[Cite as *Schafer v. Steak N Buffet Mfg.*, 2004-Ohio-4973.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

BRUXIE SCHAFER	C.A. No. 03CA008429
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
STEAK N BUFFET MFG	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 03CVI134881

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

{¶1} Appellant, Bruxie Schafer, appeals from the judgment of the Lorain County Court of Common Pleas granting summary judgment in favor of appellee, Steak N Buffet Mfg. This Court reverses.

I.

{¶2} Appellant and a friend entered Steak N Buffet Mfg., a restaurant, to have lunch. Schafer fell while on Steak N Buffet's premises and sustained injuries. As a result, appellant filed suit against appellee for personal injuries on April 28, 2003. She brought suit in Lorain County Common Pleas Court alleging that Steak N Buffet was negligent in maintaining their premises. Steak N Buffet

moved the trial court for summary judgment on the grounds that Schafer produced no evidence regarding the cause of her fall and that any danger on its premises was open and obvious. Appellant opposed the motion, and the trial court subsequently granted appellee's motion for summary judgment. Appellant timely appealed, raising one assignment of error.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT GRANTED THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT."

{¶3} In her sole assignment of error, appellant avers that the trial court erred in granting summary judgment in favor of appellee. This Court agrees.

{¶4} Appellate courts review the granting of summary judgment de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, an appellate court "review[s] the same evidentiary materials that were properly before the trial court at the time it ruled on the summary judgment motion." *Am. Energy Servs. Inc. v. Lekan* (1992), 75 Ohio App.3d 205, 208. Under Civ.R.56(C), summary judgment is proper if:

> "(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." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶5} The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Any doubt is to be resolved in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Dresher*, 75 Ohio St.3d at 293. Once this burden is satisfied, the nonmoving party bears the burden of offering specific facts to show a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735. Pursuant to Civ.R. 56(C), only certain evidence and stipulations, as set forth in that section, may be considered by the court when rendering summary judgment. Specifically, the court is only to consider "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R.56(C).

{¶7} The parties agree that appellee had a duty to its business invitees, including appellant, to maintain its premises in a reasonably safe condition and to warn the invitees of any latent dangers. They also agree that appellee had no duty

to warn appellant of any open and obvious dangers. Such is the law in Ohio. See *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203; *Simmers v. Bentley Const. Co.* (1992), 64 Ohio St.3d 642.

{¶8} There is no dispute that appellant fell while going from a carpeted area to a tile floor at a soup table. There was a metal strip which joined the carpet and tile. The parties, however, do not agree on the cause of appellant's fall and whether her fall was caused by a latent or an open and obvious defect. Appellant claims that she tripped on a buckle in the metal strip which caused a ridge in that strip. She claims she didn't see the buckle before she fell. Appellee claims that appellant's fall was not caused by the buckle and that even if the buckle caused the fall, the buckle in the strip was an open and obvious danger which required no warning. There is also evidence in the record that appellee knew that the strip was buckled and wanted the condition corrected.

{¶9} The preceding establishes that there exist genuine issues of material fact as to the cause of appellant's fall. As such, it was error for the trial court to grant summary judgment. Accordingly, appellant's sole assignment of error is sustained.

III.

{¶10} Appellant's sole assignment of error is sustained, and the judgment of the Lorain County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellees.

Exceptions.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

SLABY, J.
DISSENTS, SAYING:

{¶11} I respectfully dissent. I believe it is clear than the separation between the carpet and tile is open and obvious. I would therefore affirm.

APPEARANCES:

EDWARD S. MOLNAR, Attorney at Law, 50 Public Square, Suite 920, Cleveland, Ohio 44113, for appellant.

GEORGE C. ZUCCO, Attorney at Law, 1525 Leader Building, Cleveland, Ohio 44114, for appellee.