[Cite as *Stenger v. Timmons,* 2011-Ohio-1257.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles Stenger,	:	
Plaintiff-Appellant,	:	No. 10AP-528 (C.P.C. No. 09CVC01-1442)
v.	:	(REGULAR CALENDAR)
Thomas Timmons,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 17, 2011

Jeffrey H. Verwohlt, for appellant.

James E. Featherstone, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Charles Stenger, plaintiff-appellant, appeals from the judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by Thomas Timmons, defendant-appellee.

{¶2} On April 11, 2007, at approximately 3:30 a.m., appellant was returning to his vehicle after delivering newspapers to appellee and appellee's neighbor. As he walked on the sidewalk toward his vehicle, after delivering the paper to appellee's neighbor, he noticed a tree had been cut down in front of appellee's residence, and then he tripped and

fell on branches from the same tree that extended onto the sidewalk in front of appellee's residence. The street lamp above the area where appellant fell had not been operable for some time. Appellant was injured as a result of the fall.

{¶3} On January 30, 2009, appellant filed a negligence action against appellee, claiming appellee was negligent in not removing the tree limbs from the sidewalk area. On January 6, 2010, appellee filed a motion for summary judgment, arguing the hazard posed by the tree branches extending onto the sidewalk was open and obvious. On March 15, 2010, the trial court granted appellee's motion for summary judgment, finding the hazard to be open and obvious, and the darkness in the area should have acted as a warning of danger. On May 5, 2010, the trial court journalized its decision granting appellee's motion for summary judgment. Appellant has appealed the judgment of the trial court. Instead of indicating how the trial court erred in his assignments of error, appellant merely presents subjects of discussion as his assignments of error. Nevertheless, appellant's "assignments of error" are as follows:

> [I.] THE TRIAL COURT'S DECISION AND CIVIL RULE 5.
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> [II.] THE TRIAL COURT'S DECISION AND APPLICATION OF LAW.
>
> [III.] THE TRIAL COURT[']S DECISION AND APPLICATION OF CODE.

{¶4} We will address appellant's third assignment of error first, as it is determinative of the appeal. Appellant argues in his third assignment of error that the trial court erred when it granted appellee summary judgment. Specifically, appellant contends the trial court erred when it failed to find appellee's violation of the Codified Ordinances of the city of Grove City, Ohio ("Grove City Code") negated the application of the open and

obvious doctrine. Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. Id. Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id. The non-moving party may not rest upon the allegations or denials in the pleadings, but must affirmatively demonstrate the existence of a genuine issue of material fact to prevent the granting of a motion for summary judgment. Civ.R. 56(C); *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶5} In an action for negligence, a plaintiff must prove: (1) the defendant owed her a duty of care; (2) the defendant breached that duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. The status of the person who enters

upon the land of another defines the scope of legal duty that the owner owes the entrant. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137.

{¶6} An invitee is defined as a person who rightfully enters and remains on the premises of another at the express or implied invitation of the owner and for a purpose beneficial to the owner. Id. As a person invited onto the property to deliver a newspaper ordered by appellee, it is undisputed that appellant was an invitee. The owner or occupier of the premises owes the invitee a duty to exercise ordinary care to maintain its premises in a reasonably safe condition, so that its invitees will not unreasonably or unnecessarily be exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. A premises owner must warn its invitees of latent or concealed dangers if the owner knows or has reason to know of the hidden dangers. See *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 359.

{¶7} The owner must conduct inspections of the property to discover possible dangerous conditions of which he is unaware. *Beck v. Camden Place at Tuttle Crossing*, 10th Dist. No. 02AP-1370, 2004-Ohio-2989, ¶21. An owner is charged with constructive knowledge of defects that would have been revealed by a reasonable inspection of the premises. Id. " 'What is reasonable under the circumstances of a given case is ordinarily a question for the trier of fact.' " Id., quoting *Tarkany v. Ohio State Univ. Bd. of Trustees* (June 4, 1991), 10th Dist. No. 90AP-1398.

{¶8} However, when a danger is open and obvious, a premises owner owes no duty of care to individuals lawfully on the premises. See *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573. Open and obvious dangers are not concealed and

are discoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51. The dangerous condition at issue does not actually have to be observed by the claimant to be an open and obvious condition under the law. *Lydic v. Lowe's Cos., Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶10. Rather, the determinative issue is whether the condition is observable. Id. "The rationale underlying this doctrine is 'that the open and obvious nature of the hazard itself serves as 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.' " *Armstrong* at ¶5, citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42. "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." *Bentley* at ¶13. When applicable, the open and obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claim. Id.

{¶9} In the present case, appellant asserts that, by leaving the branches on the sidewalk, appellee violated Grove City Code 521.04(a) and (c), which provide:

> (a) No person shall place or knowingly drop upon any part of a sidewalk, playground or other public place any tacks, bottles, wire, glass, nails or other articles which may damage property of another or injure any person or animal traveling along or upon such sidewalk or playground.
>
> * * *
>
> (c) No person shall place, deposit or maintain any merchandise, goods, material or equipment upon any sidewalk so as to obstruct pedestrian traffic thereon except for such reasonable time as may be actually necessary for the delivery or pickup of such articles. In no case shall the obstruction remain on such sidewalk for more than one hour.

{¶10} Appellee's motion for summary judgment was based solely on the open and obvious doctrine, and the trial court granted summary judgment on that basis alone. Appellant argued in his memorandum contra that the trial court erred when it failed to find appellee's violation of the Grove City Code negated the application of the open and obvious doctrine. In its decision, the trial court briefly addressed this issue by concluding that, while it may be true that appellee was in violation of the Grove City Code, that fact did not negate the application of the open and obvious doctrine.

{¶11} The problem in this case is that neither the parties nor the trial court addressed this issue in the proper legal context. Appellant's argument, though not couched in these terms by the parties in any of the pleadings or by the trial court in its decision, is that appellee was negligent per se by leaving the branches on the sidewalk in violation of the Grove City Code. The concept of negligence per se allows a plaintiff to prove the first two prongs of the negligence test, duty and breach of duty, simply by showing that the defendant committed or omitted a specific act prohibited or required by statute. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, ¶15. Thus, in situations where a statutory violation constitutes negligence per se, the plaintiff will be considered to have "conclusively established that the defendant breached the duty that he or she owed to the plaintiff." *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184. Plaintiff must still, however, prove proximate cause and damages. *Pond v. Leslein*, 72 Ohio St.3d 50, 53, 1995-Ohio-193.

{¶12} The Supreme Court of Ohio held in *Chambers* that violations of city ordinances can constitute negligence per se. See id. at 565, citing *Swoboda v. Brown* (1935), 129 Ohio St. 512, 522 (negligence per se is a violation of a specific requirement of

law or ordinance). Thus, the violation of a city ordinance, as appellant alleges in the present case, can constitute negligence per se. See also *Sabitov v. Graines*, 177 Ohio App.3d 451, 2008-Ohio-3795, ¶27.

{¶13} Importantly, the Supreme Court has also recognized that, when a legislative body has enacted a statute or ordinance, the violations of which constitute negligence per se, the open and obvious doctrine does not protect a defendant from liability. *Lang* at ¶15, citing *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶25; *Chambers* at 567-68. Thus, here, if the appellee's acts constituted negligence per se, the open and obvious doctrine would not apply to the present circumstances.

{¶14} Although negligence must be found by the jury from the facts, conditions, and circumstances disclosed by the evidence, a cause of action asserting negligence per se is " 'a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required.' " *Chambers* at 565, quoting *Swoboda* at 522. If " 'a positive and definite standard of care has been established by legislative enactment whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation is negligence *per se*.' " Id. (Emphasis sic.) However, where a jury must determine the negligence or lack of negligence of a party charged with the violation of a statute from consideration and evaluation of multiple facts and circumstances and by applying the standard of care of a reasonable person, negligence per se is inapplicable. *Swoboda* at 522. Thus, if the legislative enactment expresses a rule of conduct to secure the safety or welfare of the public in general or abstract terms, the doctrine of negligence per se has no application, and liability turns on whether the defendant exercised the care

of a reasonably prudent person under similar circumstances. *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, paragraph three of the syllabus.

{¶15} Accordingly, for a plaintiff to claim negligence per se, he or she must present evidence that: (1) there is a legislative enactment that imposes a specific duty upon the defendant for the safety and protection of a person in plaintiff's position; (2) the defendant failed to observe the enactment; and (3) that failure proximately caused his or her injury. See *Gressman v. McClain* (1988), 40 Ohio St.3d 359, 362.

{¶16} Courts have applied the above guidelines to various statutes and city codes. In *Gonzalez v. Henceroth Ent., Inc.* (1999), 135 Ohio App.3d 646, a supply company deposited a load of limestone gravel in a street in Vermilion, Ohio, at the request of a construction company. The plaintiff's automobile later collided with the pile of gravel. The plaintiff filed a negligence action against the supply company and construction company. A jury rendered a verdict in favor of the companies.

{¶17} On appeal, the court analyzed two Vermilion Codified Ordinances to determine whether the companies were negligent per se. Vermilion Codified Ordinance 1020.03(b) provided: " 'No person shall place or drop upon any street, alley or public thoroughfare in the City any mud, dirt, ashes, cinders or other materials unless directed to do so by the proper authorities.' " Id. at 651. The court found this ordinance was intended to prevent anyone from blocking any public street, thus preventing the public use thereof. Id. The court concluded the ordinance was neither a measure in the furtherance of public safety nor meant to protect an individual in the plaintiff's position. Id. Thus, a violation of Vermilion Codified Ordinance 1020.03(b) would not constitute negligence per se. Id.

{¶18} Vermilion Codified Ordinance 1020.06 provided: " 'No person shall leave unprotected or unguarded or without proper lighting any hole, excavation, pile of dirt, trucks, equipment or other material in any of the streets.' " Id. The court concluded the plain language of this ordinance requires answers to two separate questions of fact: (1) was there material in the street, and (2) if so, was it unprotected, unguarded, or not properly lit? Id. at 652. Thus, in order to find that the companies were negligent in leaving the gravel in the road, the jury must determine not only that they indeed placed the gravel in the street, but also that the gravel was unguarded, unprotected, or not properly lit. Id. The court concluded that, not only were the terms of Vermilion Codified Ordinance 1020.06 general, its requirements were ambiguous. Id. The second question to be answered required a subjective determination of what lighting might be proper, and would inevitably be answered differently each time a new set of facts presents itself. Id. It failed to impose a fixed and absolute duty that was the same under all circumstances. Id. Thus, the court concluded Vermilion Codified Ordinance 1020.06 was a general-duty ordinance, and its violation would not constitute negligence per se.

{¶19} In *Wilson v. Ashtabula Water Works Co*. (1961), 93 Ohio Law Abs. 55, 57, cited by the court in *Gonzalez*, the court analyzed R.C. 5589.01, which provided, " 'No person shall obstruct or encumber by fences, buildings, structures, or otherwise, a public ground, highway, street, or alley of a municipal corporation.' " The court determined the statute was intended to prevent the obstruction of traffic and was not a safety statute. See id.

{¶20} In *Becker v. Shaull* (1992), 62 Ohio St.3d 480, 482, also cited by the court in *Gonzalez*, the Supreme Court analyzed R.C. 5589.06, which provided: " 'No person

shall wrongfully obstruct any ditch, drain, or watercourse along, upon, or across a public highway.' " The court found the prohibition in the statute was stated in general or abstract terms, and required the consideration of more than a single issue of fact to determine whether a violation has occurred. Id. at 483. In order to find that the defendants were negligent in obstructing a ditch along the highway, the trier of fact must not only make a determination that the ditch was obstructed, but must further determine whether such obstruction was wrongfully caused, giving rise to the question of whether defendants acted with due care in regarding the property. Id. The court found that what constituted "wrongfully" obstructing a ditch could involve a very subjective analysis. Id. The court concluded that the above language of R.C. 5589.06 did not impose a fixed and absolute duty that was the same under all circumstances, but rather left to the trier of fact a determination from all of the facts and circumstances of each particular case whether the alleged violator acted as would a reasonably prudent person. Id. at 484.

{¶21} In *Gray v. Ohio Gas & Appliance Co.* (June 18, 1985), 10th Dist. No. 84AP-399, the plaintiff was a fireman who suffered injuries while responding to an explosion of a truck being repaired by a repair shop. Plaintiff filed an action for damages based on negligence against the owner of the truck and the repair shop, to whom the trial court granted summary judgment. This court analyzed Columbus City Code 2543, which required that gas be removed from various parts of a gas storage vehicle when storing the vehicle indoors or repairing the vehicle in a public garage. This court found that the statute in question merely provided a rule of conduct to secure the safety or welfare of the public in general and did not established negligence per se. We cited Columbus City Code 2501.04, which provided that the purpose and the intent of the code was to

prescribe minimum requirements and controls to safeguard life, property, or public welfare from the hazards of fire and explosion. Thus, we found, it was clear from the chapter itself that the purpose of the safety ordinance was to secure the safety of the public and not specifically to ensure the safety of firemen called to the scene of a fire or explosion.

{¶22} In *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (Nov. 27, 1996), 8th Dist. No. 69523, the defendant, a dry cleaning business, placed a five-gallon bucket filled with concrete perpendicular to a sidewalk to prop open a service door, and plaintiff tripped over either the bucket or the door while walking down the sidewalk. A jury returned a verdict in favor of plaintiff, finding negligence per se based upon the defendant's violation of Solon Municipal Code 660.10. Solon Municipal Code 660.10 is identical in language to Grove City Code 521.04(a) and (c), at issue in the present case. The jury found the defendant 100 percent negligent and that the negligence was the proximate cause of the plaintiff's injuries. The defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court denied both motions.

{¶23} On appeal, the defendant argued that the trial court should have determined on the motions that, as a matter of law, the plaintiff contributed over 50 percent of the negligence involved in the accident, thereby precluding a judgment in her favor. The court found that the plaintiff established both duty and breach of duty on the defendant's part by demonstrating the defendant was negligent per se for violating Solon Municipal Code 660. However, the court found that, because the plaintiff's negligence so outweighed defendant's, the trial court should have granted judgment to defendant as a matter of law. The court further held that its analysis was not rendered inapposite

because the defendant's conduct constituted negligence per se. The court stated that negligence per se was not liability per se; rather, the plaintiff's negligence must be weighed against that of the defendant. The court also rejected the plaintiff's contentions that she did not fully appreciate the danger presented by the bucket because the concrete jutting out of the bucket was non-obvious, finding the door, the bucket, and the concrete were open and obvious.

{¶24} On appeal to the Supreme Court, in *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 1998-Ohio-602 ("*Texler*"), the court reversed the court of appeals. The court concluded that reasonable minds could differ as to the proper distribution of negligence between the parties, that there was adequate evidence that the plaintiff was taking the proper amount of care to avoid obstructions, that the defendant was 100 percent negligent, and that the defendant's negligence caused the accident. Thus, the court held that the question of whether the contributory negligence of a plaintiff is the proximate cause of the injury is an issue for the jury to decide pursuant to the modern comparative negligence provisions.

{¶25} We note the Supreme Court in *Texler* addressed only proximate cause and did so in terms of comparative negligence. *Olson v. Wilfong Tire,* 5th Dist. No. 01CA31, 2002-Ohio-2522 (in *Texler*, the Supreme Court was addressing only proximate cause); *Nelson v. Sound Health Alternatives Internatl., Inc.*, 4th Dist. No. 01CA24, 2001-Ohio-2571 (the question addressed by *Texler* is one of proximate cause and comparative negligence and not of a landowner's duty of care); *Yahle v. Historic Slumber Ltd.* (Nov. 19, 2001), 12th Dist. No. CA2001-04-015 (the narrow issue before the court involved only the issue of the plaintiff's contributory negligence, which involves the proximate cause

element of negligence). Breach and duty of care were established by negligence per se at trial. See *Nelson* (stating the plaintiff established that the defendant was negligent per se due to the defendant's violation of a city ordinance and recognizing the court failed to mention this issue in its decision); *Yahle* (the *Texler* court did not address the issue of the defendant's duty or breach of that duty because these elements had already been conclusively determined at trial by demonstrating negligence per se in the defendant's breach of a municipal ordinance). On remand from the Supreme Court, the appellate court confirmed that the trial court did not err when it allowed the jury to consider the Solon city ordinance when determining the duty of care it owed the plaintiff, finding a property owner may be held liable for injuries resulting from the violation of a duty imposed by statute. See *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (Aug. 6, 1998), 8th Dist. No. 69523 ("*Texler II*"). Thus, at least one court has found the violation of a code containing language identical to that in Grove City Code 521.04(a) and (c) constitutes negligence per se.

{¶26} In the present case, according to appellant, because appellee violated Grove City Code 521.04(a) and (c), he was guilty of negligence per se. However, this argument was not fully developed before the trial court and, therefore, the trial court never determined whether appellee's alleged placement of branches on the sidewalk was a violation of the Grove City Code and, thus, negligence per se. Therefore, the issue before the trial court was whether these code sections established a positive and definite standard of care, such that a jury could determine a violation of Grove City Code 521.04(a) and (c) by the finding of a single issue of fact, or whether a jury must determine the negligence or lack of negligence of appellee from a consideration and evaluation of

multiple facts and circumstances by the process of applying, as the standard of care, the conduct of a reasonably prudent person. On remand, the trial court must address whether appellee's actions constituted negligence per se. If the trial court finds that appellee's actions constituted negligence per se, the open and obvious doctrine does not apply to absolve appellee of his duty toward appellant. See *Lang* at ¶15. In such a case, the trial court may not render summary judgment on the basis of the open and obvious doctrine. If the trial court finds appellee's actions did not constitute negligence per se, the open and obvious doctrine may be applied to the present case, and the trial court may again render summary judgment on that basis. Therefore, appellant's third assignment of error is sustained. Given this court must remand the matter for the trial court to determine whether appellee was negligent per se, appellant's first and second assignments of error are moot.

{¶27} Accordingly, appellant's first and second assignments of error are rendered moot, and appellant's third assignment of error is sustained. The judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for proceedings consistent with this decision.

Judgment reversed and cause remanded.

TYACK, J., concurs.

SADLER, J., dissenting.

{¶28} Because I disagree with the majority's decision to remand this case to the trial court for its determination of whether negligence per se is applicable based on the city ordinance before us, I respectfully dissent.

{¶29} As the majority states, if a violation of a statute or ordinance constitutes negligence per se, the open and obvious doctrine does not apply to absolve a defendant of liability. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495. Thus, I agree with the majority that the question of whether a violation of Grove City Code 521.01(a) and (c) constitutes negligence per se must be answered prior to considering application of the open and obvious doctrine. However, in my view, because this matter is before us by way of summary judgment and our standard of review is de novo, this court should determine whether or not a violation of the Grove City ordinances constitutes negligence per se and proceed in accordance with such determination.

{¶30} Because the majority has held otherwise, I respectfully dissent.

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