[Cite as *Estate of Helle v. Hensley*, 2011-Ohio-4279.]

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

Estate of Gene A. Helle	Court of Appeals No. WM-10-017
Appellant	Trial Court No. 09 CI 053
v.	
Matthew Hensley, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: August 26, 2011

* * * * *

Daniel H. Grna, for appellant.

Michael J. Manahan, for appellees.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a judgment issued by the Williams County Court of Common Pleas, which granted summary judgment in favor of appellees, one the owner and one the occupant of a home in which appellant's decedent was injured and died as a result of a fall. Because we conclude that the trial court properly granted summary judgment, we affirm.

{¶ 2} Appellant, the estate of Gene Helle ("Helle"), filed a wrongful death action alleging claims of negligence against appellees, Sandra Hensley ("Mrs. Hensley") and her son, Matthew Hensley ("Hensley"). Mrs. Hensley owns a house located in Montpelier, Ohio and Hensley resides at that home. Appellant claims that appellees' negligence caused Helle's injuries and death when he fell down a staircase at the Montpelier house in March 2008. Appellees filed a motion for summary judgment, which was opposed by appellant. The following facts were presented in the record through deposition testimony and other evidence.

{¶ 3} Sandra Hensley financed the Montpelier house through a mortgage in her name and held title to the property. She and her son had agreed that he would live in the home, provided that he paid for her monthly mortgage payments. When Hensley missed several payments, however, his mother made the payments. Mrs. Hensley and her son had a verbal agreement that he would purchase the property from his mother when he could afford it. No written agreement regarding the purchase or any other arrangement existed between the two regarding the property.

{¶ 4} For a short time prior to the incident, Mellissa Sayre ("Sayre"), had been living with Hensley at the house. On March 8, 2008, the day of the incident, at Sayre's invitation, Helle had come to visit her and was invited to spend the night at the house. That evening, the three socialized for around four hours until about 3:00 a.m. At that point, Hensley and Sayre went to sleep in a bedroom on the first floor of the house. Helle

went to bed on a couch in the living room, which was in close proximity to the basement stairs.

{¶ 5} At around 3:30 a.m., Hensley and Sayre heard three loud bumps. Hensley investigated and discovered that Helle had fallen down the basement staircase. While clearly injured, Helle was moving under his own power and was helped up the stairs. Both Hensley and Sayre insisted that he receive medical treatment but Helle refused. At around 5:30 to 6:00 a.m., the three went back to sleep with Helle resuming his place on the couch. When he awoke at around 11:00 a.m., Hensley found Helle's body on the floor next to the couch. The coroner concluded that he had died from a brain hemorrhage.

{¶ 6} In his deposition, a Williams County sheriff's deputy said that, during his investigation at the house, Hensley told him that while the three were still in the basement, Helle said he had been looking for the bathroom when he fell down the stairs. Neither Hensley nor Sayre recall this statement. There is some conflict in whether the dining room outside the basement door was lighted. Hensley testified that no lights were on when the three initially went to bed. However, Sayre said that a light above the dining room table was set on dim, which was in an area close to the basement door.

{¶ 7} Helle had visited the home of Hensley on at least two prior occasions. On one visit, Sayre gave Helle a tour of the home, including showing him the basement stairs area. While viewing the stairway together, Sayre told Helle that Hensley "did not want anybody in the basement because it was a work in progress." Hensley also said that he had told Helle not to go in the basement before the three initially went to bed. When

Helle visited on previous occasions he also had been inside the bathroom, which was off the dining room area, some distance away from the basement door. Sayre estimated Helle had been in the bathroom at least three to five times prior to his fall.

{¶ 8} Appellant's suit against Mrs. Hensley was in part premised on claims that she had allegedly breached her duty of care as a landlord under R.C. 5321.04. Appellant also asserted claims of negligence against both appellees for breach of their duty of care to a social guest and under a claim of qualified nuisance. The trial court granted summary judgment to appellees on all claims, applying the open-and-obvious doctrine and determining that Helle had become a trespasser when he entered the stairway without permission.

{¶ 9} Appellant appealed that judgment and argues the following six assignments of error:

{¶ 10} "I. The trial court committed error when it found that Sandra Hensley was not a landlord for purposes of imposing liability upon her pursuant to Chapter 5321 of the Ohio Revised Code and committed further error in concluding that appellant's claims under Chapter 5321 were barred.

{¶ 11} "II. The trial court committed error when it ruled that appellant's statutory claims were barred by the open and obvious doctrine.

{¶ 12} "III. The trial court committed error when it ruled that appellant's statutory and common law claims were barred under the doctrine of comparative negligence.

{¶ 13} "IV. The trial court committed error when it ruled that appellant's common law claims were barred under the open and obvious doctrine.

{¶ 14} "V. The trial court committed error when it ruled that Mr. Helle was a trespasser.

{¶ 15} "VI. The trial court committed error in dismissing appellant's qualified nuisance claims."

{¶ 16} Appellant's assignments of error are all based upon the underlying issue that the trial court erred in granting summary judgment in favor of appellees. An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is proper when: (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) viewing the evidence most strongly in favor of the non-moving party reasonable minds can come but to one conclusion, and that conclusion is adverse to the non-moving party. Civ.R. 56(C); *Leibreich v. A.J. Refrigeration, Inc. (1993),* 67 Ohio St.3d 266, 268. Material facts are those facts that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner (1993),* 67 Ohio St.3d 337, 340, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248. To determine what constitutes a genuine issue, the court must decide whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. *Turner,* supra, at 340.

I.

{¶ 17} In its first assignment of error, appellant claims that Sandra Hensley was a landlord under Ohio statute and, pursuant to R.C. 5321.04(A), owed a duty of care to "comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety."

{¶ 18} R.C. 5321.01(B) defines landlord as "the owner, lessor, or sublessor of residential premises * * * under a rental agreement." R.C. 5321.01(D) defines rental agreement as "any agreement or lease, written or oral, which establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of residential premises by one of the parties."

{¶ 19} Although there appears to have been an understanding that Matt Hensley would live in the house if he paid Mrs. Hensley's mortgage payments on the house, there is no evidence that this was a rental agreement. He missed several mortgage payments and Mrs. Hensley, his mother, still allowed him to live on the premises. Although Matt lived in the house there is no evidence he had exclusive right to the property. There is nothing further in the record which would indicate there was a lease, written or oral. Therefore, no evidence was presented that a rental agreement existed that complied with R.C. 5321.01(D). Therefore, the trial court properly found that Mrs. Hensley did not meet the definition of landlord under R.C. 5321.01(B) and had no duty of care as such.

{¶ 20} Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶ 21} We will address appellant's second, third, fourth, and fifth assignments of error together since they all address the court's finding that, under the open and obvious doctrine, appellant cannot sustain its statutory or common law negligence claims.

{¶ 22} We initially note that, pursuant to our determination that Mrs. Hensley was not a landlord, appellant's statutory claims cannot be sustained, regardless of whether the open and obvious doctrine applies. Therefore, appellant's second assignment of error is without merit.

{¶ 23} To establish a claim for negligence, a complainant must show the existence of a duty, and a breach of the duty that proximately causes injury to the defendant. *Manifee v. Ohio Welding Prods.* (1984), 15 Ohio St.3d 75, 77. A host who invites a social guest into his home has a duty "to warn the guest of any condition of the premises which is 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." *Scheibel v. Lipton* (1951), 156 Ohio St. 308, paragraph three of the syllabus.

{¶ 24} A landowner owes no duty, however, to persons on his property regarding dangers that are open and obvious. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 5, citing *Sidle v. Humphrey* (1963), 13 Ohio St.2d 45, paragraph one of the syllabus. Open and obvious dangers are those which are so obvious that a person may be expected to discover them and protect himself or herself against the conditions.

Armstrong, supra, at ¶ 14; *Sidle*, supra, at 48. See, also, *Smock v. Bob Evans Farms, Inc.*, 9th Dist. No. 02CA008075, 2003-Ohio-832, ¶ 11, citing *Paschal v. Rite Aid Pharmacy, Inc*. (1985), 18 Ohio St.3d 203, 203-204. "'Where the hazard is not hidden from view or concealed and is discoverable by ordinary inspection, the court may properly sustain a summary judgment against the claimant.'" *Smock*, supra, at ¶ 11, quoting *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51.

{¶ 25} As a sub-category of the open-and-obvious doctrine, the "step-in-the dark" rule provides that one who intentionally steps from a lighted area into total darkness, without knowledge, information, or investigation as to what the darkness might conceal, is liable for his or her own injuries as a matter of law. *Leonard v. Modene*, 6th Dist. No. 05-WD-085, 2006-Ohio-5471, ¶ 54, citing *Flury v. Central Pub. House* (1928), 118 Ohio St. 154 and *McKinley v. Niederst* (1928), 118 Ohio St. 334. "'Darkness' is always a warning of danger, and for one's own protection it may not be disregarded." *Jeswald v. Hut* (1968), 15 Ohio St.2d 224, paragraph three of the syllabus.

{¶ 26} The open-and-obvious doctrine remains viable even after the enactment of Ohio's comparative negligence statute. *Armstrong*, supra, at ¶ 14. When applicable, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims, as the Ohio Supreme Court explained: "We continue to adhere to the open-and-obvious doctrine today. In reaching this conclusion, we reiterate that when courts apply the rule, they must focus on the fact that the doctrine relates to the threshold issue of duty. By focusing on the duty prong of negligence, the 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." *Armstrong*, supra, at ¶ 13.

{¶ 27} Thus, the advent of comparative negligence does not necessarily preclude a grant of summary judgment. See *Mitchell v. Ross* (1984), 14 Ohio App.3d 75. Summary judgment may be granted to the defendant in a negligence suit where, "after construing the undisputed evidence most strongly in favor of plaintiff, a reasonable person could only conclude that the contributory negligence of the plaintiff was greater than the combined negligence" of the defendants. *Miljikovic v. Greater Cleveland Regional Transit Auth.* (Oct. 12, 2000), 8th Dist. No. 77214, citing to *Mitchell*, supra. See, also, *Tharp v. Whiteleather* (Nov. 27, 2000), 5th Dist. No. 1999CA00411.

{¶ 28} In this case, the record shows that the room outside the door leading to the darkened basement stairway was either dark or dimly lit. If the room was dark, then Helle walked from darkness into darkness. If the room was lit, Helle walked from a lighted area into the darkened stair area. In either case, the darkness was a danger that was open and obvious and Helle entered the doorway of the basement stairs without properly investigating. Even if he had not been warned about the condition of the basement stairs, Helle was in an unfamiliar house, making it even more necessary that he heed the obvious danger of the darkness.

{¶ 29} Helle, as a social guest, was responsible for guarding against the open and obvious danger of darkness and his failure to do so negated any alleged duty by appellees. The trial court's transformation of Helle into a trespasser was, thus, unnecessary, since under either status, appellees had no duty to protect him from the obvious danger of darkness. Therefore, the trial court properly determined that the open-and-obvious doctrine was applicable to bar appellant's common-law negligence claims.

{¶ 30} Accordingly, appellant's second, third, fourth, and fifth assignments of error are not well-taken.

III.

{¶ 31} In its sixth assignment of error, appellant argues that the trial court erred in dismissing its claims under the theory of qualified nuisance. We disagree.

{¶ 32} To prevail under qualified nuisance, a plaintiff must establish that a landowner created an unreasonable risk of harm due to negligence of a condition. *Kramer v. Angel's Path, L.L.C.*, 174 Ohio App.3d 359, 2007-Ohio-7099, ¶ 21, citing *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, ¶ 59. A nuisance arises from a failure to exercise due care, and, thus, requires a showing of negligence by the defendant. *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 436. Again the open-and-obvious doctrine is, however, a defense to any openly hazardous condition, even if it constitutes a qualified nuisance. See *Moody v. Coshocton Cty.*, 9th Dist. No. 05CA0059, 2006-Ohio-3751.

{¶ 33} In this case, as we noted previously, the darkened stairway, no matter what its condition, was an open and obvious danger. Appellees had no duty to warn Helle of that danger, who unfortunately, chose to enter a dark area without exercising due care for his own safety, resulting in tragic consequences. Therefore, since we conclude that no genuine issues of material fact remain in dispute, and appellees were entitled to judgment as a matter of law, summary judgment was properly granted by the trial court.

{¶ 34} Accordingly, appellant's sixth assignment of error is not well-taken.

{¶ 35} The judgment of the Williams County Common Pleas Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to 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.

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE