[Cite as *Sollberger v. USA Parking Sys., Inc.*, 2011-Ohio-216.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94859

THERESE SOLLBERGER

PLAINTIFF-APPELLANT

vs.

USA PARKING SYSTEMS, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-693425

BEFORE: Blackmon, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: January 20, 2011

ATTORNEY FOR APPELLANT

Dustin S. Lewis
The Pyle Law Firm
33565 Solon Road
Solon, Ohio 44139

ATTORNEY OR APPELLEE

Molly Steiber Harbaugh
55 Public Square, Suite 930
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Therese Sollberger ("Sollberger") appeals the trial court's decision granting summary judgment in favor of USA Parking Systems, Inc. ("USA Parking") and assigns the following error for our review:

> **"I. The court of common pleas was in error in granting summary judgment to appellees-defendants."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On May 21, 2007, Sollberger was employed by New York Life Insurance Company, whose office was located in Lakewood, Ohio. Sollberger arrived for work and parked her car in a garage owned by USA Parking. After Sollberger exited her car and was walking down a flight of nine concrete stairs, she fell, sustaining injuries.

{¶ 4} On May 21, 2009, Sollberger filed a complaint against USA Parking Systems, alleging that their negligence proximately caused her to fall and that she sustained injuries as a result. On January 11, 2010, USA Parking filed a motion for summary judgment alleging that Sollberger had failed to identify the cause of her fall, that the condition was not unreasonably dangerous, and that the condition was open and obvious. On February 16, 2010, Sollberger filed her brief in opposition to USA Parking's motion for

summary judgment. On February 26, 2010, the trial court granted USA Parking's motion for summary judgment.

Summary Judgment

{¶ 5} In her sole assigned error, Sollberger argues the trial court erred in granting summary judgment in favor of USA Parking.

{¶ 6} We review an appeal from summary judgment under a de novo standard of review. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212; *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 699 N.E.2d 534. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion that is adverse to the non-moving party.

{¶ 7} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact. Id. at 293.

{¶ 8} 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. *Frankmann v. Skyline Mgt., L.L.C.,* Cuyahoga App. No. 88807, 2007-Ohio-3922, citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602, 693 N.E.2d 271. Whether a duty exists is a question of law for the court to determine. Id., citing *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265.

{¶ 9} In the instant case, at her deposition, Sollberger testified in pertinent part as follows:

"Q. Why did you lose your balance?

"A. Something got caught under my foot, loose gravel or stones. It was a split second. I tried everything I could to hang onto that rail and I couldn't.

"Q. So you stepped off the landing with your right foot on the second step. And then when your left foot went down on the third step, you stepped onto some loose gravel?

"A. Or stones, yeah. It just happened so fast.

"* * *"

"Q. Okay. Could you see the steps in front of you, the seven or eight steps down to the next landing in front of you?

"A. Yes.

"Q. So there wasn't anything on top of the steps obscuring your view of these steps in front of you, correct?

"A. Correct.

"* * *

"Q. You said you stepped on loose stones or gravel. Is that what you are saying?

"A. Right. But I can't say what's underneath my shoe. I can't tell you how much was there. If I'm looking to go down the steps, if its under my shoe, I couldn't tell you how many pieces it would be. It just happened so fast it was enough to take my foot out from underneath me.

"* * *

"Q. After you fell, did you look and see what caused you to fall?

"A. I was in a complete daze. No I did not, I was stunned.

"Q. You just know you lost your footing, is that correct?

"A. Correct.

"Q. Can you state specifically what caused you to fall?

"A. Just as I said, loose gravel, stones. Things that should not be on stairs. Things that should have been swept up.

"Q. But you did not see any loose stones on the steps as you walked forward down the steps, is that correct?

"A. Not where I fell, but yeah, there was — in the times I've used steps, yeah, I've noticed gravel and stones. And if you're walking and they're right there in the middle, you avoid them. What I stepped on could only barely be felt enough to know where it just took your foot like that.

"Q. Okay. I'm asking you on the day of this accident, on May 21st, 2007, as you were looking down the steps that were illuminated by the overhead light, did you see any gravel on the steps prior to falling down?

> **"A. If my right foot was still on the second — I usually did look down, but I don't know if I paid attention to what was really there. I can't remember if I actually saw it because my right foot was actually going down on that — my left foot was already going down on that step as my right one was coming off, so I was looking down, but I can't say for sure how many I saw or what I saw, but there might have been, I might have something, but my foot was already getting on top of it."** Sollberger Depo. 98 – 100.

{¶ 10} A review of the above excerpt, as well as elsewhere in the record, indicates that initially Sollberger could not identify what caused her to fall. Sollberger ultimately opined that she had to have slipped on loose gravel on the steps. However, despite Sollberger's ultimate conclusion that loose gravel caused her to fall, she testified that she had an unobstructed view as she walked down the steps prior to falling. Sollberger also testified that there was nothing on the steps in front of her as she walked down the stairs.

{¶ 11} In addition, Sollberger testified that she had seen gravel on previous occasions when she used the stairs, but could not remember if that was the case on the day she fell. Further, Sollberger testified that she could barely feel whatever she slipped on the day of the accident.

{¶ 12} In a similar slip and fall case, *Coleman v. Dave's Supermarket, Inc.*, Cuyahoga App. No. 88661, 2007-Ohio-2381, the plaintiff could only speculate as to what caused her fall. She testified that she "felt it was wet," based on the fact that her pants were wet when she got up. This court reiterated, "[a]n inference of negligence does not arise from mere guess, speculation, or wishful thinking, but rather can arise only upon proof of some fact from which such inference can

reasonably be drawn." Id., quoting *Parras v. Standard Oil Co.* (1953), 160 Ohio St. 315, 116 N.E.2d 300, paragraph two of the syllabus.

{¶ 13} Likewise, in *Mines v. Russo's Stop & Shop* (Feb. 23, 1989), Cuyahoga App. No. 55073, the plaintiff could not explain the actual cause of her fall. In *Mines*, plaintiff claimed that a depression was in the pavement where she fell, but she did not say that she tripped in the depression. Plaintiff even admitted the possibility that her fall might not have resulted from a defect in the pavement. The failure to identify or explain the reason for a fall while a plaintiff is on property owned by a defendant precludes a finding that the defendant acted negligently. *Bailey v. St. Vincent DePaul Church* (May 8, 1997), Cuyahoga App. No. 71629.

{¶ 14} Moreover, in light of Sollberger's testimony that she could barely feel what she slipped on the day of the accident, we conclude that the alleged defect on the stairway — small loose gravel — that Sollberger speculates to have caused her to fall, constitutes a minor defect. "Minor or trivial imperfections, which are not unreasonably dangerous and which are commonly encountered and to be expected, as a matter of law do not create liability on the part of such owners or occupiers toward a pedestrian who, on account of such minor imperfections, falls and is injured." *Pacey v. Penn Garden Apts.* (Feb. 19, 1999), 2d Dist. No. 17370, citing *Helms v. Am. Legion, Inc.* (1966), 5 Ohio St.2d 60, 213 N.E.2d 734, syllabus

{¶ 15} As such, we will address if any attendant circumstances could convert the minor defect into a substantial defect, thus creating a possible action.

Although there is no precise definition of "attendant circumstances," they generally include "any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time." *Gordon v. Dziak*, Cuyahoga App. No. 88882, 2008-Ohio-570, citing *France v. Parliament* (Apr. 27, 1994), 2d Dist. No. 14264.

{¶ 16} To render a minor defect substantial, attendant circumstances must not only be present, but must create a "greater than normal," and hence substantial

{¶ 17} risk of injury. The attendant circumstances must, taken together, divert the attention of the pedestrian, significantly enhance the danger of the defect, and contribute to the fall. Id., citing *Stockhauser v. Archdiocese of Cincinnati* (1994), 97 Ohio App.3d 29, 33, 646 N.E.2d 198.

{¶ 18} Sollberger testified that she was not distracted by anything while walking down the stairs. As previously stated, Sollberger also testified that she had an unobstructed view as she walked down the steps prior to falling and that there was nothing on the steps in front of her as she walked down the stairs.

{¶ 19} After construing the evidence most favorably to Sollberger, we find that the record discloses no genuine issue of material fact. Summary judgment was properly granted in favor of USA Parking because Sollberger could only speculate as to the cause of her fall. We further conclude that the loose gravel that Sollberger speculates caused her to fall was a minor defect, and there was no

attendant circumstances surrounding the incident to elevate the alleged minor defect into a substantial one. As such, USA Parking could not be held liable for Sollberger's fall. Accordingly, we overrule the sole assigned error.

Judgment affirmed.

It is ordered that appellees recover from appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR