

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

ROSE WALL,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2011-P-0007
VIKING FORGE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2009 CV 0513.

Judgment: Affirmed.

David P. Thomas and Harry S. Bernstein, 801 Terminal Tower, 50 Public Square, Cleveland, OH 44113 (For Plaintiff-Appellant).

David J. Fagnilli, Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2654 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} Appellant, Rose Wall, appeals from a judgment of the Portage County Court of Common Pleas, granting appellee's, Viking Forge's, motion for summary judgment.

{¶2} Wall, a truck driver, went to Viking Forge for a scheduled pick up in February 2008. According to her deposition, Wall arrived sometime after 9:00 p.m., well after dark. She parked her truck in front of the loading docks, exited her vehicle, and

approached the Viking Forge building. The area was not lighted. Wall entered a door that was cracked open and from which she could see light.

{¶3} While inside, Wall spoke with a Viking Forge employee. She was told to back her truck into the first dock and come back inside to count her pallets. Before exiting the building, Wall stated to the employee that it was very dark outside. She walked back to her truck and moved it to the first dock. Wall then exited her truck and walked back into the building.

{¶4} While back inside, Wall stated that the Viking Forge employee identified 16 pallets to load onto the truck. Wall noticed it had become a little bit darker outside because she had shut off her truck's headlights. However, Wall did not ask for a flashlight or other assistance. She walked in and out of the doorway several more times. She finally exited the building again, walked back to her truck, slipped and fell, and was injured. At deposition, Wall could not identify the cause of her fall.

{¶5} Wall subsequently filed a complaint alleging personal injury and damages due to the slip and fall which occurred on Viking Forge's premises. Viking Forge filed an answer.

{¶6} Thereafter, Viking Forge filed a motion for summary judgment on the grounds that Wall could not establish causation and that she was responsible for her own injuries under the "step-in-the-dark" rule. Wall filed a brief in opposition. The trial court determined that Viking Forge was entitled to judgment as a matter of law and granted Viking Forge's motion for summary judgment. It is from that judgment that Wall filed a timely appeal and asserts the following assignments of error:

{¶7} “[1.] The trial court erred by granting defendant-appellee’s motion for summary judgment when there was a genuine issue of material fact regarding the ‘step in the dark rule.’

{¶8} “[2.] The trial court erred by granting defendant-appellee’s motion for summary judgment as plaintiff-appellant did not have substantial time within which to obtain discovery as a result of defendant-appellee’s delay in providing requested discovery.”

{¶9} In her first assignment of error, Wall argues that the trial court erred by granting Viking Forge’s motion for summary judgment. Wall contends that there exists a genuine issue of material fact as to whether she slipped and fell due to her own negligence in accordance with the “step-in-the-dark” rule. She alleges that factual questions exist regarding the maintenance of the area where she was injured. Also, Wall maintains that she was unable to schedule the depositions of Viking Forge’s general manager and night supervisor.

{¶10} An appellate court reviews a trial court’s decision to grant a motion for summary judgment under a de novo standard. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is proper 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) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Civ.R. 56(C); *Welco Indus., Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346.

{¶11} Once the moving party has met its burden of supporting its motion with sufficient admissible evidence, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing that there is a genuine issue for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. If the nonmoving party does not satisfy this reciprocal burden, summary judgment, if appropriate, shall be granted against the nonmoving party. Civ.R. 56(E).

{¶12} “To prevail on a claim for negligence the plaintiff must prove the following elements: (1) the existence of a duty owed by the defendant to the plaintiff, (2) the breach of duty, (3) causation, and (4) damages.” *Erie Ins. Co. v. Cortright*, 11th Dist. No. 2002-A-0101, 2003-Ohio-6690, at ¶12.

{¶13} “[T]o establish negligence in a slip and fall case, it is incumbent upon the plaintiff to identify or explain the reason for the fall. 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.” *Estate of Mealy v. Sudheendra*, 11th Dist. No. 2003-T-0065, 2004-Ohio-3505, at ¶31, quoting *Stamper v. Middletown Hospital Assn.* (1989), 65 Ohio App.3d 65, 67-68.

{¶14} In our case, Wall states in her appellate brief that she needed to conduct further discovery in order to learn more about “the deliberate nature of the step and the condition and maintenance of the area.” She alleges that she was unable to schedule the depositions of Viking Forge’s general manager and night supervisor. However, neither the general manager nor the night supervisor saw Wall fall.

{¶15} Viking Forge presented evidence that Wall had no idea what specifically caused her to trip and fall on Viking Forge’s premises. In fact, Wall admitted that she

could not identify the cause of her fall. Wall even failed to make an inference as to what caused her to fall. Thus, because Wall either personally or by outside witnesses could not identify the cause of her fall, a finding of negligence on the part of Viking Forge is precluded. *Stamper*, supra, at 67-68. As Wall did not meet her burden to show causation, her claim must fail, and summary judgment was warranted. *Id.* at 68. Therefore, the trial court properly granted Viking Forge's motion for summary judgment.

{¶16} Wall's first assignment of error is without merit.

{¶17} In her second assignment of error, Wall alleges that the trial court erred by granting Viking Forge's motion for summary judgment as she did not have substantial time within which to obtain discovery as a result of Viking Forge's delay in providing requested discovery.

{¶18} The Ohio Civil Rules contain a specific provision governing the situation in which a party cannot properly respond to a summary judgment motion until further discovery is conducted. Civ.R. 56(F) states:

{¶19} "Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

{¶20} In this case, although Wall claims that Viking Forge refused to provide additional discovery, she admittedly received Viking Forge's discovery responses three days before Viking Forge filed its motion for summary judgment and well before her brief in opposition was due. Based upon the facts presented, Wall had sufficient time to

obtain discovery and prepare a response to Viking Forge's motion for summary judgment.

{¶21} Moreover, Wall did not submit an affidavit explaining why she could not present facts essential to justify her opposition, as required by Civ.R. 56(F). She alleges that she was unable to obtain discovery of Viking Forge's general manager and night supervisor. Again, those two individuals did not see her fall and, like herself, do not know the cause of her fall. Thus, discovery from Viking Forge's general manager and night supervisor would not be beneficial to her. Because Wall either personally or by outside witnesses could not identify what caused her to fall, the trial court properly granted Viking Forge's motion for summary judgment.

{¶22} Wall's second assignment of error is without merit.

{¶23} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDALL, J.,

concur.