[Cite as *Tucker v. Kanzios*, 2009-Ohio-2788.]

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

MARY TUCKER	C.A. No. 08CA009429
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
LAURA KANZIOS	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 07CV151817

DECISION AND JOURNAL ENTRY

Dated: June 15, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Mary Tucker broke her ankle when she fell down the basement stairs in Laura Kanzius's house. Ms. Tucker had been living rent-free with Ms. Kanzius. There was evidence before the trial court, however, that, in return for staying there, she cleaned house for Ms. Kanzius and drove her places.

{¶2} According to Ms. Tucker, at the time she fell, she was painting a hallway at the top of the basement stairs. She testified at her deposition that she was standing on a landing at the top of the steps with her right hand on a handrail of the basement stairway. She said she had a roller in her left hand that she was using to paint the wall. According to her, as she reached with the roller, the handrail came loose, she began to fall, and, as she did, she grabbed a second handrail on the other side of the stairway, which also came loose, and she fell down the steps.

{¶3} Ms. Tucker sued Ms. Kanzius in the Lorain County Common Pleas Court, alleging that she was a tenant in Ms. Kanzius's house and that Ms. Kanzius had violated a statutory duty owed her under Ohio's landlord-tenant act by not keeping the handrails in repair. She further alleged that Ms. Kanzius's failure to maintain the handrails violated a common-law duty owed her.

{¶4} The trial court granted Ms. Kanzius summary judgment on both Ms. Tucker's statutory and common-law claims. This Court reverses the trial court's judgment because genuine issues of material fact remain regarding whether Ms. Tucker was a tenant in Ms. Kanzius's house and, regardless of whether she was a tenant, whether Ms. Kanzius breached a common-law duty she owed her, proximately causing her injury.

BACKGROUND

{¶5} During 2005, Ms. Tucker was living with her brother, Albert Thomas, and his fiancée, Donna McConaughey. During the summer of 2005, Mr. Thomas was diagnosed with brain cancer, and he died in August of that year.

{¶6} Mr. Thomas had worked with Ms. Kanzius's son-in-law, Bill Heidrich. At some time, either shortly before or after Mr. Thomas's death, Ms. Tucker and Ms. McConaughey met and became friends with Bill Heidrich's son, Aaron Heidrich. At that time, Aaron was living with his grandmother, Ms. Kanzius. Ms. Kanzius would have been 85 years old during the summer of 2005. She had been a widow since 2000 and was legally blind as a result of macular degeneration.

{¶7} Ms. Tucker and Ms. McConaughey remained in Mr. Thomas's house for a few months following his death. They eventually began looking for somewhere else to live because Mr. Thomas's house was being foreclosed on and his children wanted them out. In December

2005, Aaron told Ms. Kanzius that he was going to move out of her house and into an apartment or house with Ms. Tucker and Ms. McConaughey so that he could help them pay rent. According to Aaron, Ms. Kanzius told him that Ms. Tucker and Ms. McConaughey could move in with them. Aaron testified on deposition that Ms. Kanzius told him, "you're working all the time, I need somebody to help cook for me, clean for me, so they can come live with me and that would be the exchange for the rent." He testified that, when Ms. Tucker and Ms. McConaughey moved in, the understanding was that it would be only temporarily and that they would look for another place to stay. He further testified, however, that "[e]very time we told grandma we found a place or a place was found, well, you guys don't have to leave yet, so they didn't."

{¶8} Ms. Tucker testified that, about a week after she and Ms. McConaughey moved in, they sat down with Ms. Kanzius and Aaron and discussed what their arrangement would be: "Well, first of all, our arrangements when we first moved in, I was upstairs and Donna and Aaron were downstairs in separate rooms, I guess, and Donna did the cooking and I did the cleaning. And when Mrs. Kanzius had to go to the doctors and stuff, I'd take her when I had the car, too, and Aaron would take her when he could so it wasn't so hard for her." Ms. Tucker further testified that Ms. Kanzius had not said that, if they wanted to stay, they had to do certain things. Rather, her testimony was that they "wanted to help her and she wanted to help us, so it was mutual." She acknowledged that neither she nor Ms. McConaughey paid Ms. Kanzius rent during the time they stayed at her house. According to Aaron, he, Ms. Tucker, and Ms. McConaughey contributed to the water bill, bought all the food for the four of them, paid for all cleaning supplies used at the house, and paid for all their transportation costs.

{¶9} Aaron testified that he had noticed that the handrails leading to the basement were loose before Ms. Tucker's fall. He claimed that he had told Ms. Kanzius and Carolyn Richards,

Ms. Kanzius's daughter who held a power of attorney for Ms. Kanzius, about the loose railings: "I've made numerous comments to Laura Kanzius and Carolyn Richards regarding that fact." He said the handrails were shaky, could be moved up and down, and were not "studded" into the wall: "It was just paneling with drywall behind it, so instead of putting the store bought plastic studs in, they weren't, they were just screwed into the walls so they had no supports for the screws to hold." According to him, he told his grandmother that the handrails were not safe and she responded that she was not going to put any more money into the house. He testified that, when he told Ms. Richards about the handrails, she responded that it was not her house and that he should tell his grandmother about them. He claimed to have told them about the handrails "a number of times" before Ms. Tucker's fall.

{¶10} Ms. Tucker testified that she had not known anything about the condition of the handrails before her fall. She denied having ever gone down the basement stairs before the day she fell down them.

{¶11} At the time of Ms. Tucker's fall, Ms. Kanzius was not home, having accompanied one of her daughters on a trip to Florida. Aaron testified that, before Ms. Kanzius left, she instructed him, Ms. Tucker, and Ms. McConaughey to paint the living room, a hallway on which two bathrooms were located, and the basement hallway while she was gone. According to him, she said, "I want this house painted before I get home." Ms. Tucker testified that she decided to paint as much of the basement hallway as she could reach without using a ladder, recognizing that Aaron would have to finish the part that she could not reach.

{¶12} Ms. Tucker testified that, when she fell, she immediately knew she had broken something. She said that, although Aaron was in the kitchen at the time of her fall, she did not call him to help her because of physical limitations from which he suffers. Rather, she dragged

herself back up the steps and into the living room, where she first telephoned Ms. McConaughey and then telephoned 911. She was taken by ambulance to a hospital, where she had surgery the following day to install a plate and screws in her ankle. She spent three additional days in the hospital before being released to a nursing home, where she spent a little over a month. She had additional surgery a year later to remove the plate and screws. At the time of her deposition, which was a year and eight months after her fall, she still had a limp, was walking with a cane, and, when she needed to go a long distance, would use a wheelchair.

{¶13} When Ms. Tucker left the nursing home, she returned to Ms. Kanzius's house. She remained there for approximately three months, then she, Aaron, and Ms. McConaughey moved, first to one house, where they stayed for two or three months, then to a second house, where they were living at the time of Ms. Tucker's deposition.

{¶14} In granting Ms. Kanzius summary judgment, the trial court determined that Ms. Tucker wasn't a tenant in Ms. Kanzius's house. It further determined that her common-law status was that of a licensee and that, therefore, Ms. Kanzius's only duty to her was to refrain from willfully or wantonly injuring her. It concluded that Ms. Kanzius had not willfully or wantonly injured Ms. Tucker and that, therefore, Ms. Kanzius was entitled to judgment as a matter of law.

THE TRIAL COURT'S "FINDINGS OF FACT"

{¶15} The trial court's ruling on Ms. Kanzius's motion for summary judgment included a section the trial court called "Findings of Fact." "Findings of Fact" are not appropriate in a ruling on a motion for summary judgment. "A 'finding' is the determination of an issue of fact." Henry Weihofen, *Legal Writing Style* 30 (2d ed. 1980). A trial court is not supposed to weigh evidence and determine issues of fact in deciding whether summary judgment should be granted:

"[I]t is firmly established that the purpose of summary judgment is not to try issues of fact, but rather for the court to determine whether triable issues of fact exist." *Claeys v. Bowser-Morner Inc.*, 2d Dist. No. 16196, 1997 WL 368359 at *8 (July 3, 1997). In ruling on a motion for summary judgment, a "trial court can state as a basis for its decision the stipulated facts or undisputed facts, but it cannot find facts that are genuinely disputed and are material." *Koch v. Etna Twp.*, 5th Dist. No. CA-3643, CA-3644, 1991 WL 148092, at *1 (July 18, 1991).

{¶16} The trial court's mistake does not appear to have simply been one of mislabeling. Rather, the court appears to have actually resolved issues of fact in granting Ms. Kanzius summary judgment. For example, as part of its "Findings of Fact," it wrote that Ms. Kanzius had not conditioned Ms. Tucker's stay "upon the performance of services," despite Aaron's testimony that Ms. Kanzius had said that Ms. Tucker and Ms. McConaughey could cook and clean for her in "exchange for the rent" and Ms. Tucker's testimony regarding the meeting at which the parties discussed their arrangement. The trial court erred by disregarding that testimony. A jury may ultimately decide that Aaron's and Ms. Tucker's testimony is not worthy of belief, but that decision is for the jury, not for the trial court in ruling on a motion for summary judgment. Inasmuch as this Court's review of an order granting summary judgment is de novo, however, it will proceed to determine whether, despite the trial court's incorrect analysis, Ms. Kanzius was entitled to summary judgment.

MS. TUCKER'S ASSIGNMENT OF ERROR

{¶17} Ms. Tucker's sole assignment of error is that the trial court incorrectly granted Ms. Kanzius summary judgment. In reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same test a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to

judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990). This Court, in effect, stands in the shoes of the trial court and considers the motion for summary judgment as it was presented to that court.

MS. TUCKER'S LANDLORD-TENANT CLAIM

{¶18} Ms. Tucker has argued that the trial court should have determined that there was a genuine issue of material fact regarding whether a landlord-tenant relationship existed between Ms. Kanzius and her, foreclosing summary judgment on her statutory claim. Ohio's landlord-tenant act is codified in Chapter 5321 of the Ohio Revised Code. Under Section 5321.01(B), a person who owns "residential premises" is a "landlord." Under Section 5321.01(C), a "dwelling unit . . . for the use of tenants" is a "residential premises," and, under Section 5321.01(A), a "tenant" is a person "entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others." Finally, under Section 5321.01(D), a "rental agreement" is "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." To establish at trial that a landlord-tenant relationship existed between Ms. Kanzius and her, therefore, Ms. Tucker will have to prove that she occupied all or part of Ms. Kanzius's house to the exclusion of others under a written or oral agreement or lease. The issue on summary judgment was whether Ms. Kanzius established as a matter of law that Ms. Tucker will not be able to prove at trial one of the essential elements of her landlord-tenant claim.

{¶19} Ms. Kanzius has argued that the trial court correctly granted her summary judgment on Ms. Tucker's statutory claim because Ms. Tucker did not have a right to exclude others from the premises. As mentioned previously, to be a tenant under Section 5321.01(A) of the Ohio Revised Code, a person must occupy premises "to the exclusion of others." The

problem with Ms. Kanzius's argument that Ms. Tucker did not have a right to exclude others from Ms. Kanzius's house is that she did not carry her burden on that argument in the trial court. In *Vahila v. Hall*, 77 Ohio St. 3d 421, 429 (1997), the Ohio Supreme Court described the initial burden on a party seeking summary judgment: "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." (Quoting *Dresher v. Burt*, 75 Ohio St. 3d 280, 293 (1996)). Although Ms. Kanzius argued in support of her motion for summary judgment that Ms. Tucker was not her tenant, she did not suggest that one of the reasons she was not her tenant was because she did not have the right to exclude others from the premises or point to any evidence tending to prove that she did not have that right. Accordingly, Ms. Kanzius did not carry her initial summary judgment burden on that issue, and the burden did not shift to Ms. Tucker to present evidence tending to show that she did have a right to exclude others from all or part of Ms. Kanzius's house. Because Ms. Kanzius did not carry her initial burden on this issue, she is not entitled to summary judgment based on it.

{¶20} Ms. Kanzius has also argued that there was no evidence before the trial court that the parties had a rental agreement "whether written or oral." She did raise this issue in the trial court and pointed to her own testimony to support it. Ms. Tucker, however, testified that, about a week after she and Ms. McConaughey moved in, she, Ms. Kanzius, Ms. McConaughey, and Aaron sat down and discussed their "arrangements." According to Ms. Tucker, it was agreed that she would do the cleaning, Ms. McConaughey would do the cooking, and either she or Aaron would drive Ms. Kanzius places she needed to go. Aaron testified that Ms. Kanzius had

initially told him that the two women could move into her house in "exchange" for cooking and cleaning for her. He further testified that, when Ms. Kanzius left for Florida, she said she wanted the house painted by the time she returned and he understood that they "[h]ad to do it or get out." Ms. Tucker's and Aaron's testimony was sufficient to raise a genuine issue of fact regarding whether the parties had reached a "rental agreement" within the meaning of Section 5321.01(D) under which Ms. Tucker performed duties for Ms. Kanzius in lieu of paying rent.

{¶21} Ms. Kanzius has also suggested that any agreement between the parties was not a "rental agreement" because it did not require Ms. Tucker to pay rent. Section 5321.01(D), however, does not say that a "rental agreement" must require the payment of rent. As noted by the Eighth District Court of Appeals in *Georgetown Park Apartments v. Woernley*, 112 Ohio App. 3d 428, 431 (1996), "payment of rent is not a statutory tenant obligation."

{¶22} There is a genuine issue of material fact regarding whether Ms. Tucker was a tenant in Ms. Kanzius's house within the meaning of Ohio's landlord-tenant act. Accordingly, the trial court incorrectly granted Ms. Kanzius summary judgment on Ms. Tucker's statutory claim.

MS. TUCKER'S COMMON-LAW CLAIM

{¶23} In granting summary judgment to Ms. Kanzius on Ms. Tucker's common-law negligence claim, the trial court determined that Ms. Tucker was a "licensee" in Ms. Kanzius's home. Under Ohio law, "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 v. Ohio Univ.*, 28 Ohio St. 3d 66, 68 (1986). The only duty an owner owes a licensee is to "refrain from wantonly or willfully causing injury." *Id.* (citing *Hannan v. Ehrlich*, 102 Ohio St. 176, paragraph four of the syllabus (1921)). In contrast, "[b]usiness invitees are persons who come

upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Id.* (citing *Scheibel v. Lipton*, 156 Ohio St. 308, 328-29 (1951)). An owner has a duty "to protect the invitee by maintaining the premises in a safe condition." *Id.* (citing *Presley v. Norwood*, 36 Ohio St. 2d 29, 31 (1973)).

{¶24} Ms. Tucker has argued on appeal that she was an invitee in Ms. Kanzius's home. Ms. Kanzius, on the other hand, has argued that she was a licensee, having entered "for her own benefit."

{¶25} There is no doubt that Ms. Tucker benefited from living with Ms. Kanzius. What determines whether a person is an invitee rather than a licensee, however, is not whether she benefits from being on premises, but whether the owner of the premises benefits. A customer benefits from entering a grocery store. That fact, however, does not make her a licensee. She is an invitee because the owner of the store also benefits from her presence. See *Gladon v. Greater Cleveland Reg'l Transit Auth.*, 75 Ohio St. 3d 312, 315 (1996) ("Invitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner.") If Ms. Kanzius benefited from Ms. Tucker's presence in her home, Ms. Tucker was an invitee, not a licensee.

{¶26} The evidence before the trial court was that Ms. Tucker cleaned for Ms. Kanzius and drove her places. That evidence, if believed, will establish that Ms. Kanzius benefited from Ms. Tucker's presence in her home. Accordingly, there is at least a genuine issue of material fact regarding whether Ms. Tucker was an invitee in Ms. Kanzius's home. The trial court incorrectly determined that Ms. Kanzius was entitled to summary judgment on the question of Ms. Tucker's status in her home.

FORESEEABILITY

{¶27} Ms. Kanzius has further argued that, even if Ms. Tucker was an invitee in her home to whom she owed a duty of due care, she cannot be held liable for Ms. Tucker's injury because it was not foreseeable that Ms. Tucker would use the handrails for support as she painted the basement hallway. Even if it is assumed that a reasonable person in Ms. Kanzius's position would not have foreseen that a person painting the hallway would use the handrails for support, that would not relieve her from liability if a reasonable person would have foreseen that the loose handrails could result in an injury similar to that suffered by Ms. Tucker. "It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in injury to someone." *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 39 (1950) (citing *Neff Lumber Co. v. First Nat'l Bank*, 122 Ohio St. 302, 309 (1930)). Further, "[i]f an event causing injury appears to have been closely related to the danger created by the original conduct, it is regarded as within the scope of the risk, even though, strictly speaking, the particular injury would not have been expected by a reasonable man in the actor's place." *DiGildo v. Caponi*, 18 Ohio St. 2d 125, 130 (1969) (citing Restatement (Second) of Torts §281, comment g (1965)).

{¶28} Aaron testified that he told Ms. Kanzius that the handrails on the basement stairs were loose. A jury could reasonably conclude that it was foreseeable that a person would fall down the stairs as a result of the loose handrails. Accordingly, there is a genuine issue of material fact regarding whether Ms. Kanzius negligently caused Ms. Tucker's injury.

CONCLUSION

{¶29} The trial court erred by granting Ms. Kanzius's motion for summary judgment. Ms. Tucker's assignment of error is sustained, the trial court's judgment is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

There were reasonable grounds for this appeal.

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

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

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

MARK L. WAKEFIELD, and JOSEPH P. DUNSON, attorneys at law, for appellant.

WARREN S. GEORGE, attorney at Law for appellee.