[Cite as *Jaronovic v. Iacofano*, 2012-Ohio-1581.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

KEITH JARONOVIC,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-L-070**
- vs -	:	
MARK IACOFANO,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 10 CV 001626.

Judgment: Affirmed.

Eric W. Tayfel, 1360 W. 9th Street, Suite 400, Cleveland, OH 44113 (For Plaintiff-Appellant).

Adam E. Carr, The Carr Law Office, L.L.C., 5824 Akron-Cleveland Road, Suite A, Hudson, OH 44236 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Keith Jaronovic, appeals the summary judgment of the Lake County Court of Common Pleas in favor of appellee, Mark Iacofano, on Keith's claim for negligence arising from his slip and fall while a guest at a party at Mark's home. We are asked to consider whether genuine issues of material fact exist on Keith's claim, thus precluding summary judgment. For the reasons that follow, we affirm.

{¶2} Keith testified in deposition that on Friday, July 24, 2009, his friend, Kevin Iacofano, invited him to a party that Kevin's brother, Mark, was giving at Mark's home in

Painesville. Mark and his wife were having a cookout for Kevin, who had recently moved to Las Vegas and was visiting his relatives in Painesville.

{¶3} Keith drove to the party by himself and arrived at about 7:30 p.m. He parked in the driveway, and then walked on a path along the side of the house to some steps that lead down to the backyard where the cookout was being held.

{¶4} As Keith walked down the stairs, he slipped and broke his left ankle. He said he does not remember where on the steps he slipped.

{¶5} Keith's slip and fall injury happened between 7:30 p.m. and 7:50 p.m. At the time it was daylight and sunny, and Keith said he had no difficulty seeing.

{¶6} Keith testified that nothing obstructed his view at any time as he walked down the steps. There was no one else on the steps, and he was not carrying anything.

{¶7} Keith testified he does not know why he slipped. There was no substance on the steps that caused him to slip. He said the steps were made of wood, but there was nothing unusual about them. He said that no one touched him or caused him to slip and fall.

{¶8} Keith testified there was no handrail on the steps, and he could see there was no handrail when he was walking down the steps. He testified the absence of a handrail was a defect on the property and that he should have been warned in advance that there was no railing on the stairs.

{¶9} An ambulance arrived shortly thereafter and took Keith to the hospital where he was treated for a broken ankle.

{¶10} Mark testified he and his wife purchased their home two years prior to this incident. The steps were built by a prior owner long before they moved in. Mark has

never made any alterations to the steps while he and his wife have lived there. He said that while he has lived at the property, no one else has ever fallen on these steps.

{¶11} Mark testified that at the time of Keith's fall, it was daylight and sunny, and the area was lit well enough so that the steps leading down to the backyard were visible.

{¶12} On June 1, 2011, Keith filed a complaint alleging Mark negligently permitted an unreasonably dangerous condition to exist on his property, which, without warning thereof, caused him to sustain personal injury. Keith demanded judgment against Mark in excess of $25,000. Mark timely filed an answer, denying the allegations of the complaint and asserting various defenses, including the open and obvious doctrine and lack of notice of any defect on the premises.

{¶13} While discovery was being exchanged, Keith filed the report of his expert, architect Samuel V. Diaquila, regarding his inspection of the subject stairs. In his report, Mr. Diaquila noted four alleged violations of the Ohio Building Code with respect to the stairs. First, he said the stair risers (the vertical part of the stair) are only allowed to be a maximum of seven inches high, and the difference in height of the different risers is not supposed to exceed one-half inch. However, some of the risers were six inches high and some were eight inches high. Second, the stair treads (the horizontal part of the stair) varied from two inches to 13 and one-half inches, although the difference in the width of the treads is not supposed to exceed one-half inch. Third, the overhanging edges of the treads (referred to as the nose of the tread) are supposed to be uniform in size, while, here, some treads had no nose and some noses were one and one-half inches. Fourth, no handrail had been installed.

{¶14} After discovery was completed, Mark filed a motion for summary judgment. He argued he owed no duty of care to Keith as a social guest to protect him from any condition on his property that was open and obvious. Further, he argued that the open and obvious doctrine is a defense to a claim of liability arising from a violation of the Ohio Building Code. In his brief in opposition, Keith argued that the building code violations noted by his expert created issues of fact for the jury. He also argued that the open and obvious doctrine does not apply to the building code violations noted by his expert.

{¶15} The trial court granted Mark's motion. In support of its decision, the court found that, assuming Mark's steps do not comply with the building code, Mark, as a host, did not breach any duty owed to Keith as his guest because Mark did not cause any injury by any act or activity while Keith was a guest at Mark's home. Further, the court found that Mark had no duty to warn Keith because, after living at the home for two years, no one had ever fallen on the steps and Mark had never made any alterations to them. As a result, there was no evidence Mark knew or had any reason to believe the steps presented a danger. Finally, the court found Mark had no duty to warn Keith about the lack of a handrail because it was light at the time; nothing obstructed Keith's view; and he admitted he saw there was no railing on the steps when he arrived.

{¶16} Keith appeals the trial court's ruling, asserting the following as his sole assignment of error:

{¶17} "The trial court committed prejudicial error in granting summary judgment in favor of Defendant-Appellee, Mark Iacofano, in finding that Defendant-Appellee did not breach his duty of care owed to Plaintiff-Appellant Keith Jaronovic."

{¶18} 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). This court has held that 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); *Frano v. Red Robin International, Inc*., 181 Ohio App.3d 13, 2009-Ohio-685, ¶12 (11th Dist.), citing *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 268 (1993).

{¶19} The party seeking summary judgment on the ground that the nonmoving party cannot prove his case bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996).

{¶20} The moving party must point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support his claim. *Dresher*, *supra*, at 293.

{¶21} If this initial burden is not met, the motion for summary judgment must be denied. *Id*. However, if the moving party has satisfied his initial burden, the nonmoving party then has a reciprocal burden, as outlined in Civ.R. 56(E), to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against him. *Id.*

{¶22} Since a trial court's decision ruling on a motion for 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.). A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993).

{¶23} In order to establish an actionable claim for negligence, the plaintiff must establish *each* of the following four basic elements: (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. *Bond v. Mathias*, 11th Dist. No. 94-T-5081, 1995 Ohio App. LEXIS 979, *6 (Mar. 17, 1995); W. Prosser, The Law of Torts, 143-44 (4th ed. 1971); *Baier v. Cleveland Ry. Co.*, 132 Ohio St. 388, 391 (1937).

{¶24} The existence of a duty is fundamental to establishing negligence. If there is no duty, then no liability arises on account of negligence. *Hake v. Delpine*, 11th Dist. No. 2002-T-0010, 2003-Ohio-1591, ¶13. Whether a duty is owed is a question of law for the court to determine on a case-by-case basis. *Reitz v. May Co. Dep't Stores*, 66 Ohio App.3d 188, 192 (8th Dist.1990).

{¶25} It is undisputed that Keith was a social guest of Mark at the time of the accident, and that the rule laid down in *Scheibel v. Lipton*, 156 Ohio St. 308 (1951) regarding the duty of a host to his social guest applies to the facts of this case. In *Scheibel*, the Supreme Court of Ohio held:

> **{¶26}** Although the host is not an insurer of the safety of the guest while upon the premises of the host, some duty short of that owed to a business [invitee] is owed to the guest. That duty of the host, in our judgment, is to [1.] exercise ordinary care not to cause injury to his

> guest by any act of the host or by any activity carried on by the host while the guest is on the premises. Coupled with this is the duty of the host to [2.] warn the guest of any condition of the premises known to the host and which one of ordinary prudence and foresight in the position of the host should reasonably consider dangerous, if the host has reason to believe that the guest does not know and will not discover such dangerous condition. *Id*. at 329.

{¶27} Further, it is well settled that a host can assert the open and obvious doctrine *as a defense* to a negligence claim asserted against him by a social guest. *Galinari v. Koop*, 12th Dist. No. CA 2006-10-086, 2007-Ohio-4540; *Mullens v. Binsky*, 130 Ohio App.3d 64, 72 (10th Dist.1998); *Lang v. Holly Hill Motel, Inc*., 122 Ohio St.3d 120, 2009-Ohio-2495, ¶24.

{¶28} A property owner 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; *Bond, supra,* at *7. "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*, *supra*. 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 General Store*, 2d Dist. No. 2002-CA-47, 2003-Ohio-206, ¶7; *Hobart v. Newton Falls*, 11th Dist. No. 2002-T-0122, 2003-Ohio-5004, ¶10**.** Where a hazard is open and obvious, a property owner owes no duty to an

invitee, and it is unnecessary to consider the separate issues of breach and causation. *Ward v. Wal-Mart Stores Inc*., 11th Dist. No. 2000-L-171, 2001 Ohio App. LEXIS 6006, *5 (Dec. 28, 2001).

{¶29} 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 the emphasis in analyzing open and obvious danger cases relates to the threshold issue of duty. In particular, the Court observed:

> [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 82.

{¶30} Further, "'the danger does not actually have to be observed by the plaintiff in order for it to be an open and obvious condition.'" *Konet v. Mark Glassman, Inc.*, 11th Dist. No. 2004-L-151, 2005-Ohio-5280, ¶33, quoting *Lydic v. Lowe's Companies, Inc*., 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. Rather, the determinative issue is whether the condition was *observable*. *Konet*, *supra.* "Even in cases in which the plaintiff did not actually notice the condition until after he or she fell, courts have found no duty to exist when the plaintiff could have seen the condition *if he or she had looked*." (Emphasis added.) *Id*.

{¶31} The Supreme Court of Ohio in *Lang*, *supra*, held that "[t]he open-and-obvious doctrine may be asserted as a defense to a claim of liability arising from a

violation of the Ohio Basic Building Code." *Id*. at syllabus. In *Lang*, the plaintiff rented a room at a motel. While climbing two steps that had no handrail in order to get to his room, the plaintiff fell and broke his hip. In his negligence suit against the motel, the plaintiff alleged that the step over which he tripped exceeded the height limitations in the Ohio Basic Building Code. According to the plaintiff's expert witness, the first step, which he successfully climbed, was 3.5 inches higher than was permissible under the building code, and the second step, over which he fell, was 2.3 inches higher than permissible. The plaintiff alleged that this dangerous condition was exacerbated by the absence of handrails, which was also a violation of the building code. The trial court granted summary judgment to the motel, finding that, even if the steps violated the building code, it was an open and obvious condition. Thus, the motel owed no duty of care to the invitee. In affirming the judgment for the motel, the Supreme Court held that administrative-rule violations do not create a per se finding of duty and breach of duty; thus, the plaintiff was required to present evidence to establish those two elements of the negligence test. *Id*. at 125. The Supreme Court held that a violation of the building code is merely evidence that the landowner breached the duty of care, and the landowner could still challenge the plaintiff's case with the open and obvious doctrine. *Id*.

{¶32} Turning our attention to the instant case, we first consider whether Mark owed a duty of care to Keith as Mark's social guest pursuant to *Scheibel*, *supra*. Keith testified that at the time he slipped and fell, there was no substance on the steps that caused him to slip, and no one touched him or caused him to fall. Thus, there is no evidence that Mark caused injury to Keith by any act or activity carried on by Mark while Keith was a guest at his home. Further, Mark testified that in the two years he lived on

the premises prior to the accident, no one had ever fallen on the steps and he had never altered them. Thus, there is no evidence that Mark knew of a dangerous condition involving the steps or that he had reason to consider the steps to be dangerous. We therefore hold that, pursuant to *Scheibel*, Mark owed no duty of care to Keith and his negligence claim was therefore precluded.

{¶33} Despite the absence of a duty of care owed by Mark pursuant to *Scheibel*, Keith argues his expert report provided evidence of Mark's negligence. However, as noted above, the Ohio Supreme Court in *Lang*, *supra*, held that violations of administrative rules, such as the Ohio Building Code, are merely evidence that the landowner breached the duty of care; the property owner can still assert the open and obvious doctrine as a defense.

{¶34} Keith testified that at the time of the accident, it was daylight and sunny, and he had no difficulty seeing. He said that nothing obstructed his view at any time as he walked down the steps. Further, Keith testified he could see there were no handrails when he was walking down the steps.

{¶35} Keith argues that the open and obvious doctrine does not apply here because, in descending the stairs, he would not have been able to discern the size of the steps. However, as noted above, for a danger to be open and obvious, the danger does not actually have to be observed by the plaintiff as long as the condition was observable. *Konet*, *supra*. Moreover, even if the plaintiff did not actually notice the condition until after he fell, the property owner owes no duty to him if the plaintiff could have seen the condition *if he had looked*. *Id*.

{¶36} Based on Keith's testimony regarding the visibility of the steps, the condition of the steps was observable. Thus, even if Keith did not actually notice the

condition of the steps until after he fell, Mark owed no duty to him because Keith could have seen the condition of the steps if he had looked. Thus, any danger presented by the steps was open and obvious. For this additional reason, Mark owed no duty of care to Keith.

{¶37} In any event, even if Mark owed a duty of care to Keith, his negligence claim would have been precluded by the absence of any evidence of proximate causation, which is a separate element of a negligence claim. This court addressed the absence of evidence of causation in *Estate of Mealy v. Sudheendra*, 11th Dist. No. 2003-T-0065, 2004-Ohio-3505. In that case, the plaintiff alleged his decedent fell in a parking lot due to a defective curb. However, the plaintiff testified he did not know how his decedent fell. The plaintiff presented an affidavit of his expert in opposition to summary judgment. In his affidavit, the plaintiff's expert outlined certain alleged defects in the curb, such as a variation in curb height, and stated that these alleged defects caused the plaintiff's decedent to fall. However, the affidavit did not outline any facts that supported the expert's opinion that the alleged defects caused the fall. This court stated that this omission violated Civ.R. 56(E), which requires affidavits opposing summary judgment to "'set forth such facts as would be admissible in evidence.'" *Id*. at ¶15-18. Because no supporting facts were contained in the expert's affidavit, this court held that his opinion regarding causation was nothing more than an unsupported legal conclusion, which is insufficient to oppose summary judgment. *Id*. at ¶25. Further, this court held that because the plaintiff could not identify the proximate cause of his decedent's fall, the plaintiff's negligence claim was precluded. *Id*. at ¶32, citing *Beair v. KFC National Management Co*., 10th Dist. No. 03AP-487, 2004-Ohio-1410, ¶9.

{¶38} Applying this court's holding in *Mealy*, *supra*, to the instant case, although Mr. Diaquila stated in his report that the steps violated certain provisions of the Ohio Building Code, he failed to outline any facts to support his suggestion that such defects caused Keith's fall. Consequently, Mr. Diaquila's report was insufficient to oppose summary judgment. Moreover, Keith testified he does not know why he fell, and the record is otherwise devoid of any evidence of legal causation. For this additional reason, Keith's negligence claim was precluded.

{¶39} We therefore hold the trial court did not err in entering summary judgment in Mark's favor.

{¶40} For the reasons stated in this opinion, appellant's assignment of error lacks merit. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.