[Cite as *Francis v. Loviscek*, 2018-Ohio-4279.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JOANNE FRANCIS, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
		CASE NO. 2017-L-167
- vs -	:	
LAUREEN LOVISCEK, EXECUTOR, THE ESTATE OF LOREN R. SHAW, et al.,	:	
	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2016 CV 001855.

Judgment: Affirmed.

James V. Loiacono, James V. Loiacono, LLC, 41 East Erie Street, Painesville, OH 44077 (For Plaintiffs-Appellants).

Michael E. Smith, Mark L. Rodio, and *Angela Daling Lydon,* Frantz Ward LLP, 200 Public Square, Suite 3000, Cleveland, OH 44114 (For Defendants-Appellees, Berkshire Hathaway Realty (a.k.a. Blue Rock Select, LLC); Prudential Realty (a.k.a. Blue Rock Select, LLC); Chuck Monte; and William Flaherty).

Stephen J. Yeargin, 6060 Rockside Woods Blvd., Suite 131, Independence, OH 44131 (For Defendants-Appellees, Keller Williams Realty (a.k.a. Northeast Real Estate Group); and Lisa Sisko).

Robert J. Koeth and *Ann E. Leo,* Koeth, Rice & Leo Co., L.P.A., 1280 West Third Street, 3rd Floor, Cleveland, OH 44113 (For Defendant-Appellee, Laureen Loviscek, Executor, The Estate of Loren R. Shaw).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Joanne Francis and Richard Francis, appeal the summary judgment entered by the Lake County Court of Common Pleas against them and in favor of appellees, Lauren Loviscek, executor of the estate of Loren R. Shaw; Blue Rock Select, LLC; William Flaherty; Chuck Monte; Northeast Real Estate Group; and Lisa Sisco, on appellants' claims for negligence and loss of consortium. At issue is whether the trial court erred in entering summary judgment. For the reasons that follow, we affirm.

{¶2} On November 2, 2016, appellants filed a complaint against appellees alleging, as pertinent here, negligence and loss of consortium. They alleged that, while viewing Shaw's home, which was listed for sale, Ms. Francis tripped and fell when she walked from the utility room into the garage, sustaining injuries. Appellants sued Lauren Loviscek (executor of the now-deceased property owner, Loren Shaw), Lisa Sisco and Northeast Real Estate Group (Shaw's listing agent and her employer), and William Flaherty, Chuck Monte, and Blue Rock Select, LLC (appellants' real estate agents and their employer). Appellants also alleged that, due to Ms. Francis' injuries, Mr. Francis sustained loss of consortium.

{¶3} Appellees filed answers denying the material allegations of the complaint. After the parties exchanged discovery, appellees filed separate motions for summary judgment. Appellants filed a single brief in opposition. Due to the similarity of issues, the trial court considered the motions together.

{¶4} The statement of facts that follows is based on the parties' depositions and evidentiary materials. Shaw and his wife purchased a ranch-style condominium with an attached two-car garage from the builder in 1990.

{¶5} In early 2013, Shaw hired appellee, Lisa Sisco, a real estate agent with Northeast, to list his property for sale. At the time of his listing, Shaw was elderly and has since passed away. He never met appellants and was not present in the home when Ms. Francis fell. Similarly, Ms. Sisco never met appellants and was not present at the time of the accident.

{¶6} At the time of her fall, Ms. Francis was 68 years old with several medical conditions and Mr. Francis was 70 years old.

{¶7} Appellees, Flaherty and Monte, were appellants' real estate agents, and Monte showed this property to them. Prior to March 2, 2013, the date of the accident, Monte had shown appellants Shaw's home. On or about March 2, 2013, appellants asked Monte to show them the property again as they were interested in buying it. Monte arranged a viewing, and they agreed to meet there that afternoon.

{¶8} Mr. and Ms. Francis, their adult son, and his wife met Monte at the property. After looking at the bedrooms and bathrooms, Ms. Francis decided to look at the garage. She walked from the kitchen to the adjoining utility room, in which the door to the garage is located. Ms. Francis testified the utility room was well-illuminated from the light in the kitchen.

{¶9} There is a four-inch step down from the utility room into the garage onto a concrete pad that is four inches above the garage floor. The concrete pad covers the full width of the exit door, but is slightly less than the width of the door's threshold. The concrete pad runs 22 feet along the entire rear of the garage. A person stepping to the left of the pad when entering the garage could step directly onto the garage floor, which is four inches lower than the pad and thus eight inches below the base of the doorway.

{¶10} Ms. Francis testified that when she opened the door into the garage, she stepped to the left, missed the concrete pad, and fell, landing on her face on the garage floor, injuring herself. She said there was no concrete beneath her left foot when she stepped into the garage and this caused her to fall. Her testimony that concrete was missing on the left side of the pad where she stepped is belied by appellants' photographs showing that no concrete was missing.

{¶11} Ms. Francis said she does not know whether the door to the garage opened *inward* toward the utility room or *out* toward the garage, but said this "didn't matter to [her]."

{¶12} Ms. Francis did not enter the garage during their first viewing of the condominium; however, Mr. Francis testified he looked into the garage from the door. He said that after looking into the garage, he did not have any issues or concerns with the garage. As a result, he did not provide any warnings to anyone about the garage or tell Ms. Francis not to enter it.

{¶13} Ms. Francis testified she was not distracted in any way when entering the garage. She was not talking to anyone and was not carrying anything. She did not remember looking down to see where she was walking before stepping into the garage.

{¶14} Ms. Francis said she did not know where the light switch was and did not turn on any lights before she entered the garage. She said that she had no way of preventing what happened to her and that she does not accept any responsibility for not looking before she entered the garage.

{¶15} Mr. Francis said that his daughter-in-law came into the house and said that Ms. Francis had fallen. He said that when he entered the garage, he did not trip or fall; rather, he stepped onto the pad. Further, he said that neither his son nor his daughter-in-law tripped or fell in entering the garage. Mr. Francis said he does not recall if the lights were turned on in the garage, but that he could see where he was going and could see Ms. Francis on the floor when he entered the garage.

{¶16} Shaw stated in his affidavit that the concrete pad and the garage floor were installed by the original builder and that he, i.e., Shaw, was the first and only owner of the property until he sold it in 2014. He said he never modified the slab and that in the 23 years he and his wife lived in the home, neither he nor anyone else ever tripped, slipped, or fell because of the concrete slab/step or had ever complained about any issues with the slab/step.

{¶17} Appellants' photographs show that Shaw kept two small carpets outside the utility room door, one directly beneath the door on the concrete pad and another several inches away on the garage floor up against the base of the concrete pad, clearly showing the offset between the pad and the garage floor.

{¶18} Appellants submitted the affidavit of their expert, Howard Nelson, the sole proprietor of a construction business. Nelson concluded that the entrance to Shaw's garage from the utility room was defective because the door opens "the wrong way." He said that if the door opened in the opposite direction, a person would be more likely to step to the right onto the slab, thus avoiding a fall. Nelson said the exit was also defective because the offset between the slab and the garage floor is not discernable.

However, Nelson did not cite any section of the Ohio Residential Building Code or any facts to support his opinions.

{¶19} Shaw presented the report of his expert, Timothy Calvey, a Registered Professional Engineer and Vice President of Calvey Consulting, LLC. Calvey reviewed the parties' depositions, appellants' photographs, the parties' answers to interrogatories, Nelson's affidavit, and public records regarding the property. Calvey stated the back of the garage has a "housekeeping pad" made of concrete that is 4 inches high, four feet wide, and 22 feet long. He said the pad was installed by the original builder and was inspected by the Lake County Building Department at that time. He said Shaw made no modifications to the utility room exit or to the pad.

{¶20} Calvey concluded the construction complies with Ohio Residential Building Code requirements. In 2005, the General Assembly enacted H.B. 175, which established a residential building code for homes built in Ohio. Calvey said that Section 311.3.1 of the Code allows up to "8 1/4 inches below the top of the threshold provided the door does not swing over the landing or floor." Calvey said the step between the door and the housekeeping pad is four inches. Further, the photographs of the door show it swings into the utility room. Thus, the exit door complies with this Code section. The trial court noted in its judgment entry that, even if a person stepped directly from the doorway onto the garage floor, the step down would not violate the Ohio Residential Building Code because the drop would be less than 8 1/4 inches.

{¶21} Further, Calvey stated that Section 311.3 of the Code provides "that the width of the landing 'shall not be less than the door served.'" Calvey said the *width of the landing is greater than the width of the exit door.*

{¶22} Calvey stated that Nelson did not identify any section of the Ohio Residential Building Code to support his opinions. Specifically, Calvey stated that Nelson did not identify any Building Code section to support his allegation that the door opens the "wrong" way. Calvey stated that the Lake County Building Department requires that the "door swing" be identified on permit design drawings and that the permit drawings are reviewed and approved by the Lake County Building Department.

{¶23} Calvey stated the door swing that was installed is normal. He also said "the change in elevation between the garage slab [floor], the housekeeping pad, and the door entrance is obvious under normal lighting conditions." The photographs of the area attached to Calvey's report show that this change in elevation is clearly observable.

{¶24} In summary, Calvey concluded that the construction of the utility room exit door and the housekeeping pad complied with the Ohio Residential Building Code and that the exit to the garage, as constructed, is not defective and was not the cause of Ms. Francis' accident. He further stated he did not agree with Nelson's opinion, which, he said, is not supported by Ohio Residential Building Code requirements.

{¶25} In entering summary judgment against appellants, the trial court found there was no genuine issue of material fact regarding whether the utility room exit was in violation of the Ohio Residential Building Code or whether the exit was defective and that, even if the exit was defective, any such defect was open and obvious. The court found that, as such, appellees had no duty to warn Ms. Francis of any danger associated with the entrance into the garage and, without a duty, appellants' claims for negligence and loss of consortium failed.

{¶26} Appellants appeal, asserting two assignments of error. For their first assigned error, they allege:

{¶27} "The trial court committed prejudicial error in granting defendants-appellees [sic] respective motions for summary judgment based upon its opinion that the dangers of the entrance to the garage of which plaintiff-appellant, Joanne Francis, complained were open and obvious; and, therefore concluding that there was no genuine issue of material fact, and defendants-appellees had no duty to warn plaintiff-appellant, Joanne Francis, of any danger associated with the subject entrance."

{¶28} Appellants argue that a genuine issue of material fact exists as to whether the concrete pad was an open and obvious danger.

{¶29} Summary judgment is a procedural device intended to terminate litigation and to avoid trial when there is nothing to try. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358 (1992). Summary judgment is proper when (1) there is no genuine issue of 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 nonmoving party, that party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc*., 67 Ohio St.3d 266, 268 (1993).

{¶30} Since a trial court's decision whether to grant summary judgment involves only questions of law, we conduct a de novo review of the trial court's judgment. *DiSanto v. Safeco Ins. of Am*., 168 Ohio App.3d 649, 2006-Ohio-4940, ¶41 (11th Dist.).

{¶31} In order to establish a claim for negligence, the plaintiff must establish that (1) the defendant owed a duty to him; (2) the defendant breached that duty; (3) the

defendant's breach of duty proximately caused his injury; and (4) he suffered damages. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998); *Bond v. Mathias*, 11th Dist. Trumbull No. 94-T-5081, 1995 WL 237077, *2 (Mar. 17, 1995).

{¶32} The parties do not dispute that Ms. Francis was a business invitee in Shaw's condominium. A business owner owes a business invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition so that invitees are not subjected to unreasonable dangers. *Mealy v. Sudheendra*, 11th Dist. Trumbull No. 2003-T-0065, 2004-Ohio-3505, ¶29. A business owner is not an insurer of its invitees' safety. *Occhipinti v. Bed Bath & Beyond*, *Inc*., 11th Dist. Lake No. 2010-L-109, 2011-Ohio-2588, ¶19. However, he must warn them of actual dangers on the property if his knowledge of those dangers is superior to that of the invitees. *Id*. at ¶20. "The fact that a party slipped and fell on the defendant's premises is, of itself, insufficient to create an inference that the premises are unsafe or to establish negligence. There must be some evidence showing that a negligent act or omission of the defendant caused the plaintiff to slip and fall." *Id.* at ¶23.

{¶33} "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." *Adelman v. Timman*, 117 Ohio App.3d 544, 549 (8th Dist.1997). A business has no duty to protect an invitee from dangers "[that] are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968), paragraph one of the syllabus; *see also Bond, supra,* at *3. "The rationale behind the [open and obvious] doctrine is that the open and obvious nature of the hazard itself serves as a warning." *Simmers v. Bentley*

Constr. Co., 64 Ohio St.3d 642, 644 (1992). The open and obvious doctrine concerns the first element of negligence, i.e., whether a duty exists. *Sidle*. Therefore, the open and obvious doctrine obviates any duty to warn of an obvious hazard and bars negligence claims for injuries related to the hazard. *Henry v. Dollar Gen. Store*, 2d Dist. No. 2002-CA-47, 2003-Ohio-206, ¶7; *Hobart v. Newton Falls*, 11th Dist. Trumbull No. 2002-T-0122, 2003-Ohio-5004, ¶10. Where a hazard is open and obvious, a business owner owes no duty to an invitee, and it is unnecessary to consider the issues of breach and causation. *Ward v. Wal-Mart Stores Inc*., 11th Dist. Lake No. 2000-L-171, 2002 WL 5315, *2 (Dec. 28, 2001).

{¶34} The Supreme Court of Ohio reaffirmed the viability of the open and obvious doctrine in *Armstrong v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573. In *Armstrong*, the court held that the emphasis in analyzing open-and-obvious-danger cases relates to the threshold issue of duty. "[T]he rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it. The fact that a plaintiff was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff." *Id*. at ¶13.

{¶35} "[T]he dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be an 'open and obvious' condition under the law. Rather, the determinative issue is whether the condition is observable. Even in cases in which the plaintiff did not actually notice the condition until after he or she fell, this court has found no duty to exist in cases where the plaintiff could have seen the condition if he or

she had looked." *Lydic v. Lowe's Companies, Inc*., 10th Dist. Franklin No. 01AP-1432, 2002-Ohio-5001, ¶10.

{¶36} Whether a person owes a duty to protect others against an open and obvious danger is generally a question of law. *Watson v. Bradley*, 11th Dist. Trumbull No. 2016-T-0031, 2017-Ohio-431, ¶20. However, where disputed facts exist regarding the openness and obviousness of the danger, an issue of fact is presented for the jury. *Armstrong v. Lakes Golf and Country Club, Inc*., 5th Dist. Delaware No. 17 CAE 08 0054, 2018-Ohio-1018, ¶29.

{¶37} In concluding any danger presented by the steps in the garage was open and obvious, the trial court made the following findings:

> **{¶38}** Based on the photographs, affidavits and depositions, the court finds that any danger the steps presented in the garage was so open and obvious that as a matter of law Joanne Francis should have been able to avoid it on her own. Accordingly, the defendants owed no duty of care to Joanne Francis. There was nothing remotely hidden or latent about the configuration of the steps. The condition of the steps was apparent to anyone using or observing them. Nothing obstructed Joanne Francis' view of the step. Her daughter-in-law, son, and husband used the step without difficulty. In paragraphs 9 through 12 of his affidavit, Shaw stated that neither he nor any guest ever tripped, slipped or fell because of the step or complained about the step. A duty to warn only arises when there are actual dangers on the premises and the owner's knowledge of those dangers is superior to that of the invitee. * * * There is no evidence he or the brokers were aware that the step was dangerous. While it was unclear if the lights in the garage were turned on, lighting in the utility room and garage was adequate. *See* Joanne Francis depo. P. 58-59. In her deposition, she stated she could see where she was going. *Id*. While her husband does not remember if the lights were on in the garage, he could see his wife on the floor and could see where he was going. Richard Francis depo. P. 31.

{¶39} Appellants attempted to create a genuine issue of material fact by presenting the affidavit of their expert, Nelson. However, "[e]xpert affidavits offered in *

* * opposition to summary judgment must comply with Civ.R. 56(E) as well as the evidence rules governing expert opinion testimony, Evid.R. 702-705." *Frederick v. Vinton County Bd. of Educ*., 4th Dist. Vinton No. 03CA579, 2004-Ohio-550, ¶23. Thus, "the affidavit must set forth the * * * facts or data [the expert] considered in rendering his opinion." *Id*. "It is improper for an expert's affidavit to set forth conclusory statements and legal conclusions without sufficient supporting facts." *Id.* at ¶28.

{¶40} Here, Nelson failed to cite any section of the Ohio Residential Building Code to support his legal conclusion that the door swings the "wrong" way. Nor did he reference any facts supporting his conclusion that the offset between the pad and the garage floor was not discernible. Thus, Nelson's conclusions do not create a genuine issue of material fact. *Frederick, supra*. In any event, the court correctly found that, even if Nelson's opinions were valid, any alleged defects were open and obvious.

{¶41} Further, as Shaw stated in his affidavit, in the 23 years he lived at the property, no one ever tripped, slipped, or fell or complained of any problem with the door or offset. The lack of prior reports of a defective condition is evidence that the property owner was in no better position than his invitees to foresee such condition, if it existed, and to prevent the resulting hazard to them. *Calabrese v. Romano's Macaroni Grill*, 8th Dist. Cuyahoga No. 94385, 2011-Ohio-451, ¶17.

{¶42} Appellants rely on this court's opinion in *Miller v. Wayman*, 11th Dist. Geauga No. 2012-G-3057, 2012-Ohio-5598. In that case, Mr. Miller and his daughter went to a local coffee shop. While they were waiting to be served, Mr. Miller asked his daughter, who worked at the shop, for directions to the bathroom and she said it was in the rear of the shop. Mr. Miller walked down a hallway and found an unmarked door he

assumed was for the bathroom. The door opened inward revealing a dark, unlit room. Mr. Miller took a step into the room looking for a light switch and, expecting to find a restroom, instead he found a staircase and fell down a flight of stairs. In reversing the trial court's summary judgment in favor of the shop, this court stated:

> **{¶43}** [R]easonable minds could differ as to whether the dangers in this case were open and obvious. * * *
>
> **{¶44}** [T]he unmarked door opened inward, and those invitees unfamiliar with the passage would find themselves instantaneously atop a stairwell. One could similarly conclude that the doorway concealed the stairwell. Even a well-lit passage could lead to injury on stairs that are not noticeable until the door swings open, and * * * *whether it is reasonable for a person to look down when entering what they might reasonably believe to be a bathroom* is a factual question for a jury. * * * That is, the hazard (the stairwell) may not have been apparent to a reasonable person in the ordinary course. (Original emphasis deleted and emphasis added.) *Id*. at ¶39-40.

{¶45} However, the facts in *Miller* are distinguishable. When Mr. Miller opened the door, he reasonably believed he was walking into the restroom. Since the restroom would have been part of the store, it was reasonable for him to presume he would be walking into a room on the same level as the rest of the store so there was no need to look down to protect himself. However, here, Ms. Francis knew the door in the utility room did not lead to another room in the home, but, rather, led into the garage where one would reasonably expect to find a step down of some sort to get to the garage floor. There is no dispute that the garage was well lit, and appellants' photographs clearly show the step down from the door to the concrete pad and from the pad to the floor. Thus, it would not be reasonable for her to presume that the garage would be on the same level as the home, and the rationale in *Miller* does not apply. As a result, she had a duty to protect herself from any step(s) that might lead from the home into the garage.

Thus, the trial court correctly found that any danger presented by the concrete pad was so open and obvious that Ms. Francis should have been able to avoid it on her own and thus appellees owed her no duty of care.

{¶46} In addition, appellants argue that their claim is further supported by the presence of attendant circumstances. The "attendant circumstances" of a slip and fall may create a material issue of fact as to whether the danger was open and obvious. *Louderback v. McDonald's Restaurant*, 4th Dist. No. 04CA2981, 2005-Ohio-3926, ¶19. Attendant circumstances include any distraction that would divert the attention of a pedestrian in the same circumstances and thereby reduce the amount of care an ordinary person would exercise. *McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d 494, 499 (1st Dist.1996). "The attendant circumstances must, taken together, divert the attention of the pedestrian, significantly enhance the danger of the defect, and contribute to the fall." *Stockhauser v. Archdiocese of Cincinnati*, 97 Ohio App.3d 29, 33 (2d Dist.1994). Attendant circumstances do not include the plaintiff's activity at the time of the fall unless his attention was diverted by an unusual circumstance of the property owner's making. *Lang v. Holly Hill Motel, Inc.*, 4th Dist. Jackson No. 06CA18, 2007-Ohio-3898, ¶25.

{¶47} While appellants argue that the inwardly-opening door and the offset between the landing and the floor were attendant circumstances, they do not cite any action by any of the appellees that distracted Ms. Francis. In any event, Ms. Francis testified that when entering the garage, she was not distracted in any way, thus defeating appellants' argument.

{¶48} With respect to appellants' claims against the real estate agent-appellees, the Supreme Court of Ohio has held that the open and obvious doctrine applies only to owners and occupiers of land. In *Simmers, supra,* the Supreme Court held that an independent contractor who created a dangerous condition on real property was not relieved of liability under the doctrine that exonerates a landowner from the duty to warn those entering the property of open and obvious dangers. *Id*. at 645. The Court stated:

> **{¶49}** The rule relieving a defendant from liability for harm resulting from "open and obvious" hazards is a legal doctrine that has developed in suits against *property owners* by a person injured when he comes on the property. The "open and obvious" doctrine states that *an owner or occupier of property* owes no duty to warn invitees entering the property of open and obvious dangers on the property. * * * The rationale behind the doctrine 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. * * *
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> **{¶50}** Historically, a landowner's liability in tort is incident to the *occupation or control* of the land, which involves *the owner's right and power to admit and exclude people from the premises.* * * * The "open and obvious" doctrine, therefore, governs a landowner's duty to persons entering the property—property over which the landowner has the right and power to admit or exclude persons as invitees, licensees, or trespassers.
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> **{¶51}** Bentley was an independent contractor performing services for the owner of the bridge. While Bentley may have had the right to be on, and in the vicinity of, the bridge, it had no property interest in the premises. * * * *We are not persuaded to extend the "open and obvious" doctrine to persons who conduct activity with the consent of the landowner but who themselves have no property interest in the premises.*
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> **{¶52}** * * *
>
> **{¶53}** *Since Bentley had no property interest in the premises, we must look to the law of negligence to determine Bentley's duty of care,* and then consider the significance of the factual finding that the

> hole was open and obvious. * * *. (Emphasis added.) *Simmers, supra*, at 644-645.

{¶54} Likewise, here, since none of the real estate agent-appellees owned or occupied Mr. Shaw's condominium, the open and obvious danger rule does not apply to them, and their liability must be determined under the ordinary rules of negligence, not those pertaining to landowners, because they had no property interest in the premises. *Id.* at 644.

{¶55} Under the law of negligence, a defendant's duty to a plaintiff depends on the foreseeability of the injury. *Sorensen v. DeFranco*, 11th Dist. Lake No. 2013-L-038, 2013-Ohio-5829, ¶27. Here, it was undisputed that the door/steps complied with the Ohio Residential Building Code and were inspected by the County Building Department when the home was built, and that in the 23 years since the home was built, no one else was ever injured by or ever complained about the door/steps. Further, there was no evidence that the real estate agent-appellees had more knowledge than Ms. Francis of any hazard presented by the door/steps. Thus, it was not foreseeable to these appellees that someone entering the garage from the utility-room door would be injured by falling onto the floor. As a result, under ordinary negligence principles, these appellees did not owe a duty of care to prospective purchasers of the property, like Ms. Francis, and her claims against them failed as a matter of law.

{¶56} We therefore hold the trial court did not err in finding, as a matter of law, that, with respect to appellee, Lauren Loviscek, executor, any danger was open and obvious; there were no attendant circumstances; Ms. Loviscek owed no duty to warn Ms. Francis; and Ms. Loviscek was entitled to summary judgment. Further, we hold the trial court did not err in finding, as a matter of law, that the real estate agent-appellees

owed no duty of care to Ms. Francis and that they were also entitled to summary judgment.

{¶57} Appellants' first assignment of error is overruled.

{¶58} For their second and final assignment of error, appellants contend:

{¶59} "The trial court committed prejudicial error in granting defendants-appellees [sic.] respective motions for summary judgment based upon its opinion that plaintiff-appellant, Richard Francis', derivative cause of action for loss of consortium must fail as a matter of law because the trial court granted defendants-appellees [sic.] respective motions for summary judgment against plaintiff-appellant, Joanne Francis', claim for negligence."

{¶60} A claim for loss of consortium is a derivative action, and would not exist but for the primary action. *Tomlinson v. Skolnik*, 44 Ohio St.3d 11, 14 (1989). Since summary judgment was properly granted as to all negligence claims and all appellees, Mr. Francis cannot maintain a cause of action for loss of consortium.

{¶61} Appellants' second assignment of error is overruled.

{¶62} For the reasons stated in this opinion, the assignments of error lack merit and are overruled. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, P.J., concurs in judgment only,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶63} I concur in the decision to affirm the judgment of the lower court, granting summary judgment in favor of appellees. I write separately, however, because I disagree with the majority's analysis of the potential liability of the appellee real estate agents, i.e., the appellees who were neither owners nor occupiers of the subject premises.

{¶64} The majority concludes the real estate agents were entitled to summary judgment because "there was no evidence that the real estate agent-appellees had more knowledge than Ms. Francis of any hazard presented by the door/steps." *Supra* at ¶ 55. While this statement may be factually accurate, there is a more fundamental reason why the real estate agents who were neither owners nor occupiers of the subject premises did not owe Ms. Francis a duty of care.

{¶65} "Possession and control are * * * two required elements of premises liability." *Duncan v. Hallrich, Inc.*, 11th Dist. Geauga No. 2006-G-2703, 2007-Ohio-3021, ¶ 12. As explained by the Ohio Supreme Court:

> "[L]iability in tort is an incident to occupation or control. *Berkowitz v. Winston* [1934], 128 Ohio St., 611, 193 N.E., 343; *Ripple v. Mahoning National Bank* [1944], 143 Ohio St., 614, 56 N.E.(2d), 289." *Cooper v. Roose* (1949), 151 Ohio St. 316, 317, 39 O.O. 145, 146, 85 N.E.2d 545, 546. "* * * The control necessary as the basis for tort liability implies the power and the right to admit people to the premises and to exclude people from it, and involves a substantial exercise of that right and power."

(Citation omitted.) *Mitchell v. Cleveland Elec. Illuminating Co.*, 30 Ohio St.3d 92, 94, 507 N.E.2d 352 (1987).

{¶66} In the present case, there is no evidence that the real estate agents either owned or controlled the premises and certainly not any evidence that they substantially

exercised comparable rights and powers. In the absence of such evidence, the foreseeability of the injury is irrelevant to their potential liability. Even if Ms. Francis had a viable claim against Mr. Shaw, the real estate agents would be entitled to judgment under the facts presented. *See Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 688 (Ind.App.2006) ("[w]e * * * decline to impose a duty on real estate brokers unless they have control over the premises sufficient to independently give rise to a duty to warn under recognized premises liability principles").

{¶67} For the foregoing reasons, I concur in judgment only.