[Cite as *Tillman v. Montpelier Church of Christ*, 2012-Ohio-6252.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

Ricky Tillman	Court of Appeals No. WM-11-013
Appellant	Trial Court No. 10 CI 198
v.	
Montpelier Church of Christ	**DECISION AND JUDGMENT**
Appellee	Decided: December 31, 2012

* * * * *

Kimberly C. Kurek and John L. Huffman, for appellant.

Glenn E. Wasielewski, for appellee.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a September 26, 2011 judgment of the Williams County Common Pleas Court, which granted summary judgment in favor of defendant-appellee, Montpelier Church of Christ ("Montpelier").

{¶ 2} Plaintiff-appellant, Ricky Tillman, brings this appeal, citing one assignment of error. Tillman argues that sufficient evidence existed to raise a genuine issue of

material fact as to the proximate cause of his injuries. He, therefore, argues that summary judgment was improper.

{¶ 3} Montpelier argues that summary judgment was proper. Montpelier agrees with the trial court that it would require pure "conjecture and speculation" to find that it was the proximate cause of Tillman's injuries.

{¶ 4} For the reasons that follow, we reverse.

I. Statement of Facts

{¶ 5} Montpelier owned a home at 315 South Platt Street in Montpelier, Ohio. At the time of the incident, the property was being rented to Tyann Swirles, Tillman's fiancé. Tillman also resided at the property.

{¶ 6} On the morning of July 14, 2008, Tillman was walking from the upstairs bedroom area to the first floor of the property. As Tillman attempted to walk down the stairs, he slipped and fell down the steps, sliding on his buttocks all the way to the landing area. The stairway consisted of 13 separate 30 inch-wide steps. There was no handrail that followed the entire length of the stairs.

{¶ 7} Tillman testified in his deposition that, as he was falling, he "tried to brace [himself], catch something." He further testified that he struck his left index finger on wooden molding located at the bottom of the steps, requiring surgery and resulting in permanent functional limitations.

{¶ 8} Tillman acknowledges that he did not notice a defect of any kind in the rental home, and concedes that he did not think the stairway had any type of defect until

after he was injured. However, Tillman stated in his affidavit that "[h]ad a handrail been in place, I would have been able to grab it and brace my fall and prevent injury."

{¶ 9} Tillman filed suit against Montpelier on July 6, 2010, alleging negligence and negligence per se. Discovery ensued, after which Montpelier filed its motion for summary judgment. Tillman filed a memorandum in opposition.

{¶ 10} The trial court, although finding that Montpelier breached its duty of care to Tillman, nonetheless granted Montpelier's motion for summary judgment. The court, relying on *Renfroe v. Ashley*, 167 Ohio St. 472, 475, 150 N.E.2d 50 (1958), reasoned that Tillman did not establish proximate cause between the lack of a handrail and his injuries.

II. Assignment of Error

{¶ 11} Tillman raises the following assignment of error:

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING MCC'S MOTION FOR SUMMARY JUDGMENT AND FINDING THAT PROXIMATE CAUSE WAS NOT ESTABLISHED BETWEEN THE LACK OF A HANDRAIL AND MR. TILLMAN'S RESULTANT INJURIES.

III. Analysis

{¶ 12} In reviewing a grant of summary judgment, the appellate court follows the same standard as that employed by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 572 N.E.2d 198 (9th Dist.1989). Civ.R. 56(C) provides the standard for granting a motion for summary judgment:

> Summary judgment shall be rendered forthwith 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 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

{¶ 13} Thus, summary judgment is appropriate when (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his or her favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 14} In this case, we must determine if a genuine issue of material fact exists as to whether the lack of a handrail proximately caused Tillman's injuries.

{¶ 15} In order to establish proximate cause, Tillman relies on his deposition testimony that as he was falling he attempted to brace himself or catch the wall. Tillman also relies on his affidavit submitted with his memorandum in opposition to motion for summary judgment in which he states, "Had a handrail been in place, I would have been able to grab it and brace my fall and prevent injury." Montpelier, on the other hand, argues that Tillman's deposition testimony and affidavit are not sufficient to establish proximate cause. It agrees with the trial court that such a finding would require pure "conjecture and speculation."

{¶ 16} This case is analogous to *Dahlem v. C & W Invest. Co.*, 10th Dist. No. 89AP-434, 1989 WL 117296 (Oct. 5, 1989). In *Dahlem*, the plaintiff fell on a stairway that lacked a handrail, causing injury. Both parties moved for summary judgment. In support of his motion, the plaintiff relied on an affidavit, in which he testified,

> Both before and after the date of my injury, I have customarily and regularly used a handrail where one is available when ascending and descending stairs * * * * Because there was not a handrail at the accident site, there was no handrail to hold on to for the purpose of steadying and securing myself when I slipped, nor was there a handrail to hold on to in order to stop myself from falling. *Id.* at *7.

Nevertheless, the trial court in *Dahlem* granted summary judgment in favor of the defendant. The plaintiff appealed the trial court's decision, citing, among other things, a genuine issue of material fact as to the proximate cause of his injuries.

{¶ 17} On appeal, the Tenth District reversed, holding, "[D]efendants have failed in their burden to demonstrate that there exists no genuine issue as to any material fact as we believe that plaintiff's affidavit sufficiently indicates that the availability of a handrail may have prevented his fall." *Id.* at *8. *See also Stevens v. Aaron Rental Properties, Inc.*, 5th Dist. No. 2009CA131, 2010-Ohio-4447, ¶ 25-26 (genuine issue of material fact existed as to whether lack of a handrail was a proximate cause of plaintiff's injuries where the plaintiff testified in her deposition "* * * I started falling. I grabbed for whatever. I couldn't catch myself and ended up at the end of the stairway knocked out");

Owens v. Taylor, 10th Dist. No. 92AP-211, 1992 WL 180115 (July 21, 1992) ("[G]iven plaintiff's testimony that with a handrail she would not have fallen, plaintiff's testimony provides sufficient evidence of proximate cause to require the issue be submitted to the jury for determination.")

{¶ 18} We previously reached a similar result in *Scott v. Kirby*, 6th Dist. No. L-05-1287, 2006-Ohio-1991. In that case, the plaintiff testified in her deposition that as she stepped off the front porch, the edge of the porch crumbled, causing her left foot to give way. She then testified that because there were no handrails on the steps, she had to use her right foot to try to balance herself. As she tried to do this, her right foot slipped, causing her leg to twist, and resulting in a fractured ankle. The plaintiff later added in her affidavit, "The steps did not have a handrail, which would have helped prevent my fall and subsequent injuries." The trial court granted summary judgment to the defendant-landlord. On appeal, we reversed, holding in part that the plaintiff's testimony "creates a genuine issue of material fact on the questions of (1) whether the condition of the porch and steps was the proximate cause of her injury; (2) *whether the lack of handrails was the proximate cause of her injury*, and/or (3) whether a combination of both of these defects was the proximate cause of [plaintiff's] injuries." (Emphasis added.) *Id.* at ¶ 33.

{¶ 19} Here, in accordance with *Dahlem* and *Kirby*, after reviewing all of the evidence in the light most favorable to the non-moving party, we find a genuine issue of material fact exists as to whether the lack of a handrail was the proximate cause of Tillman's injuries.

{¶ 20} Montpelier, arguing for the opposite conclusion, contends that this case is similar to *Smalley v. Pauly*, 6th Dist. No. L-04-1106, 2004-Ohio-6885, in which this court affirmed summary judgment in favor of the defendant. In *Smalley*, the plaintiff was injured when she fell on stairs that did not contain a handrail. The plaintiff sued, alleging that the defendant's negligence in not providing a handrail caused her injuries. Both parties moved for summary judgment. In support of his motion, the defendant argued that the plaintiff failed to produce any evidence that the lack of a handrail caused her fall. The plaintiff countered that because the lack of a handrail constituted negligence per se, she should not be required to show that the lack of a handrail caused her fall. The trial court granted summary judgment in favor of the defendant.

{¶ 21} On appeal, we affirmed, finding that nothing in the record existed to support the argument that the lack of a handrail caused the plaintiff to fall. In so doing, we found it "noteworthy that [the plaintiff] stated that she did not know what caused her to lose her balance and fall. She did not testify that if there had been a handrail she would have used it and thereby would have been able to prevent her fall." *Id.* at ¶ 9.

{¶ 22} Here, however, Tillman stated in his deposition that as he was falling he "tried to brace [himself], catch something." Further, he testified in his affidavit, "Had a handrail been in place, I would have been able to grab it and brace my fall." We believe this is sufficient to create a genuine issue of material fact on the issue of proximate causation. Therefore, we find *Smalley* to be distinguishable.

{¶ 23} Montpelier next argues that the trial court properly relied on *Renfroe*, 167 Ohio St. 472, 150 N.E.2d 50, when it found that the issue of proximate causation was too speculative to withstand a motion for summary judgment.

{¶ 24} In *Renfroe,* the plaintiff brought an action for damages, claiming that her fall was due to the defendant's negligence in failing to provide a handrail at the side of a stairway. At trial, the only evidence adduced on whether the defendant's negligence proximately caused the plaintiff's injury was the plaintiff's testimony that, "I fell down the stairs. I don't know whether I slipped or tripped or what happened. All of a sudden I was flying down and automatically reached for a handrail because there was one at my father's apartment, and I know I could have prevented the fall had there been a handrail." *Id.* at 474-475. The defendant objected to the latter part of the plaintiff's testimony. The trial court sustained the objection, struck the testimony, and instructed the jury to "disregard the latter part." *Id.* at 475. At the close of the plaintiff's case, the trial court granted a directed verdict for the defendant. The court of appeals reversed, and the matter was accepted for review by the Ohio Supreme Court. In reversing the judgment of the court of appeals, and affirming the directed verdict, the Ohio Supreme Court reasoned that the plaintiff's testimony was "too meager and inconclusive to support a finding that [the defendant's] negligence was the direct or proximate cause of plaintiff's unfortunate mishap." *Id.*

{¶ 25} We find *Renfroe* to be distinguishable. In that case, the focus of the analysis was whether the absence of the handrail *caused the fall*: "Plaintiff was the only

witness who described the cause of her fall"; "whether in the circumstances the presence of a handrail would have prevented the fall is of too speculative a nature to leave to a jury's guess"; "the testimony given by plaintiff was too meager and inconclusive to support a finding that such negligence was the direct or proximate cause of plaintiff's unfortunate mishap." *Id.* at 474-475. Here, in contrast, the legal question posed is whether the absence of a handrail caused Tillman to be unable to stop or brace himself as he was already falling, resulting in permanent injury to his left hand. As it relates to that question, we find that Tillman's deposition and affidavit testimony are sufficient to create a genuine issue of material fact. Therefore, the trial court erred in granting summary judgment in favor of Montpelier.

{¶ 26} Accordingly, Tillman's assignment of error is well-taken.

IV. Conclusion

{¶ 27} On consideration whereof, the judgment of the Williams County Common Pleas Court is reversed, and the cause is remanded for further proceedings consistent with this decision. Montpelier is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____

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JUDGE

Thomas J. Osowik, J. _____

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JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.

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JUDGE