[Cite as *Estate of Barrish v. Ebert*, 2005-Ohio-4587.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85346

ESTATE OF BETTY A. BARRISH, ET AL.	:	
	:	
Plaintiffs-Appellants	:	JOURNAL ENTRY
	:	
-vs-	:	AND
	:	
JACK EBERT, ET AL.	:	OPINION
	:	
Defendants-Appellees	:	

Date of Announcement of Decision:	SEPTEMBER 1, 2005
Character of Proceeding:	Civil appeal from Court of Common Pleas Case No. CV-515671
Judgment:	Affirmed
Date of Journalization:	
Appearances:	
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JAMES J. SWEENEY, P.J.:

{¶1} In this appeal, plaintiffs-appellants the Estate of Betty A. Barrish, et al. ("Barrish") appeal from the judgment of the Cuyahoga County Court of Common Pleas which granted the motion for summary judgment of the defendants-appellees Jack Ebert, Kathleen Ebert Viesca, Jack Ebert and Co., and John Paul Ebert, dba Noble Management Co. (collectively referred to as "Ebert"). For the following reasons, we affirm the decision of the trial court. A review of the record reveals the following facts: On December 19, 1999, Betty Barrish attended an open house being held by the Psychobiology Clinic at 2936-2940 Noble Road, Cleveland Heights, Ohio. The Psychobiology Clinic is a tenant in this building, which is owned by Ebert.

{¶2} Mrs. Barrish was dropped off at the rear entrance of the premises by her husband as he went to park the car. Mrs. Barrish approached the rear entrance of the building and walked into a partially enclosed vestibule outside of the back door of the building. A concrete wheelchair ramp is located inside the vestibule. As Mrs. Barrish was walking up this ramp to enter the building, her left foot slipped on the left edge of the ramp causing her to fall onto the floor on her left side, fracturing her hip.

{¶3} On November 26, 2003, Barrish filed a complaint in the Cuyahoga County Court of Common Pleas against Ebert alleging personal injury and subsequently, wrongful death, as a result of the fall.[1]

[1]The action was originally filed by Barrish on December 17, 2001; however, it was voluntarily dismissed without prejudice on December 3, 2002.

{¶4} On June 24, 2004, Ebert filed its motion for summary judgment. On August 27, 2004, Barrish filed her brief in opposition. On September 7, 2004, the trial court granted Ebert's motion for summary judgment on the grounds that Barrish failed to present evidence (1) as to the cause of her fall and (2) that the wheelchair ramp was negligently designed, maintained, or constructed.

{¶5} It is from this decision that Barrish now appeals and raises one assignment of error for our review.

{¶6} "I. The trial court erred in granting the motion for summary judgment of defendants-appellees."

{¶7} In this assignment of error, Barrish claims that the trial court erred in granting summary judgment in favor of Ebert because genuine issues of material fact existed concerning her claim for personal injury.

{¶8} An appellate court reviews a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. "De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶9} Summary judgment is appropriate where it appears that: (1) there is no genuine issue as to any material fact; (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 favor. *Harless v. Willis Day Warehousing Co., Inc*. (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶10} The burden is on the movant to show that no genuine issue of material fact exists. Id. Conclusory assertions that the nonmovant has no evidence to prove its case are insufficient; the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to support his claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293; Civ.R. 56(C). Unless the nonmovant then sets forth specific facts showing there is a genuine issue of material fact for trial, summary judgment will be granted to the movant.

{¶11} With these principles in mind, we proceed to consider whether the trial court's grant of summary judgment in Ebert's favor was appropriate.

{¶12} Barrish's complaint alleges that Ebert is liable for her injuries because the accident was a result of the negligent construction, maintenance, and design of the wheelchair ramp located at its premises. As a general rule, the mere existence of a wheelchair ramp does not create an unreasonable hazard and a business owner does not have a duty to warn or protect invitees from the open and obvious danger presented by one. *LeJeune v. Crocker Shell Food Mart and Car Wash* (Oct. 22, 1998), Cuyahoga App. No. 74262.

{¶13} Here, in its motion for summary judgment, Ebert claimed that Barrish failed to provide a report from a liability expert to support her contentions that the wheelchair ramp was negligently constructed, designed, or maintained. In support of its motion, Ebert submitted the deposition testimony of Mrs. Barrish. Mrs. Barrish testified that it was

daylight, with no precipitation on the day that she fell. She admitted there was no obstruction to her vision as she entered the building. She admitted that she was blind in her left eye, had difficulty seeing out of her right eye, and was using a cane on the day of the fall. Upon being shown several photographs of the area where she fell, she was unable to identify the area where she fell nor was she able to identify what caused her to fall. Rather, her only testimony was that she stepped off the ramp and fell.

{¶14} In order to defeat a motion for summary judgment on a negligence claim, a plaintiff must establish that a genuine issue of material fact remains as to whether: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; and (3) the breach of duty proximately caused the plaintiff's injury. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680. Since the existence of the ramp was an open and obvious danger, Ebert did not have a duty to warn Barrish about its inherent dangers unless there was a substantial physical defect in the ramp or Ebert was negligent in maintaining it. See *LeJeune v. Crocker Shell Food Mart and Car Wash,* supra at 8. Accordingly, Barrish must produce some evidence that a genuine issue of material fact existed as to the construction, design, or maintenance of the wheelchair ramp. Barrish failed to do so.

{¶15} In support of her brief in opposition, Barrish attached the affidavit of Mr. Barrish describing the condition of the ramp and relevant portions of the ADAAG Accessibility Guidelines, which incorporate the requirements of the ADA for all places of public accommodation.[2]

[2]Barrish also offered an affidavit from his attorney who examined the records of the Cleveland Heights Building Department. These records allegedly state that Ebert failed to obtain a permit for the construction of the ramp or secure an inspection for the completion

{¶16} In his affidavit, Mr. Barrish states that he believes his wife fell because of a large four-foot-wide gap, three to four inches deep, between the edge of the ramp and the wall of the enclosure. However, Mr. Barrish does not present any evidence that this gap is a substantial physical defect or that it violates applicable building codes.

{¶17} Barrish also states that he believes his wife fell because of (1) poor lighting in the area, (2) the ramp and the floor were covered in the same dark brown carpet, (3) the ramp did not have any markings or curb, and (4) there were no handrails or guardrails. Although Barrish relies on the ADAAG Accessibility Guidelines to create an issue of fact as to whether the wheelchair ramp violated the handicap access act[3] and was negligently constructed or maintained, she fails to present any evidence to support her allegations.

{¶18} First, Section 4.8.5 of the ADAAG Guidelines states that handrails must be installed on ramps with a "rise greater than 6 in (150 mm) or a horizontal projection greater than 72 in (1830 mm)." However, Barrish did not present any evidence that the ramp in question fell within this range and required handrails. Next, Barrish cites to Section 4.8.7, which states that "ramps with drop off shall have curbs, walls, railings, or projecting surfaces that prevent people from slipping off the ramp. Curbs shall be a minimum of 2 in (50 mm) high ***." Again, although Barrish alleges that the ramp did not have a curb, she fails to present any evidence that the ramp in question had a drop off that required a curb, or in the event that it did have a drop-off, that it did not have a wall, railing or projecting surface that also complied. Finally, Barrish cites to Section 4.5.3, which deals with the use

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of the ramp. However, this "evidence" is not admissible for purposes of Rule 56(C) and (E) since they were not properly authenticated.

[3]The American's with Disabilities Act became effective in 1991 and required the installation of wheelchair ramps.

of carpeting on ramps. However, this section does not require that the carpeting used on the ramp be different from the surrounding floor. Rather, this section states that the carpet must be securely attached and specifies the loop, pile, and thickness of the carpet. Barrish failed to present any evidence that the carpeting in question on the ramp did not comply with the ADAAG Guidelines.

{¶19} An examination of the record reveals that there is nothing in the record to establish whether the wheelchair ramp complied with the specific requirements by the law, and if the wheelchair ramp did not comply with the standards, whether such noncompliance caused the injuries of Mrs. Barrish. See *Hummel v. Taco Bell* (Aug. 24, 1989), Cuyahoga App. No. 55871. As such, we conclude that Barrish has not raised a factual question that would allow reasonable minds to infer that Ebert breached a specific duty to Mrs. Barrish that was the proximate cause of her injuries. Accordingly, Barrish's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., J., CONCURS.
CHRISTINE T. McMONAGLE, J., DISSENTS
(See dissenting opinion attached).

JAMES J. SWEENEY
PRESIDING JUDGE

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶20} The facts in this case are simple and for the most part, uncontroverted. On December 19, 1999, Betty Barrish, whose estate is the plaintiff within, attended an open house being held by the Psychobiology Clinic at 2936-2940 Noble Road, Cleveland Heights, Ohio. This clinic is a tenant in a building owned by defendant Ebert.

{¶21} At the relevant time, Mrs. Barrish was blind in her left eye, sight impaired in her right eye, and walked with a cane. On the day in question, her husband dropped her off at the rear entrance of the building while he went to park the car. The rear entrance to the building had a partially enclosed vestibule which protected patrons from the elements and a concrete wheelchair ramp. The wheelchair ramp extended the length of the vestibule, but not the width. There was a four foot gap between the edge of the wheelchair ramp and the wall of the vestibule. There were no lights on in the vestibule, and the windows in the vestibule were "tinted". There were no handrails on the ramp, there were no markings on the side of the ramp, no curb on the side of the ramp, and both the ramp and the floor below it were carpeted in dark brown carpeting. Mr. Barrish identified a portion of the ramp some three to four inches above the floor where Mrs. Barrish slipped off to the side and fell, breaking her hip. Before the court as a consequence of a motion for summary judgment were pictures of the vestibule, taken by and authenticated by Mr. Barrrish, an affidavit of Mr. Barrish, and a selected portion of the deposition of Mrs. Barrish.

{¶22} The trial judge granted summary judgment in favor of the defendants, finding that "Plaintiff has not presented evidence as to the cause of her fall, nor has she presented

expert testimony to establish that the wheelchair ramp was negligently designed, maintained, or constructed. Accordingly, the Court finds that there are no genuine issues of material fact, and defendants are entitled to judgment as a matter of law."

{¶23} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. To obtain a summary judgment under Civ.R. 56(C), the moving party must demonstrate 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. The moving party bears the initial burden of informing the court of the basis of the motion and identifying those portions of the record which support the requested judgment. *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 1997-Ohio-259, 674 N.E.2d 1164. If the moving party discharges its initial burden, the party against whom the motion is made then bears a reciprocal burden of specificity to oppose the motion. Id. See, also, *Mitseff v. Wheeler* (1998), 38 Ohio St.3d 112, 526 N.E.2d 798.

{¶24} Summary judgment is appropriate if, after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to that party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. Any doubts must be resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶25} As to the first prong of the court's finding, that the plaintiff had not presented evidence as to the cause of her fall, that is simply not true: the only two witnesses to this fall were Mr. and Mrs. Barrish. Both of them stated that at the time of the fall, Mrs. Barrish was ascending the wheelchair ramp and that her foot slipped off the unmarked and unguarded edge[4].

{¶26} As to the second prong of the court's finding, that expert testimony was necessary to establish that the wheelchair ramp was negligently designed, maintained or constructed, such is simply not the case.

{¶27} In order to establish a cause of action for negligence, it is necessary to prove the existence of a duty of care, a breach of that duty of care, and injury that proximately flows from that breach. *Feldman v. Howard* (1967), 10 Ohio St.2d 189.

{¶28} In general, a premises owner owes a business invitee a duty of ordinary care, unless a danger might be described as "open and obvious." *Campbell v. Hughes Provision Co.* (1950), 153 Ohio St. 9; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. In the case of an open and obvious danger, the owner is under no duty to protect business invitees from dangers which are so obvious and apparent to such invitee that he may be reasonably expected to detect them and protect himself. The testimony of both Barrishes that the vestibule in question was not lit, contained an unmarked incline covered in a dark carpeting that was the same color as the non-inclined floor, and was an entrance to a

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[4] Mr. Barrish averred that, "I saw my wife's left foot slip from or miss the left edge of the ramp, and I watched her fall from the ramp to the floor, landing on her left side." (Charles Barrish Affidavit, ¶6). Mrs. Barrish testified that, "I started to walk up the ramp on the inside to the elevator and I was walking up and it was black on black and I did not see that there was a slab and my left foot just went right off." (Betty Barrish Deposition, p.16, lines 8-11). She further testified that, "I was in the middle of it (the ramp). There was a drop to the floor and I went off the side down on the floor." (Id. at p. 17, lines 16-18).

medical building where medically and visually impaired persons might come removes from all doubt the issue of "open and obvious."

{¶29} The next issue is the duty of ordinary care. The defense argued, and the trial court ruled, that an expert was needed in order to establish the standard of ordinary care. Expert testimony is not always required, however, to establish a standard of care. "Except for malpractice cases (against a doctor, dentist, etc.), there is no general rule or policy requiring expert testimony as to the standard of care, and this is true even in the increasingly broad area wherein expert opinion will be received." *Kemper v. Builder's Square* (1996), 109 Ohio App.3d 127, citing *Thompson, Admx., v. Ohio Fuel Gas Co.* (1967), 9 Ohio St.2d 116; see, also, *Anderson v. Stratton Chevrolet* (2000), Mahoning App. No. 99-CA-164, 2000-Ohio-2592; *State Farm Mut. Auto. Ins. Co. v. Kia Motors Am., Inc.* (2005), 160 Ohio App.3d 727, 2005-Ohio-2222; *Baiko v. Mays* (2000), 140 Ohio App.3d 1.

{¶30} Finally, Appellee cites *Hummel v. Taco Bell* (Aug. 24, 1989), Cuyahoga App. No. 55871, and *LeJeune v. Crocker Shell Food Mart & Car Wash* (Oct. 22, 1998), Cuyahoga App. No. 74262, as being on point and dispositive of the issues in the case sub judice. They are not. In *Hummel*, the court held that the only testimony regarding the cause of the fall was that "there was nothing on the wheelchair ramp which caused her to slip, and that it was a beautiful day, without rain or snow. Further she stated that she walked up the ramp in order to enter the restaurant, thus negating any possibility that she was unaware of the ramp while she was departing. Appellant also testified that there were no cracks or depressions in the pavement of the ramp. She simply slipped on the heel of her shoe and fell to the ground, having chosen to walk down the wheelchair ramp rather than stepping off the curb. Moreover, appellant does not allege that she is handicapped."

In short, the only nexus between the wheelchair ramp and the fall was that the wheelchair ramp was the location of the fall. Nothing about the ramp itself or its surroundings was shown to have caused Ms. Hummel to fall.

{¶31} In *LeJeune,* Ms. LeJeune exited a car, walked around the front of the vehicle, and fell over a wheelchair ramp. The court held that a wheelchair ramp of its own nature, is not per se dangerous as its nature is "open and obvious."

{¶32} Neither of these decisions address the allegations at issue here. In this case, the border of the ramp was obscured by inadequate lighting and dark carpeting. Further, there were no handrails, nor was there a curb which might have offset the dangers created by the lighting and lack of contrast. The issue of whether this homemade, unusually configured wheelchair ramp posed a potential danger to handicapped persons who might utilize it was a question for the jury and it was hence error to grant summary judgment upon the issue.