[Cite as *Rosenbrook v. Lucas Cty. Bd. of Commrs.*, 2015-Ohio-1793.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Frank and Pauline Rosenbrook

Appellants

v.

Board of Lucas County Commissioners, et al.

Appellees

Court of Appeals Nos. L-14-1175
L-14-1176

Trial Court No. CI0201102558

DECISION AND JUDGMENT

Decided: May 8, 2015

* * * * *

Guy T. Barone and Eric Allen Marks, for appellants.

Julia R. Bates, Lucas County Prosecuting Attorney, and John A. Borell and Maureen O. Atkins, Assistant Prosecuting Attorneys for appellee, Board of Lucas County Commissioners.

Michael A. Paglia and Sarah A. Miller, for appellee, Coyne Textile Services.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellants, Pauline and Frank Rosenbrook, appeal the judgment of the Lucas County Court of Common Pleas, granting summary judgment in favor of appellees, the Board of Lucas County Commissioners ("the County") and Coyne International Enterprises, Corp., dba Coyne Textile Services ("CTS").

A. Facts and Procedural Background

{¶ 2} This case stems from a slip-and-fall incident that occurred at the Lucas County Courthouse on January 6, 2010. On that date, Pauline's grandson, Gregory Rosenbrook, was scheduled to appear for a hearing at the courthouse. Wanting to provide financial support for Gregory, Pauline also attended the hearing. Upon arrival, Pauline and Gregory proceeded through security and rode the elevator up to the floor on which the hearing was to be held. At the conclusion of the hearing, Pauline, along with Gregory and Gregory's attorney, took the elevator back to the ground floor. Arriving at the ground floor, Gregory and his attorney exited the elevator, followed by Pauline. As Pauline walked onto the floor mat that was lying in front of the elevator, she tripped and fell to the floor. After falling, Pauline glanced back at the floor mat and noticed that it was curled. As a result of her fall, Pauline sustained a fractured shoulder and other injuries.

{¶ 3} Three months after the incident at the courthouse, Pauline, along with her husband, Frank, filed a complaint, alleging that the County, through its agents and

employees, negligently failed to conduct adequate and frequent inspections of the premises, and failed to warn her of certain "hazardous conditions," ultimately leading to her injuries. Appellants also alleged that the County owned and/or leased the floor mat that caused the fall. In addition to their allegations of negligence, appellants also claimed that the County acted with "willful and wanton disregard for the safety of others," and with "heedless indifference to, or disregard for others, by failing to inspect, warn and correct the hazardous condition."

{¶ 4} The County filed its answer on May 25, 2011, in which it generally denied all of appellants' allegations, and asserted numerous affirmative defenses, including failure to state a claim upon which relief can be granted and statutory immunity. Further, on June 7, 2011, the County filed a Civ.R. 12(C) motion for judgment on the pleadings. Three weeks later, and after discovering that CTS was the owner of the floor mat upon which Pauline tripped, appellants sought leave to amend their complaint in order to add CTS, as well as its owner, Thomas Coyne, as additional defendants. The trial court granted appellants' request for leave to amend their complaint and, on July 26, 2011, appellants filed their amended complaint, in which they alleged that CTS and Coyne were negligent in their failure to inspect and maintain the floor mats and warn courthouse guests of hazardous conditions regarding the floor mats. Appellants further alleged that

CTS and Coyne were reckless with regard to maintenance and inspection of the floor mats.[1]

{¶ 5} On August 5, 2011, the County filed its answer to appellants' amended complaint, once again denying appellants' allegations, and asserting that the amended complaint failed to state a claim upon which relief can be granted. Likewise, on September 1, 2011, CTS filed its answer.

{¶ 6} Thereafter, on September 26, 2011, the trial court issued its decision denying the County's motion for judgment on the pleadings. The County appealed, and, on December 31, 2012, we affirmed the trial court's denial of the County's motion for judgment on the pleadings. *Rosenbrook v. Bd. of Lucas Cty. Commrs.*, 6th Dist. No. L-11-1272, 2012-Ohio-6247. Subsequently, the trial court reactivated the case, and pretrial discovery was continued by the parties.

{¶ 7} Eventually, on March 31, 2014, appellees filed three separate motions for summary judgment. In the County's motion for summary judgment, it argued that it was immune from liability under R.C. 2744.02(A)(1). Alternatively, the County contended that it did not breach the duty it owed to Pauline. Specifically, the County argued that Pauline's relationship to the County was in the nature of a licensee to whom the County merely owed her a duty to refrain from willful, wanton, or reckless conduct. The County further asserted that appellants failed to produce any evidence of reckless conduct.

[1] Coyne was subsequently dismissed from this action on December 13, 2011, and is therefore not a party to this appeal.

Additionally, the County contended that any defect in the floor mats would have been open and obvious. Consequently, the County argued that it had no duty to warn Pauline of any alleged curling in the floor mats.

{¶ 8} In addition to the County's motion for summary judgment, CTS filed two separate motions for partial summary judgment. In its first motion, CTS sought summary judgment as to appellants' negligence claim, arguing that appellants failed to establish a defect in the floor mat upon which she fell or that the defect actually caused her to fall. Further, CTS contended that it was entitled to summary judgment because it had no knowledge of the alleged defect in the floor mat. CTS also reiterated the County's argument that any defects in the floor mat, if any, were open and obvious and, thus, CTS owed no duty to warn Pauline of said defects.

{¶ 9} In its second motion for summary judgment, CTS sought judgment in its favor on appellants' claim for punitive damages, noting that the record contained no evidence that it acted with malice toward appellants.

{¶ 10} On April 23, 2014, appellants filed their memorandum in opposition to appellees' motions for summary judgment. In their memorandum, appellants argued that the County is not immune from liability because the curl in the floor mat represented a physical defect caused by the negligence of the County's employees as set forth in R.C. 2744.02(B)(4). Appellants also took issue with appellees' characterization of Pauline as a licensee. Appellants asserted that Pauline was a business invitee since she was at the

courthouse for the County's benefit vis-à-vis the payment of her grandson's court fees. Thus, appellants posited that appellees owed them a duty to exercise ordinary care. Appellants went on to argue that appellees breached their duty of care by failing to warn Pauline of the "dangerous defect in the floor mat." Further, appellants contended that CTS owed Pauline a duty of care as an intended beneficiary of the contract between CTS and the County. Finally, appellants argued that the open-and-obvious doctrine did not apply in this case because Pauline's fall was precipitated by attendant circumstances that remove this case from the ordinary open-and-obvious scenario.

{¶ 11} Upon consideration of the parties' arguments, the trial court, on July 10, 2014, issued its decisions granting appellees' motions for summary judgment. In its entries, the court found that the record contained no evidence of a physical defect in the floor mat or negligence on the part of a County employee. Thus, the court found that the County was immune from liability under R.C. 2744.02(A). Moreover, the court concluded that the open-and-obvious doctrine was applicable in this case and barred appellants' claims. As to appellants' argument that CTS owed Pauline a duty of care as a third-party beneficiary of the contract between CTS and the County, the court found that the terms of the contract did not support a finding that Pauline was a third-party beneficiary. Additionally, the court found that there was "no evidence to suggest that CTS breached [its duty to exercise ordinary care] or acted in a way to create a foreseeable injury." Appellants' timely appeal followed.

B. Assignments of Error

{¶ 12} On appeal, appellants assert the following assignments of error:

FIRST ASSIGNMENT OF ERROR: THE LOWER COURT ERRED IN GRANTING APPELLEE LUCAS COUNTY BOARD OF COUNTY COMMISSIONERS' MOTION FOR SUMMARY JUDGMENT.

SECOND ASSIGNMENT OF ERROR: THE LOWER COURT ERRED IN GRANTING APPELLEE COYNE TEXTILE SERVICES' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO NEGLIGENCE.

II. Analysis

A. Standard of Review

{¶ 13} We review summary judgment decisions de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any 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 viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). "When a motion for

summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

B. Grant of Summary Judgment to the County

{¶ 14} In their first assignment of error, appellants contend that the trial court erred in granting the County's motion for summary judgment. Specifically, appellants argue that the trial court mistakenly determined that the County was entitled to immunity. Further, appellants assert that the trial court's application of the open-and-obvious doctrine was in error. Because we find that the County was entitled to immunity under R.C. 2744.02(A), we need not address appellants' argument concerning the open-and-obvious doctrine as it relates to the County.

{¶ 15} As stated by the Ohio Supreme Court, a "three-tiered analysis" is used to determine whether a political subdivision is immune from liability. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10. Under the first tier, we examine whether the general grant of immunity provided by R.C. 2744.02(A) applies. *Id.* If it does, the second tier requires us to determine whether immunity has been abrogated by the exceptions set forth in R.C. 2744.02(B). *Id.* at ¶ 11. If an exception applies, the third tier involves a determination of whether the political

subdivision is able to successfully assert one of the defenses listed in R.C. 2744.03, thereby reinstating its immunity. *Id.* at ¶ 12.

{¶ 16} Appellants acknowledge that the County qualifies for immunity under R.C. 2744.02(A)(1). However, appellants assert that the County's immunity has been abrogated pursuant to R.C. 2744.02(B)(4).

{¶ 17} R.C. 2744.02(B)(4) provides:

> (B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:
>
> * * *
>
> (4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention,

workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶ 18} We have previously held that "R.C. 2744.02(B)(4) abrogates the general immunity afforded political subdivisions engaged in a governmental activity only if an injury is: 1) caused by employee negligence, 2) on the grounds or in buildings used in connection [with] that governmental activity, and 3) due to physical defects on or within those grounds or buildings." *Hamrick v. Bryan City School Dist.*, 6th Dist. Williams No. WM-10-014, 2011-Ohio-2572, ¶ 25.

{¶ 19} Here, the parties agree that the courthouse at which Pauline's injury occurred qualifies as a building used in connection with a governmental activity. However, the parties dispute the remaining elements; namely, whether Pauline's injury was caused by employee negligence or was due to a physical defect in the floor mat.

{¶ 20} In order to establish employee negligence, appellants must show the existence of a duty, a breach of that duty, and an injury proximately resulting from the breach. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998). The failure to prove any element is fatal to a negligence claim. *Whiting v. Ohio Dept. of Mental Health*, 141 Ohio App.3d 198, 202, 750 N.E.2d 644 (10th Dist.2001).

{¶ 21} As a threshold matter, we must determine the appropriate duty of care owed to Pauline. To determine the duty of care owed in premises liability actions, we examine

"the relationship between the owner or occupier of the premises and the injured party." *Turner v. Cathedral Ministries*, ---- N.E.3d ----, 2015-Ohio-633, ¶ 10 (6th Dist.), citing *Mostyn v. CKE Restaurants, Inc.*, 6th Dist. Williams No. WM-08-018, 2009-Ohio-2934, ¶ 13. "That relationship will fall into one of three categories: invitee, licensee, or trespasser." *Id.*

{¶ 22} The County (as well as CTS) argues that Pauline was a licensee to whom it owed no duty except to refrain from willfully or wantonly causing injury. On the contrary, appellants argue that Pauline was a business invitee, thereby obligating the County to exercise ordinary care to maintain the premises in a safe condition, and to warn of latent or hidden dangers of which it had, or reasonably should have had, knowledge.

{¶ 23} "Business invitees are persons who come upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68, 502 N.E.2d 611 (1986), citing *Scheibel v. Lipton*, 156 Ohio St. 308, 102 N.E.2d 453 (1951). A property owner must exercise ordinary care and protect the invitee by maintaining the premises in a safe condition. *Id.*, citing *Presley v. Norwood*, 36 Ohio St.2d 29, 31, 303 N.E.2d 81 (1973). "A plaintiff must prove his or her status as a business invitee by submitting evidentiary material showing that the defendant received a benefit or encouraged or invited the plaintiff to use the premises." *Turner* at ¶ 12, citing *Roesch v. Warren Distrib./Fleet Eng. Research*, 146 Ohio App.3d 648, 652, 767 N.E.2d 1187 (8th Dist.2000).

{¶ 24} "Conversely, a person who enters the premises of another by permission or acquiescence, for his own pleasure or benefit, and not by invitation, is a licensee." *Light* at 68. "The duty of a property owner to a licensee is not to injure him or her by willful or wanton misconduct or any affirmative act of negligence." *Id.*, citing *Scheurer v. Trustees of Open Bible Church*, 175 Ohio St. 163, 192 N.E.2d 38 (1963). Willful and wanton acts are those that demonstrate intent or reckless disregard of the safety of others. *France v. Lambert*, 5th Dist. Stark No. CA-8197, 1990 WL 187081, *2 (Nov. 26, 1990). A licensee must show that the defendant knew that injury was likely to occur. *Id.*

{¶ 25} In its decision, the trial court did not address the question of whether Pauline was a business invitee or a licensee. Rather, the trial court assumed that Pauline was a business invitee and proceeded to deny recovery to appellants on the basis that the alleged curling of the floor mat constituted an open and obvious hazard. Nonetheless, the County insists that Pauline was a licensee since she was visiting the courthouse for her own benefit.

{¶ 26} Indeed, Ohio courts that have examined the status of entrants onto state or local government property and have generally classified the entrants as licensees. *Estate of Enzweiler v. Clermont Cty. Bd. of Commrs.*, 12th Dist. Clermont Nos. CA2010-11-085, CA2010-11-086, 2011-Ohio-896, ¶ 16, citing *Souther v. Preble Cty. Dist. Library, West Elkton Branch*, 12th Dist. Preble No. CA2005-04-006, 2006-Ohio-1893, ¶ 14. *See also Provencher v. Ohio Dept. of Transp.*, 49 Ohio St.3d 265, 551 N.E.2d 1257 (1990),

syllabus (individuals using public roadside rest areas are licensees). The issue of a courthouse visitor's classification as a licensee or an invitee was previously addressed in *Shotts v. Jackson County*, 4th Dist. Jackson No. 00CA016, 2000 WL 33226299 (Dec. 27, 2000). In that case, Shotts brought a negligence action against Jackson County and the Jackson County Commissioners to recover damages she sustained when she slipped and fell down some crumbling concrete steps outside the courthouse. *Id.* at *1. Shotts had entered the courthouse to drop her children off for a scheduled visitation with their father. *Id.*

{¶ 27} Upon examination of the nature of Shotts's visit to the courthouse, the Fourth District determined that she was a licensee. *Id.* at *3. In reaching its conclusion, the court reasoned that Shotts was not present at the courthouse for the benefit of the county or the county commissioners. *Id.* Rather, the court found that she was at the courthouse for her own benefit, namely to "facilitate the children's visitation with their father." *Id. See also Estate of Enzweiler*, *supra* (finding that a visitor of the courthouse was a licensee despite her claim that the county could have received funds from a filing fee generated by her title examination).

{¶ 28} Similar to the courthouse visitor in *Shotts*, Pauline's presence at the Lucas County Courthouse was not for the benefit of the County. Instead, the purpose for Pauline's visit to the courthouse was to "pay whatever costs and fees were necessary to

keep [Gregory] out of jail." Thus, it is clear that Pauline went to the courthouse on January 6, 2010, for Gregory's benefit, not the County's.

{¶ 29} Nonetheless, appellants contend that Pauline benefited the County by paying Gregory's fees and costs, as well as his attorney's fees, which would have otherwise been borne by the County. Our research has found no Ohio case directly addressing the issue of whether a visitor to a courthouse is entitled to invitee status based upon his or her payment of court costs. However, this issue was addressed in *Simpson v. Harris County*, 951 S.W.2d 251 (Tex.App.1997). There, the 14th District Court of Appeals of Texas held that the payment of filing fees, which are used to support the judiciary and its related support services, does not entitle the payee to invitee status. *Id.* at 253.

{¶ 30} Upon due consideration, we agree with the court in *Simpson* that Pauline's payment of Gregory's costs does not operate as a benefit to the County. Thus, we find that Pauline was a licensee when she visited the courthouse on January 6, 2010. As such, the County owed Pauline a duty not to injure her by willful or wanton misconduct or any affirmative act of negligence. *Light, supra*, 28 Ohio St.3d at 68, 502 N.E.2d 611 (1986).

{¶ 31} "Willful conduct 'involves an intent, purpose or design to injure.'" *McKinney v. Hartz & Restle Realtors, Inc.*, 31 Ohio St.3d 244, 246, 510 N.E.2d 386 (1987), quoting *Denzer v. Terpstra*, 129 Ohio St. 1, 193 N.E. 647 (1934), paragraph two of the syllabus. "Wanton conduct occurs when one 'fails to exercise any care whatsoever

toward those to whom he owes a duty of care, and his failure occurs under circumstances in which there is great probability that harm will result * * *.'" *McKinney* at 246, quoting *Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), syllabus. Further, a licensee must be warned of hidden dangers, pitfalls or obstructions. *Hannan v. Ehrlich*, 102 Ohio St. 176, 185-86, 131 N.E. 504 (1921). Moreover, if the landowner knows of the presence of such danger, the licensee must be alerted to any danger, which the landowner should reasonably believe that the licensee will not discover. *Salemi v. Duffy Constr. Corp.*, 3 Ohio St.2d 169, 209 N.E.2d 566 (1965), paragraph two of the syllabus.

{¶ 32} Having reviewed the materials submitted with appellants' opposition to the County's motion for summary judgment, we have found no evidence of willful or wanton misconduct surrounding the County's handling of the floor mats. Rather, the County produced evidence demonstrating that courthouse deputies conduct inspections of the courthouse each morning to ensure the safety of the visitors and verify that the courthouse was not broken into overnight. Further, appellants have failed to introduce any evidence demonstrating that the County had notice, constructive or otherwise, of the alleged curls in the floor mat prior to Pauline's fall.

{¶ 33} Because appellants failed to submit evidence to create a genuine issue of material fact on the question of whether Pauline's injuries resulted from the willful or wanton misconduct or negligence of a County employee, we find that the trial court properly concluded that the County was immune from liability under R.C. 2744.01(A).

Thus, we need not address whether the alleged curling in the mats constituted a physical defect under R.C. 2744.01(B)(4).

{¶ 34} Accordingly, appellants' first assignment of error is not well-taken.

C. Grant of Summary Judgment to CTS

{¶ 35} In their second assignment of error, appellants argue that the trial court erred in granting CTS's motion for partial summary judgment as to their negligence claim. In particular, appellants argue that the trial court erred in finding that Pauline was not owed a duty of care as an intended third-party beneficiary to the contract between the County and CTS. Further, appellants take issue with the trial court's conclusion that the open-and-obvious doctrine bars their recovery against CTS.

{¶ 36} In its decision granting CTS's motions for partial summary judgment, the trial court addressed the above arguments advanced by appellants. Initially, the trial court noted that the floor mat upon which Pauline fell was not under CTS's control or possession at the time of the fall.

{¶ 37} Regarding appellants' contention that Pauline was owed a duty of care as an intended third-party beneficiary, the trial court found that appellants failed to include such an allegation in their amended complaint. Nonetheless, the court examined the terms of the contact between CTS and the County, and concluded Pauline was not an intended third-party beneficiary.

{¶ 38} Ohio uses the "intent to benefit" test to determine whether a third-party is an intended beneficiary. Under that test, a third-party is not an intended beneficiary under a contract unless there is "evidence that the contract was intended to directly benefit that third-party. Generally, the parties' intention to benefit a third-party will be found in the language of the agreement." *Huff v. FirstEnergy Corp.*, 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3, ¶ 12.

{¶ 39} Here, the contract between CTS and the County is silent as to third parties. Notwithstanding the absence of any such reference, appellants argue that the following contract language gives rise to an inference that courthouse visitors are intended third-party beneficiaries:

> 11. INSURANCE – If this order covers the performance of labor for the County, seller agrees to indemnify and protect the County against all liabilities, claims or demands for injuries or damages to any person or property growing out of the performance of this contract, by seller, its servants, employees, agents or representatives. Seller further agrees to furnish, upon County's request, Insurance Carrier's Certificate showing that seller has adequate workers compensation, public liability and property damage insurance coverage.

{¶ 40} Contrary to appellants' argument, we find nothing in the foregoing indemnification clause that demonstrates appellees entered into the contract with the

intention of benefitting courthouse visitors. Indeed, visitors to the courthouse receive no benefit from the indemnification clause. Rather, the clause was inserted into the contract in order to protect *the county* from liability arising out of CTS's performance under the contract. Because the contract does not reveal an intent to benefit Pauline or other members of the general public who decide to visit the courthouse, we conclude that Pauline was not an intended third-party beneficiary under the contract.

{¶ 41} Next, we turn to appellants' contention that the trial court erred in holding that they were barred from recovering on their negligence claim against CTS under the open-and-obvious doctrine.

{¶ 42} The open-and-obvious doctrine provides that owners do not owe a duty to persons entering their premises regarding dangers that are open and obvious. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 14, citing *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the syllabus. The rationale underlying this doctrine is "that the open and obvious nature of the hazard itself serves 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." (Emphasis added.) *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E .2d 504 (1992).

{¶ 43} Here, appellants insist that the trial court erred in applying the open-and-obvious doctrine to their negligence claim against CTS, which is not an owner or occupier of the courthouse.

{¶ 44} Relevant to this issue, the Supreme Court of Ohio held in *Simmers, supra*, that "[a]n independent contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which exonerates an owner or occupier of land from the duty to warn those entering the property concerning open and obvious dangers on the property." *Id.* at syllabus. In addition, we have previously found that "the open-and-obvious doctrine only exonerates an owner or occupier of the land from the duty to protect against open and obvious dangers; an independent contractor is not relieved of liability." *Semprich v. Erie Cty.*, 6th Dist. Erie No. E-12-070, 2013-Ohio-3561, ¶ 19, citing *Simmers* at 645.

{¶ 45} Construing the holding in *Simmers*, the trial court in the case sub judice found that the open-and-obvious doctrine does not apply in cases in which the independent contractor *created* the danger that caused the injury, but remained available to independent contractors who did not affirmatively create the danger. The court went on to note the absence of any evidence that CTS caused the alleged curls in the floor mat. However, the court stopped short of relying upon the open-and-obvious doctrine to support its decision granting CTS's motion for summary judgment. Rather, the court

stated that "an open-and-obvious analysis [is] unnecessary" because CTS was entitled to summary judgment under the general laws of negligence.

{¶ 46} We agree with the trial court's award of summary judgment to CTS based upon the general laws of negligence. Specifically, we agree with the trial court that there are no genuine issues of material fact on the element of causation.

{¶ 47} Under Ohio law, "if an injured patron cannot identify the cause of her fall, a finding of negligence is precluded." *Brown v. The Twins Group-PH LLC*, 2d Dist. Clark No. 2004CA59, 2005-Ohio-4197, ¶ 12, citing *Russell v. Creatif' Catering, Inc.*, 2d Dist. Montgomery No. 17031, 1998 WL 833811 (Dec. 4, 1998). *See also Lewin v. Lutheran W. High School*, 8th Dist. Cuyahoga No. 88635, 2007-Ohio-4041, ¶ 15, citing *Cleveland Athletic Assn. Co. v. Bending*, 129 Ohio St. 152, 194 N.E. 6 (1934) ("To prevail on a negligence theory in a slip and fall case, the plaintiff must be able to identify the reason for the fall."). "As such, a plaintiff will be prevented from establishing negligence when he, either personally or with the use of outside witnesses, is unable to identify what caused the fall. In other words, a plaintiff must know what caused him to slip and fall. A plaintiff cannot speculate as to what caused the fall." *Beck v. Camden Place at Tuttle Crossing*, 10th Dist. Franklin No. 02AP-1370, 2004-Ohio-2989, ¶ 12. (Internal citations omitted.)

{¶ 48} In *Brown, supra*, Rita Brown suffered a broken bone near her shoulder when she tripped and fell on a floor mat at a Pizza Hut restaurant. While waiting for her

food to be prepared, Brown witnessed "several employees kick the mats to straighten them." *Brown* at ¶ 2. However, Brown did not notice any curling of the mat prior to falling. Rather, she stated that she fell after catching her foot on something, which she presumed to be the floor mat. *Id.* at ¶ 3. After falling, Brown complained of the mat and the store manager "repeatedly apologized." *Id.* Moreover, Brown's friend, Chris Brewer, stated that he heard an employee say "the rugs do that." *Id.* In a follow-up call to Brown, the store manager acknowledged that he had "to do something about those mats in that area," and went on to state that he routinely tripped over the mats himself. *Id.* at ¶ 4.

{¶ 49} As a result of her injuries, Brown filed suit against the owner of the Pizza Hut restaurant. The trial court subsequently granted the restaurant owner's motion for summary judgment. On appeal, the Second District found, inter alia, that the restaurant owner was entitled to summary judgment on Brown's negligence claim because Brown could not identify what caused her to trip and fall. *Id.* at ¶ 13. The court reasoned that Brown "only noticed that a corner of the mat was flipped up after she fell. She did not know whether it was flipped up before she fell, or if her fall flipped it up. Brown cannot identify what caused her to fall. As a result, a finding of negligence is precluded." *Id.*

{¶ 50} Likewise, in this case, appellants cannot identify the cause of Pauline's fall. Indeed, when asked about the cause of her fall at her deposition, Pauline stated: "That rug probably in front of me. Otherwise, I don't know. The rug was curled up." Notably,

Pauline went on to acknowledge that she did not see the rug curled up until *after* she fell. In his affidavit attached to appellants' memorandum in opposition to summary judgment, Gregory stated that Pauline "tripped on a curled portion of the mat in front of the first floor elevator." However, it is clear from the remainder of the affidavit that Gregory did not personally witness the fall. Rather, the affidavit provides that Gregory "*heard* [Pauline] fall, hit the ground and scream." (Emphasis added.) Similar to the plaintiff in *Brown*, appellants merely speculate as to the cause of Pauline's fall. Without more, we conclude that appellants have failed to establish causation and, thus, their negligence claim is precluded. *Beck*, 10th Dist. Franklin No. 02AP-1370, 2004-Ohio-2989, at ¶ 12. Consequently, we find that the trial court did not err in granting CTS's motion for partial summary judgment as to appellants' negligence claim.

{¶ 51} Accordingly, appellants' second assignment of error is not well-taken.

III. Conclusion

{¶ 52} Having found appellants' assignments of error not well-taken, we hereby affirm the judgment of the Lucas County Court of Common Pleas. Costs are assessed to appellants in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE