case was a refiled case. It originally had been filed in Canton Municipal Court.

appellant of the same. The trial court further found that there were no attendant circumstances.

{¶6} Appellant now raises the following assignment of error on appeal:

{¶7} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEES WHEN GENUINE ISSUES OF MATERIAL FACT REMAINED AS TO WHETHER THE CONDITION CAUSING APPELLANT'S FALL WAS OPEN AND OBVIOUS."

I

{¶8} Appellant, in her sole assignment of error, challenges the trial court's award of summary judgment to appellees. Appellant specifically contends that there were genuine issues of material fact as to whether or not the raised threshold was an open and obvious condition. We disagree.

{¶9} 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:

{¶10} "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."

{¶11} 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.

{¶12} 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.

{¶13} 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 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,* supra*, Boydston v. Norfolk S. Corp.* (1991), 73 Ohio App.3d 727, 733, 598 N.E.2d 171, 175.

{¶14} 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.

{¶15} 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. See *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.*

{¶16} "Attendant circumstances" become part of the analysis and may create a genuine issue of material fact as to whether a hazard is open and obvious. *See Cummin v. Image Mart, Inc.,* Franklin App. No. 03AP1284, 2004-Ohio-2840, at paragraph 8, citing *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 498, 693 N.E.2d 807. An attendant circumstance is a factor that contributes to the fall and is beyond the injured person's control. *See Backus v. Giant Eagle, Inc.* (1996), 115 Ohio App.3d 155, 158, 684 N.E.2d 1273. "The phrase refers to all circumstances surrounding the event, such as time and place, the environment or background of the event, and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event." *Cummin,* at paragraph 8, citing *Cash v. Cincinnati* (1981), 66 Ohio St.2d

319, 324, 421 N.E.2d 1275. An attendant circumstance has also been defined to 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 have exercised at the time. *McGuire,* 118 Ohio App.3d at 499, 693 N.E.2d 807. Attendant circumstances do not include the individual's activity at the moment of the fall, unless the individual's attention was diverted by an unusual circumstance of the property owner's making. *Id.* at 498, 693 N.E.2d 807.

{¶17} Also, an individual's particular sensibilities do not play a role in determining whether attendant circumstances make the individual unable to appreciate the open and obvious nature of the danger. As the court explained in *Goode v. Mt. Gillion Baptist Church,* Cuyahoga App. No. 87876, 2006-Ohio-6936, at paragraph 25: "The law uses an objective, not subjective, standard when determining whether a danger is open and obvious. The fact that a particular appellant himself or herself is not aware of the hazard is not dispositive of the issue. It is the objective, reasonable person that must find that the danger is not obvious or apparent."

{¶18} In the case sub judice, appellant testified that the threshold was approximately two and one half inches high and was constructed of two or three planks of wood with a ridged piece of metal on top. Appellant testified that the store had lighting, that there was nothing obstructing her view as she entered the store and that she had a clear view of where she was going. Appellant admitted during her deposition that she was not looking down before she fell and that nothing prevented her from seeing the threshold. Appellant also testified that after she had fallen, she looked back and could describe the threshold "to the tee." Transcript at 58. Based on the foregoing

we concur with the trial court that the threshold was an open and obvious condition because it was neither hidden nor concealed from view and was discoverable by ordinary inspection.

{¶19} Appellant maintains that there were attendant circumstances and that, therefore, there is a genuine issue of material fact as to whether the threshold was open and obvious. Appellant argues that because she had been to the same store numerous times before without incident, she would not be expecting any change in the doorway. She also argues that appellee Value City distracted shoppers such as appellant with displays. According to appellant, "the reason for glass doors and putting displays in the front of the store and in the walkway from the doors to the main store is to attract customer's attention."

{¶20} Appellant, in her brief, argues that "[a]ppellees should not be permitted to intentionally distract its customer, and then succeed on summary judgment by claiming that the customer is automatically to blame for actually being distracted." The problem with such argument is that there is no evidence that appellant herself was actually distracted. Rather, during her deposition, appellant testified that, as she was approaching the entrance to the store on the day in question, nothing was distracting her in any way. In short, appellant did not point to any evidence that she was distracted by store displays or anything else.

{¶21} Based on the foregoing, we find that reasonable minds could only conclude that the threshold was open and obvious. We further find no evidence of any attendant circumstances which enhanced the danger to appellant and contributed to her fall. We find, therefore, that appellees owed no duty to appellant to warn her of the

threshold and that the trial court did not err in granting summary judgment in favor of appellees.

{¶22} Appellant's sole assignment of error is, therefore, overruled.

{¶23} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, P.J.

Gwin, J. and

Wise, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES

JAE/d0722

[Cite as *Freeman v. Value City Dept. Store,* 2010-Ohio-4634.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

IDA FREEMAN Plaintiff-Appell***	:	
-vs-	:	JUDGMENT ENTRY
VALUE CITY DEPARTMENT STORE, et al., Defendants-Appellees	:	CASE NO. 2010 CA 00034

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

s/Julie A. Edwards

s/W. Scott Gwin

s/John W. Wise

JUDGES