[Cite as *Bohne v. Gaglione*, 2009-Ohio-5913.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

MARIE BOHNE	)	CASE NO. 07 MA 230
	)	
PLAINTIFF-APPELLANT	)	
	)	
VS.	)	OPINION
	)	
ANTHONY L. GAGLIONE, et al.	)	
	)	
DEFENDANTS-APPELLEES	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 00 CV 1895

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

Atty. William C.H. Ramage
4822 Market Street, Suite 220
Boardman, Ohio 44512

For Defendants-Appellees:

Atty. Craig G. Pelini
Atty. Kristen E. Campbell
Pelini, Campbell, Williams & Traub LLC
Bretton Commons – Suite 400
North Canton, Ohio 44720

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: November 4, 2009

WAITE, J.

{¶1} Appellant, Barbara Bohne, Executrix of the Estate of Marie Bohne ("Bohne"), appeals the directed verdict entered in favor of Appellees, Anthony L. and Gail B. Gaglione by the Mahoning County Court of Common Pleas in this negligence action. For the following reasons, the decision of the trial court is affirmed.

Facts

{¶2} The facts are taken from the excerpt of the trial included in the record on appeal. The transcript contains the testimony of Brigitte Phillips, the sales clerk who was present when Bohne was injured, Richard Kraly, an architect who provided expert testimony regarding compliance with the Ohio Basic Building Code ("building code"), and Barry Bates, a retired professor who provided expert testimony on human performance and biomechanics.

{¶3} On September 9, 1999, Bohne visited Adi's Boutique at the Starr Centre Plaza on Route 224 in Canfield, Ohio. (Tr., p. 5.) Bohne was 85 years old and a regular customer of the boutique. It was a hot day and Phillips noticed that Bohne appeared tired and pale, so she asked Bohne to sit down and gave her a glass of ice water. The two women chatted briefly while Bohne drank the ice water, and then she did some shopping. (Tr., pp. 5-6.)

{¶4} Approximately 45 minutes later, Bohne finished her shopping. Phillips offered to carry Bohne's package and to help Bohne to her car. Bohne took Phillips' arm and they walked out of the store together. When they got to the steps leading to the parking lot, Bohne let go of Phillips' arm and said, "I'm fine, Brigette [sic]." (Tr., p. 7.) Bohne then took hold of a pole at the top of the steps. (Tr., pp. 7-8.)

{¶5} There were two steps, or three risers, leading to the parking lot but no handrails. The variance between the boardwalk and the first step (riser #1) was 5 and 1/2 inches. The variance between the first step and the second step (riser #2) was 5 and 3/4 inches. The variance between the second step and the ground level (riser #3) was 6 and 1/2 inches. The building code permitted no more than a 3/16 inch variance between steps. (Tr., pp. 35-36.) The width of the steps was 89 1/2 inches. The building code required handrails on each side of the steps, as well as a center handrail for steps measuring 88 inches or wider. (Tr., p. 38.)

{¶6} After Bohne let go of Phillips' arm, Phillips proceeded to walk down the steps toward Bohne's car. (Tr., p. 8.) She testified that she was, "ahead of [Bohne] maybe two steps or so going towards the car when all of a sudden down [Bohne] went." Phillips stated that she, "went down the step and maybe started going to the next step when [Bohne] started coming down, and then there was this clunk and she was down." (Tr., p. 8.) According to Phillips, she was on the ground level trying to open Bohne's car door when she discovered Bohne face down on the cement in front of the bottom step. (Tr., p. 9.) Phillips did not actually see Bohne fall, and Bohne had no recollection of the events preceding the fall. (Tr., pp. 9, 19.)

{¶7} Although Kraly testified that the steps presented two building code violations, he was unable to attribute the accident to those violations. (Tr., p. 55.) He conceded that he did not know whether Bohne slipped, tripped, or blacked out prior to falling down the steps.

{¶8} Relying upon physics principles and Bohne's landing position, Bates testified that Bohne was in the process of descending the steps when she fell. (Tr., p. 136.) He further testified that it was unlikely that she had slipped on the boardwalk because she would have likely fallen backward. (Tr., p. 137.) Finally, Bates testified that the uneven steps disrupt the body's pre-programmed muscle response based upon the observed height of the first step. (Tr., p. 132.) Bates was unable to examine Bohne, who died approximately two years after the accident, and, therefore, his testimony was based on a hypothetical person. (Tr., p. 149.)

{¶9} On cross-examination, Bates explained that he had accepted the case in 2004, and he completed his expert report in this matter approximately six months later. (Tr., p. 145.) However, three days prior to his deposition in September of 2007, Bates was informed by Appellant's counsel that Bohne had a previous history of multiple falls. (Tr., p. 146.)

{¶10} This information prompted Bates to request the depositions of Bohne's physicians. (Tr., p. 145.) Bates testified that Bohne's doctor associated her earlier falls with unrelated events, for instance, one fall was attributed to a flu shot, and another was attributed to a new medication. (Tr., p. 149.) According to Appellees' brief, Louis Villaplana, M.D. provided testimony that Bohne had problems with unsteadiness, gait instability, and falls, (Appellees' Brf., p. 2), however, Dr. Villaplana's testimony was not made a part of the record on appeal. Bates testified that a person with a history of falls would be more likely to use a handrail. (Tr., p. 139.)

ASSIGNMENT OF ERROR

{¶11} "THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO PLAINTIFF-APPELLANT WHEN IT SUSTAINED DEFENDANT-APPELLEE'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF PLAINTIFF'S CASE."

{¶12} A trial court's decision granting a motion for directed verdict presents a question of law, which an appellate court reviews de novo. *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 257, 741 N.E.2d 155. The applicable standard of review for a directed verdict is set forth in Civ.R. 50(A)(4):

{¶13} "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶14} When the party opposing the motion has failed to produce any evidence on one or more of the essential elements of a claim, a directed verdict is appropriate. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695, 586 N.E.2d 141.

{¶15} To establish a claim of negligence in Ohio, a plaintiff must show the existence of a duty, a breach of that duty, and some injury that directly and proximately resulted from a breach of the duty. *Menifee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77, 15 OBR 179, 472 N.E.2d 707, citing *DiGildo v. Caponi* (1969), 18 Ohio St.2d 125, 127, 47 O.O.2d 282, 247 N.E.2d 732, and *Feldman v.*

Howard (1967), 10 Ohio St.2d 189, 193, 39 O.O.2d 228, 226 N.E.2d 564. The existence of a duty in a negligence action is a question of law. *Wallace v. Dept. of Commerce, Div. of State Fire Marshall* (2002), 96 Ohio St.3d 266, 274, 2002-Ohio-4210, 773 N.E.2d 1018.

{¶16} In premises liability situations, the duty owed by a landowner to individuals visiting the property is determined by the relationship between the parties. *Light v. Ohio University* (1986), 28 Ohio St.3d 66, 502 N.E.2d 611. The standard of care depends upon whether the individual is characterized as an invitee, licensee or trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 315, 662 N.E.2d 287.

{¶17} Typically, a customer who enters a store is a business invitee. An invitee is one who enters the premises of another by invitation for some purpose that is beneficial to the owner or occupier. Id. The owner has the duty to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition. *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31, 65 O.O.2d 129, 303 N.E.2d 81; *Light*, 28 Ohio St.3d at 68, 502 N.E.2d 611.

{¶18} A premises-owner owes no duty to persons entering those premises regarding dangers that are open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus. The rationale underlying this rule is, "that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect

themselves." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644, 597 N.E.2d 504.

{¶19} Appellant cites *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 697 N.E.2d 198, for the rule of law that violations of the building code do not constitute negligence per se, but that such violations may be admissible as evidence of negligence. Id. at 568.

{¶20} The Supreme Court of Ohio recently addressed a strikingly similar fact pattern in *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120. The *Lang* decision was issued after briefing in this case was complete, however, Appellees provided a copy of the slip opinion as supplemental authority. Mr. Lang, a 78 year-old man suffering from emphysema, fell and broke his hip while attempting to climb two stairs at a motel. His wife had requested a handicapped-accessible room, however, no such room was available. The front desk clerk suggested a room that would require the Langs to climb only one step, however, access to the room actually involved climbing two steps.

{¶21} Similar to the matter at bar, the steps in *Lang* were uneven, exceeded the height limitation in the building code, and no handrail was present. Mr. Lang successfully negotiated the first step with the assistance of his wife, but was injured when he missed the second step. Mr. Lang died a little over three months after his fall.

{¶22} It is important to note that Mrs. Lang, as executrix, did not appeal the trial court's determination that the danger was open and obvious. She argued

instead that the open-and-obvious doctrine does not eliminate a landowner's duty of care when the dangerous condition at issue violates the building code. However, the Ohio Supreme Court held that the open-and-obvious doctrine remains applicable to premises-liability actions where the condition that caused the injury violates the building code.

{¶23} The majority declined Mrs. Lang's invitation to treat administrative rule violations as evidence of negligence per se, and held instead that such a violation should be treated as "mere evidence of negligence" subject to applicable defenses, including the open-and-obvious doctrine. Id., ¶21. The majority rejected Mrs. Lang's argument that applying the open-and-obvious doctrine to building code violations negates the importance of the regulations and eliminates penalties for noncompliance, concluding instead that, "[t]here is little difference* * *between an open and obvious condition that arises from an administrative-rule violation and one that arises from other circumstances; in either case, the plaintiff is responsible for his or her own decision to proceed through a known danger." Id., ¶22.

{¶24} Moreover, numerous appellate courts, including our own, have concluded that the lack of a handrail constitutes an open and obvious danger. *Salanki v. Doug Freshwater Contracting, Inc.*, 7th Dist. No. 06-JE-39, 2007-Ohio-6703, ¶75; *Johnson-Steven v. Broadway Sunoco*, 8th Dist. No. 8944, 2008-Ohio-691; *Aycock v. Sandy Valley Church of God*, 5th Dist. No. 2006 AP 09 0054, 2008-Ohio-105, ¶30. Appellant's counsel conceded at oral argument that the facts of this case and the facts of *Lang* are indistinguishable.

{¶25} Because the alleged danger was open and obvious, Appellees owed no duty of care to Bohne. Accordingly, Appellant's assignment of error is overruled and the judgment entry of the trial court is affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.