[Cite as *Mann v. Northgate Investors L.L.C.*, 2012-Ohio-2871.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lauren J. Mann,	:	
Plaintiff-Appellant,	:	
		No. 11AP-684
v.	:	(C.P.C. No. 10CVC-10-14595)
Northgate Investors LLC, d.b.a. Northgate Apartments,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 26, 2012

Michael T. Irwin, for appellant.

Reminger Co., LPA, Kevin P. Foley and *Nicole M. Norcia,* for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶ 1} Plaintiff-appellant, Lauren J. Mann, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendant-appellee, Northgate Investors LLC, d.b.a. Northgate Apartments, and entering judgment for defendant on plaintiff's claim of negligence. Because the trial court failed to apply negligence per se to defendant's alleged violations of R.C. 5321.04, we reverse.

I. Facts and Procedural History

{¶ 2} On June 15, 2007, plaintiff, along with two friends, went to visit Michelina Markiewicz at her apartment, leased from defendant. They arrived about noon, spent the

day at the apartment, and left between 10:00 and 11:30 p.m. that evening. Markiewicz had a second-floor apartment, and the only means of egress to the exterior door of the apartment building was down two flights of stairs. The common area outside Markiewicz's apartment, as well as the stairs, was unlit. On plaintiff's leaving, someone closed the door to Markiewicz's apartment behind her, causing plaintiff to traverse the two flights of stairs in darkness. As she reached the bottom of the stairs, she stumbled through the glass plates on one side of the exterior door and suffered injury. Plaintiff's evidence indicated prior complaints to defendant about the non-working lights did not result in defendant's correcting the problem. (Markiewicz's affidavit.)

{¶ 3} Plaintiff filed a complaint on October 5, 2010 against defendant, alleging defendant "negligently failed to maintain adequate lighting for safe ingress and egress to said premises during nocturnal hours thereby creating a danger to residents and guests." (Complaint, at ¶ 7.) Plaintiff asserted defendant's negligence caused her to trip and fall through the glass window and to sustain personal injury.

{¶ 4} After filing an answer, defendant filed a motion for summary judgment, primarily arguing two points. Defendant initially contended plaintiff's deposition testimony revealed that she did not know the reason for her fall and thus could not sustain her burden with respect to proximate cause. Defendant secondly noted that although plaintiff alleged the lack of lighting caused her injury, darkness was an open-and-obvious condition of which plaintiff should have been aware and for which defendant owed no duty to warn.

{¶ 5} After the parties fully briefed the motion, the court issued a decision and entry on July 22, 2011. Concluding R.C. 5321.04 does not apply to plaintiff's case, the court determined plaintiff failed to establish a duty on the part of defendant or to present evidence of causation. Accordingly, the court granted defendant's summary judgment motion.

II. Assignments of Error

{¶ 6} On appeal, plaintiff assigns three errors:

> [I] THE TRIAL COURT ERRED IN SUSTAINING DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT IN ITS DECISION AND ENTRY RENDERED 7/22/11 WHICH HOLDS THAT R.C. 5321.04 DOES NOT

> EXTEND A DUTY OF CARE OWED TO APPELLANT AS A BUSINESS INVITEE.
>
> [II] THE TRIAL COURT ERRED IN FAILING TO RULE THAT A VIOLATION OF A LANDLORD'S DUTIES UNDER R.C. 5321.04 CONSTITUTES NEGLIGENCE PER SE.
>
> [III] THE TRIAL COURT ERRED IN APPLYING THE "OPEN AND OBVIOUS" DOCTRINE WHICH IS NOT AVAILABLE AS A DEFENSE WHERE LIABILITY IS ASSERTED BASED UPON NEGLIGENCE PER SE.

A. *Summary Judgment Standard of Review*

{¶ 7} All three assignments of error arise under the trial court's ruling on defendant's summary judgment motion. An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

B. *Applicable Law Regarding Liability*

{¶ 8} "To prevail in a negligence action, the plaintiff must show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting from the breach." *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 21. "At common law, a landlord was charged with a general duty to exercise reasonable care to keep the premises retained in his control for the common use of his tenants in a reasonably safe condition." *Mullins v. Grosz*, 10th Dist. No. 10AP-23, 2010-Ohio-3844, ¶ 23.

{¶ 9} The open-and-obvious doctrine, however, eliminates the common law duty of ordinary care to maintain the premises in a reasonably safe condition and to warn invitees of latent or hidden dangers that a premises owner owes to invitees. *Lyle v. PK Mgt., LLC*, 3d Dist. No. 5-09-38, 2010-Ohio-2161, ¶ 28. The doctrine's rationale is that

the open and obvious nature of the hazard itself serves as a warning, so that owners reasonably may expect their invitees to discover the hazard and take appropriate measures to protect themselves against it. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644 (1992).

{¶ 10} In 1974, the Ohio General Assembly modified the common law regarding landlords and tenants when it "enacted R.C. 5321.01 *et seq*., the Landlord and Tenant Act, in an attempt to clarify and broaden tenants' rights as derived from common law." *Mullins* at ¶ 23. Under R.C. 5321.04(A)(3), a landlord is required to "[k]eep all common areas of the premises in a safe and sanitary condition." A landlord's violation of the duties in R.C. 5321.04(A) generally constitutes negligence per se. *Robinson* at ¶ 23, *Mullins* at ¶ 24. Application of negligence per se in a tort action means the plaintiff conclusively established that the defendant breached the duty owed to the plaintiff. *Mullins* at ¶ 24, quoting *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998). "Negligence *per se*, however, is not equivalent to 'a finding of liability *per se* because the plaintiff will also have to prove proximate cause and damages.' " *Sikora v. Wenzel*, 88 Ohio St.3d 493, 496 (2000), quoting *Chambers* at 565.

{¶ 11} Moreover, "[t]he 'open and obvious' doctrine does not dissolve the statutory duty to repair." *Robinson* at ¶ 25. If a landlord breaches a duty under R.C. 5321.04, the "open and obvious" doctrine will not protect the landlord from liability. *Id*. If, however, no statutory breach occurred, the open-and-obvious doctrine remains a bar to a common law negligence claim. *Ryder v. McGlone's Rentals*, 3d Dist. No. 3-09-02, 2009-Ohio-2820, ¶ 17.

III. First, Second, and Third Assignments of Error — R.C. 5321.04(A)(3)

A. *R.C. 5321.04(A)(3) Applies to a Tenant's Guest*

{¶ 12} Plaintiff's first assignment of error asserts the trial court erred when it stated "the purpose of this statute * * * was * * * to establish the duties between landlords and tenants. In this case, the plaintiff was a business invitee, not a tenant." (Emphasis sic.) (Decision and Entry, at 4.) The trial court thus determined defendant owed only a common law duty of ordinary care to plaintiff.

{¶ 13} Plaintiff asserts the duties R.C. 5321.04 imposes on defendant as landlord apply not just to a tenant but to guests of a tenant, so that a breach of those duties is

negligence per se in plaintiff's action against defendant. Defendant responds that R.C. 5321.04 does not burden defendant with any obligation to a tenant's guest apart from the duties inherent in a common law negligence claim, where the open-and-obvious doctrine precludes recovery.

{¶ 14} In *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414 (1994), the Supreme Court of Ohio addressed fatal injuries to the tenant and his guest when a fire in the rented premises was undetected for lack of a properly operating fire detector on the first floor of the premises. In concluding negligence per se applied to the negligence action of the administrator of the guest's estate against the landlord, the Supreme Court explained that R.C. 5321.04 does "not distinguish between the duties a landlord owes to a tenant and the duties a landlord owes to other persons lawfully upon the leased premises." *Id.* at 419. Accordingly, " '[t]he guest, servant, etc., of the tenant is usually held to be so identified with the tenant that this right of recovery for injury as against the landlord is the same as that of the tenant would be had he suffered the injury.' " *Id.*, quoting *Caldwell v. Eger*, 8 Ohio Law Abs. 47 (8th Dist.1929), quoting 16 Ruling Case Law (1917) 1067, Section 588.

{¶ 15} Defendant counters that *Shump* did not involve common areas, but only the premises leased under the rental agreement between the landlord and tenant. Defendant supports its interpretation of *Shump* with two factors: (1) the emphasis in *Shump* on the term "leased premises," and (2) cases from the Ninth District which, defendant notes, "held that correct application of *Shump* imposes a tenant-landlord duty on invitees of the tenant only when an injury to the invitee occurs within an area in the exclusive control of the tenant." (Emphasis sic.) (Appellee's brief, at 5-6.) *See Shump* at syllabus (stating "[a] landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant"); *Shumaker v. Park Lane Manor of Akron, Inc.*, 9th Dist. No. 25212, 2011-Ohio-1052. Defendant's argument is not persuasive for two reasons.

{¶ 16} Initially, in finding a landlord owes a tenant's guest the same duties it owes to the tenant, *Shump* rejected the reasoning of *Rose v. Cardinal Industries, Inc.*, 68 Ohio App.3d 406 (6th Dist.1990) and *Seiger v. Yeager*, 44 Ohio Misc.2d 40 (C.P.1988). Applying R.C. 5321.04 to the complaint of a tenant's social guest who fell into a hole in an apartment building's common area, *Rose* concluded R.C. 5321.04 applied to tenants only.

Rose explained that "in the absence of any clear statutory provision or case law specifically extending the duties and remedies of R.C. 5321.04 to social guests of tenants," it would not do so. *Id*. at 410. *See also Seiger*, at 42 (similarly concluding it would "not extend the duties owed by a landlord to his tenant to third parties to create negligence *per se*"). Were the Supreme Court maintaining the distinction defendant proposes, the court would not have needed to address *Rose* and *Seiger* at all in the context of a case involving a tenant and guest on the leased premises.

{¶ 17} Secondly, although defendant relies heavily on a series of cases from the Ninth District Court of Appeals that concluded to the contrary, this court addressed the issue in *Schoefield v. Beulah Rd., Inc.*, 10th Dist. No. 98AP-1475 (Aug. 26, 1999), albeit in a footnote. The plaintiff in that case injured herself on "deteriorating steps located on property owned, leased and/or controlled by the defendant(s)" as she, a tenant of the apartment complex, was visiting her mother, a tenant in a different apartment in the same complex. After the visit, the plaintiff in *Schoefield* exited her mother's apartment, stepped down off the concrete, and "land[ed] in front of her mother's apartment building" where the "concrete landing/steps had deteriorated," causing her to fall.

{¶ 18} In a footnote, this court stated that the plaintiff was "both a tenant of appellant's and a guest of her mother's" but determined her "status [was] immaterial" to the discussion, because "a landlord owes the same duty to persons lawfully on the premises that is owed to tenants. See *Shump*." *Schoefield* thus applied *Shump* to mean that the guest of a tenant, injured in a common area, is entitled to the protections of R.C. 5321.04. Although defendant may be tempted to dismiss the footnote as dicta, the determination was critical to resolving the appeal. Had this court not so concluded in the footnote, it would have had to determine whether the plaintiff was a tenant or guest for purposes of her claim against the landlord.

{¶ 19} Consistent with Supreme Court cases, *Schoefield* further concluded R.C. 5321.04 imposed upon landlords a duty to repair, its violation "constitutes negligence *per se*," and the open-and-obvious doctrine, which "goes generally to a landowner's duty to warn and protect against open and obvious dangers" did not apply, because *Schoefield* concerned "a different duty—a duty to repair under R.C. 5321.04(A)(2)." *See, e.g.*,

Robinson, supra, at ¶ 25 (citing *Schoefield* and concluding the open-and-obvious doctrine does not dissolve the R.C. 5321.04 duty to repair).

{¶ 20} This court is not the only appellate court to conclude landlords owe to guests of a tenant in the common area the same duties the landlord owes to a tenant. See *Smith v. Finn*, 6th Dist. No. L-04-1244, 2005-Ohio-1547, ¶ 2, 13-14 (concluding landlord owed nurse's aide, injured on stairs leading to her client's second floor apartment, same duty as landlord owed to tenant); *Scott v. Kirby*, 6th Dist. No. L-05-1287, 2006-Ohio-1991, ¶ 4, 7, 20-23 (determining tenant's sister, injured when edge of front porch on bottom floor apartment "crumbled" or "broke," was entitled to R.C. 5321.04 protections pursuant to *Shump*); *Saunders v. Greenwood Colony*, 3d Dist. No. 14-2000-40 (Feb. 28, 2001) (concluding father who fell while walking from the sidewalk to the parking area of his daughter's apartment was not a licensee because, pursuant to *Shump*, landlord owed father same duties as landlord owed to tenant-daughter); *Hodges v. Gates Mills Towers Apt. Co.*, 8th Dist. No. 77278 (Sept. 28, 2000) (noting "Gates Mills Towers concede[d] that Leila Hodges," a home health care nurse who was injured when the apartment complex elevator allegedly stopped eight to ten inches below floor level, "was lawfully on its premises" so that, pursuant to *Shump*, "the obligations imposed upon a landlord under R.C. 5321.04 would appear to extend to tenants and to other persons lawfully upon the leased premises"). Accordingly, plaintiff is entitled to maintain an action against defendant based on alleged violations of R.C. 5321.04.

B. *Negligence Per Se and the Open-and-Obvious Doctrine under R.C. 5321.04(A)(3)*

{¶ 21} Plaintiff's second and third assignments of error assert the trial court erred in failing to conclude that a violation of R.C. 5321.04 constitutes negligence per se and in applying the open-and-obvious doctrine. Pursuant to *Robinson*, *supra*, plaintiff's contention is accurate; *Robinson* determined a violation of R.C. 5321.04 is negligence per se and the open-and-obvious doctrine does not apply in those circumstances.

{¶ 22} We recognize that in *LaCourse v. Fleitz*, 28 Ohio St.3d 209 (1986), the court excepted ice and snow from such a result, concluding "R.C. 5321.04(A)(3) does not impose a duty on landlords to keep common areas of the leased premises clear of natural accumulations of ice and snow." *Id.* at syllabus. In explaining its decision, the court noted

the common law of this state never required landlords to keep common areas free of ice and snow, such that if "the legislature intended [R.C. 5321.04(A)(3)] to dismantle a long-standing rule of the common law, it would have expressly so declared." *Id*. at 212. *See also Kueber v. Haas*, 47 Ohio App.3d 62, 63-64 (1st Dist.1988) (concluding "dead trees in a heavily wooded area" were similar to "the natural accumulation of snow and ice" so that "no duty [was] imposed under R.C. Chapter 5321 on the Haases to remove the dead trees from the area"); *McDaniels v. Petrosky*, 10th Dist. No. 97APE08-1027 (Feb. 5, 1998) (determining failure to remove tree stump did not violate R.C. 5321.04(A)(3)); *Wiggans v. Glock*, 2d Dist. No. 15967 (Mar. 14, 1997) (deciding landlord had no duty under R.C. 5321.04(A)(3) to protect tenant who slipped on grass clippings, as lawn clippings were similar to the natural accumulation of ice and snow, the "danger posed by the grass clippings was open and obvious," and landlord had the right to assume his tenants would assess the risk such natural phenomena posed).

{¶ 23} Applying *Shump* and *LaCourse*, *Mowery v. Shoaf*, 7th Dist. No. 01-CO-40, 2002-Ohio-3006, addressed the claims of Mowery, a guest who alleged the landlord failed to maintain the driveway at her friend's apartment in a safe and sanitary condition under R.C. 5321.04(A)(3) because the exterior was poorly illuminated. *Mowery* first applied *Shump* and stated "landlords do owe a duty to maintain common areas in a safe condition for tenants and social visitors alike." *Id*. at ¶ 25. *Mowery* then relied on *LaCourse* to hold "that there is a similar bar on any duty one otherwise might expect a landlord to have with respect to the condition of darkness. Even more than accumulations of ice and snow, darkness is a completely predictable event that is not of the landlord's making." *Id*. at ¶ 38. *Mowery* supported its conclusion with citations to other cases involving poorly lit parking lots where courts held that darkness is a warning of danger, and the person who disregards the condition of darkness does so at his or her own peril. *Mowery* at ¶ 39-41.

{¶ 24} *Mowery* and the cases cited in it all involved natural darkness in an outside setting, much like natural accumulations of ice and snow. Here, plaintiff needed to descend the darkened stairwell "to get out of the building." (Mann Depo, at 25.) The evidence here, construed in plaintiff's favor, indicates the darkness was artificial darkness that arose inside the building from the structure of the building and the lack of lighting, not darkness solely from the presence of nighttime. *See Schoefield* (finding *LaCourse*

distinguishable because the case involved "weather-related conditions," but *Schoefield* concerned "a structural defect"); *Kaeppner v. Leading Mgt., Inc.*, 10th Dist. No. 05AP-1324, 2006-Ohio-3588, ¶ 11 (noting that an owner or occupier of property may be liable where the plaintiff establishes "either that: (1) the natural accumulation of ice and snow was substantially more dangerous than the Plaintiff could have anticipated and that the land owner had notice of such danger; or (2) that the land owner was actively negligent in permitting an unnatural accumulation of ice and snow to exist"). Indeed, to apply *LaCourse* to every condition deemed open and obvious under the common law would render *Shump* largely ineffective.

{¶ 25} Accordingly, in *Gelvin v. Brown*, 8th Dist. No. 58370 (Apr. 25, 1991), although the issue before the court primarily concerned evidence of proximate cause, the court indicated the defendant-landlord's failure to provide operable lights in a stairwell constituted negligence per se under R.C. 5321.04. The landlord had been cited for violating the housing code for failing to light the hallway, and the court concluded "the jury was presented with sufficient evidence upon which it could infer that the defendant's failure to eliminate the violations in the hallway proximately caused appellee to fall." *Id*. Cf. *Garden Woods Apts. v. Gee*, 2d Dist. No. 13962 (Sept. 27, 1993). Similarly, here, if defendant violated R.C. 5321.04, it was negligent per se.

{¶ 26} Lastly, plaintiff needed to present evidence concerning proximate cause. *Beck v. Camden Place at Tuttle Crossing,* 10th Dist. No. 02AP-1370, 2004-Ohio-2989, ¶ 12, quoting *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 67-68 (12th Dist.1989) (noting that usually, "[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"). "[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." *Beck* at ¶ 12.

{¶ 27} Here, plaintiff initially stated in her deposition that she did not know what caused her fall. Plaintiff testified she made it down the first flight of stairs safely, crossed the landing, and was proceeding down the second flight of stairs. When defense counsel asked whether she tripped over something, she replied that "[i]t happened so fast, I don't recall." (Depo., at 35.) At the urging of plaintiff's attorney, defense counsel clarified the question and asked plaintiff whether she caught her foot on something, to which plaintiff

responded, "Yes, it's a very big possibility." (Depo., at 36.) When, however, counsel asked if she knew what her foot caught, plaintiff responded, "No, ma'am, I have not a clue" but added "there was no object on the stairs that I tripped over." (Depo., at 36-37.) As she stated, "So my last step that I was taking after already being off the step is when I fell through the glass." (Depo., at 38-39.) She stated she had made it down the steps, both of her feet were on the ground, she fell and she did not know what caused the fall.

{¶ 28} Ultimately, however, she explained that although both feet in reality were on the ground, she thought there might have been another step but could not ascertain that in the darkness, and for that reason she lost her balance, causing her to stumble forward into the glass plate on the side of the exit door. On summary judgment we are required to construe the evidence in plaintiff's favor. We cannot say plaintiff failed to present evidence of proximate cause, as her testimony reasonably may be interpreted to indicate the darkness led to her failure to appreciate that she was at the bottom of the stairs and caused her to stumble through the plate glass. Because the evidence must be construed in her favor on summary judgment, her evidence creates an issue for the trier of fact to resolve at trial.

{¶ 29} As a result, we sustain plaintiff's three assignments of error.

IV. Disposition

{¶ 30} For the reasons stated, we conclude plaintiff's evidence created genuine issues of material fact for trial. Accordingly, we sustain plaintiff's three assignment of error, reverse the judgment of the Franklin County Court of Common Pleas, and remand for further proceedings consistent with this decision.

Judgment reversed and case remanded.

BROWN, P.J., and CONNOR, J., concur.