

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. **12 1600**

On Appeal from the Tenth Appellate District
Franklin County, Ohio

Court of Appeals Case No. 11AP-684

LAUREN J. MANN
Plaintiff-Appellee,

vs.

NORTHGATE INVESTORS LLC, d.b.a. NORTHGATE APARTMENTS,
Defendant-Appellant

NOTICE OF CERTIFIED CONFLICT

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Now comes defendant/appellant, Northgate Investors, LLC d.b.a. Northgate Apartments (“Northgate”), by and through undersigned counsel, and pursuant to Supreme Court Rule Practice 4.1 hereby submit its notice of certified conflict. On June 26, 2012, the Tenth District Court of Appeals rendered a decision concluding that R.C. § 5321.04 imposes duties on a landlord that extends not just to tenants, but to a guest of a tenant. See *Mann v. Northgate Investors, LLC, d.b.a. Northgate Apartments*, 10th Dist. No. 11AP-684, 2012-Ohio-2871, attached hereto as Exhibit “A.” On August 30, 2012, the Tenth District Court of Appeals concluded that its decision in *Mann v. Northgate Investors, LLC, d.b.a. Northgate Apts.*, 10th Dist. No. 11AP-684, 2012-Ohio-2871 was in conflict with a previous decision from the Ninth District Court of Appeals in the case of *Shumaker v. Park Lane Manor of Akron, Inc.*, 9th Dist. No. 25212, 2011-Ohio-1052. See Memorandum Decision rendered on August 30, 2012, attached hereto as Exhibit “B.” As such, the Tenth District Court of Appeals certified the following question:

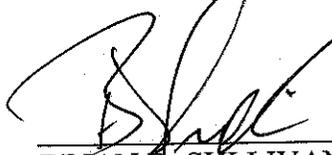
Whether the landlord owes the statutory duties of R.C. 5321.04(A)(3) to a tenant’s guest of property on the premises but on the common area stairs at the time of injury?

See Journal Entry certifying conflict filed August 30, 2012, attached hereto as Exhibit “C.”

See also *Shumaker v. Park Lane Manor of Akron, Inc.*, Ninth Dist. No. 25212, 2011-Ohio-1052, attached hereto as Exhibit “D.”

Northgate hereby submits its notice of certified conflict so this court can answer the referenced certified question.

Respectfully submitted,



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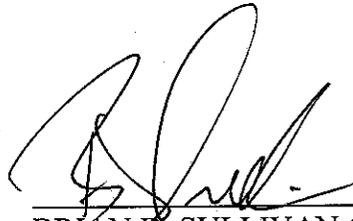
d.b.a. Northgate Apartments

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Certified Conflict was sent by regular U.S. mail this
17th day of September, 2012 to:

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

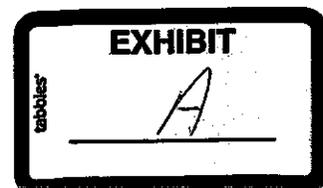
APPEAL from the Franklin County Court of Common Pleas.

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"); *Kaepfner 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.

XC

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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FRANKLIN COUNTY OHIO

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CLERK OF COURTS

Lauren J. Mann,

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Plaintiff-Appellant,

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v.

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Northgate Investors LLC, d.b.a.
Northgate Apartments,

:

Defendant-Appellee.

:

:

No. 11AP-684

(C.P.C. No. 10CVC-10-14595)

(REGULAR CALENDAR)

MEMORANDUM DECISION

Rendered on August 30, 2012

Michael T. Irwin, for appellant.

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

ON MOTION TO CERTIFY A CONFLICT

BRYANT, J.

{¶ 1} Pursuant to App.R. 25(A), defendant-appellee, Northgate Investors, LLC d.b.a. Northgate Apartments, timely filed a motion to certify a conflict on July 6, 2012. Defendant contends our decision in *Mann v. Northgate Investors LLC, d.b.a. Northgate Apts.*, 10th Dist. No. 11AP-684, 2012-Ohio-2871, conflicts with the decisions of the Seventh, Ninth and Twelfth District Courts of Appeals. Because our decision, consistent with the decisions of some appellate courts in the state, conflicts with those of at least the Ninth District Court of Appeals, we grant defendant's motion. See *Shumaker v. Park Lane Manor of Akron, Inc.*, 9th Dist. No. 25212, 2011-Ohio-1052.

{¶ 2} Ohio Constitution, Article IV, Section 3(B)(4) governs motions seeking an order to certify a conflict. According to that section, a conflict shall be certified



"[w]henver the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state." See also App.R. 25 and S.Ct.Prac.R. IV.

{¶ 3} Before a case can be certified to the Supreme Court of Ohio, three conditions must be satisfied. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594 (1993), rehearing denied by *Whitelock v. Cleveland Clinic Found.*, 67 Ohio St.3d 1420 (1993). Initially, "the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be 'upon the same question.' " (Emphasis sic.) *Id.* at 596. Next, "the alleged conflict must be on a rule of law—not facts." *Id.* Finally, "the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals" *Id.* "Factual distinctions between cases do not serve as a basis for conflict certification." (Emphasis sic.) *Id.* at 599.

{¶ 4} The Ninth District Court of Appeals in *Shumaker*, as we acknowledged in our decision, concluded a landlord does not owe the statutory duties of R.C. 5321.04(A)(3) to a tenant's guest who is in the apartment's common area. Because we held the landlord owes those statutory duties to a guest properly on the premises but in a common area at the time of injury, a conflict exists. For that reason, we certify the following question:

Whether landlord owes the statutory duties of R.C. 5321.04(A)(3) to a tenant's guest properly on the premises but on the common area stairs at the time of injury?

{¶ 5} Accordingly, defendant's motion to certify a conflict is granted.

Motion to certify a conflict granted.

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

THE STATE OF OHIO }
 Franklin County, ss }
 I, MARVELLEN O'SHAUGHNESSY, Clerk
 OF THE COURT OF APPEALS
 WITHIN AND FOR SAID COUNTY,
 HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN
 AND COPIED FROM THE ORIGINAL
Memorandum Decision
 FILED ON FILE IN MY OFFICE AND SEAL OF SAID
 COUNTY THIS 30th DAY OF Aug, A.D. 2012
 MARVELLEN O'SHAUGHNESSY, Clerk
 By *[Signature]* Deputy

20885 - E39

FILED
COURT OF APPEALS
FRANKLIN COUNTY OHIO
2012 AUG 30 PM 1:02
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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

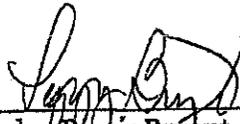
JOURNAL ENTRY

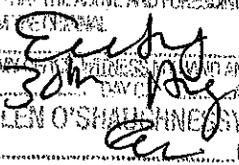
For the reasons stated in the memorandum decision of this court rendered herein on August 30, 2012, it is ordered that defendant's July 6, 2012 motion to certify the judgment of this court as being in conflict with the judgment in *Shumaker v. Park Lane Manor of Akron, Inc.*, 9th Dist. No. 25212, 2011-Ohio-1052, is sustained and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

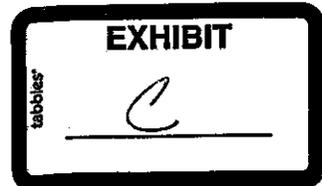
Whether landlord owes the statutory duties of R.C. 5321.04(A)(3) to a tenant's guest properly on the premises but on the common area stairs at the time of injury?

Costs assessed to defendant.

BRYANT, J., BROWN, P.J., & CONNOR, J.

By 
Judge Peggy Bryant

THE STATE OF OHIO }
Franklin County, ss }
I, MARVELLEN O'SHAUGHNESSY, Clerk
OF THE COURT OF APPEALS
WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN
AND COMED FROM THE ORIGINAL.
NOW ON FILE IN CASE NO. 10CV014595 AND SEAL OF SAID
COUNTY THIS 30th DAY OF AUGUST, A.D. 2012.
MARVELLEN O'SHAUGHNESSY, Clerk
By  Deputy



[Cite as *Shumaker v. Park Lane Manor of Akron*, 2011-Ohio-1052.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DEBRA SHUMAKER

C. A. No. 25212

Appellant

v.

PARK LANE MANOR OF AKRON, INC.
et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009-04-3060

Appellees

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

Per Curiam.

INTRODUCTION

{¶1} As Debra Shumaker was walking through a half-inch of water that was flowing across a road at Park Lane Manor, she slipped and fell on ice that had formed beneath the water. She sued the apartment complex and the City of Akron, which had been hired to repair the broken private water main that was the source of the water. The trial court granted summary judgment to the City because it determined the City did not owe a duty to Ms. Shumaker and was entitled to political subdivision immunity. It granted summary judgment to Park Lane because it concluded that the condition was open and obvious. This Court affirms because Park Lane did not owe Ms. Shumaker the same duties as its tenants, the condition was open and obvious, and because the City has political subdivision immunity under Chapter 2744 of the Ohio Revised Code.



BACKGROUND

{¶2} According to Ms. Shumaker, her son lives in an apartment at Park Lane Manor with his wife and children. She visits them several times a week. On Friday, December 16, 2005, a water main broke near her son's building. The water rose to the surface, where it pooled on the lawn before overflowing onto the walkway to her son's unit and the road in front of the building. According to Park Lane's maintenance supervisor, the area of road that had water flowing across it was about 12 feet wide. He testified that the water flowed to a drain that was about 20 feet away.

{¶3} According to Ms. Shumaker, she first saw the water and learned about the water main break when she babysat for her grandchildren over the weekend. Although she could not remember which night she was at the apartment, she remembered staying overnight. During her weekend visit, she remembered walking through the water and learning that the City was going to repair the water main. She testified that, during her visit, there was yellow tape around the part of the lawn that had water on it as well as a couple of parking spaces that were a short distance from her son's building.

{¶4} The City's water distribution superintendent testified that the City had a history of repairing water main problems at Park Lane. He speculated that the relationship developed because of the number of low income and elderly residents who lived in the apartments. He said that the City would repair Park Lane's water lines at cost instead of making it hire a private contractor.

{¶5} According to the water distribution superintendent, Park Lane called his department about the water main break on Friday, December 16, 2005. He sent an employee to Park Lane that same day, who inspected the leak and agreed to do the repair. His department

originally scheduled the repair for Saturday. Because there were a number of public water mains that broke that weekend, however, it had to postpone the repair until Monday.

{¶6} On Monday, December 19, 2005, Ms. Shumaker returned to her son's apartment. She drove down the road in front of his building, passing through the flowing water. As she drove down the road, she noticed a big yellow machine sitting in the couple of parking spaces that had had yellow tape around them. She parked at the end of the road and started walking back toward her son's building, carrying her purse. She considered walking behind the building to her son's back door, but decided against it because there was snow and ice on the grass that looked dangerous. As she walked up the road, she noticed a couple of men standing near the big yellow machine. She recognized one of them as Park Lane's maintenance supervisor and assumed the other was a city worker there to repair the water main.

{¶7} Ms. Shumaker testified that, as she approached the part of the road with the flowing water, she looked for the shallowest spot. She chose a spot that she estimated was only about a half-inch deep. As she walked, she "holler[ed]" a question to the maintenance supervisor about whether the water was still on at her son's apartment because she wondered whether she would be able to prepare a bottle for her grandson. The supervisor answered "[y]eah. But you have got about five minutes, so hurry up." According to Ms. Shumaker, she walked past the walkway leading to her son's building and continued toward the supervisor. Just as she was beginning to ask him how long the water was going to be off, she slipped on a sheet of "black ice" that was "underneath the water" and fell, injuring her arm and shoulder.

{¶8} Ms. Shumaker sued Park Lane and the City, alleging negligence. Park Lane moved for summary judgment, arguing that it did not have a duty to warn her because the condition was open and obvious. The City moved for summary judgment, arguing that it had not

created the condition that led to Ms. Shumaker's fall, that it had no duty to maintain the water main, that it is immune from liability, and that the condition was open and obvious. The trial court granted Park Lane's motion because it concluded that the condition was open and obvious. It granted the City's motion because it determined the City did not owe Ms. Shumaker a duty and was entitled to political subdivision immunity. Ms. Shumaker has appealed, assigning four errors.

LANDLORD-TENANT RELATIONSHIP

{¶9} Ms. Shumaker's first assignment of error regarding Park Lane is that the trial court incorrectly determined that Park Lane did not owe her the same duties as it owed its tenants under Section 5321.04(A) of the Ohio Revised Code. She has argued that, because Park Lane owed her a statutory duty under Section 5321.04, it can not use the open and obvious doctrine to avoid liability.

{¶10} Section 5321.04(A) provides the statutory obligations that a landlord owes to its tenants. Interpreting that section, the Ohio Supreme Court held in *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 25 (1981), "that a landlord is liable for injuries, sustained on the demised residential premises, which are proximately caused by the landlord's failure to fulfill the duties imposed by R.C. 5321.04." In *Sikora v. Wenzel*, 88 Ohio St. 3d 493, syllabus (2000), it held that "[a] landlord's violation of the duties imposed by R.C. 5321.04(A)(1) or 5321.04(A)(2) constitutes negligence *per se*[" In *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, it concluded that "[t]he open and obvious' doctrine does not dissolve the statutory duty to repair [under Section 5321.04]" because the doctrine is based on the landlord's common law duty to warn, while Section 5321.04 imposes on the landlord a duty to repair. *Id.* at ¶21, 25.

{¶11} Ms. Shumaker has argued that, even though she was not a tenant, Park Lane owed her the same duties as her son. She has noted that, in *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St. 3d 414 (1994), the Ohio Supreme Court held that “[a] landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant.” *Id.* at syllabus. It also wrote that “the obligations imposed upon a landlord under R.C. 5321.04 . . . extend to tenants *and* to other persons lawfully upon the leased premises.” *Id.* at 420.

{¶12} Ms. Shumaker’s argument fails because *Shump* is limited to injuries occurring “upon the leased premises.” *Id.* This Court has held that “a social guest, injured in an area not in the exclusive control of the tenant, is owed a duty of care by the landlord no higher than that owed to a licensee.” *Rios v. Shauck*, 9th Dist. No. 97CA006753, 1998 WL 289692 at *1 (June 3, 1998); see also *Owens v. French Village Co.*, 9th Dist. No. 99CA0058, 2000 WL 1026690 at *5 (July 26, 2000). In *Sanders v. Bellevue Manor Apartments*, 9th Dist. No. 95CA006067, 1996 WL 1768 (Jan. 3, 1996), for example, this Court concluded that *Shump* had no effect on the duty that a landlord owed to the daughter of a tenant who fell in a parking lot that was under the landlord’s control. *Id.* at *5. Similarly, in this case, there is no dispute that Ms. Shumaker fell on the one-lane road outside of her son’s apartment building. Accordingly, because she did not slip and fall “upon the leased premises,” Park Lane did not have a duty to her under Section 5321.04(A). Ms. Shumaker’s first assignment of error as to Park Lane is overruled.

OPEN AND OBVIOUS

{¶13} Ms. Shumaker’s second assignment of error regarding Park Lane is that the trial court incorrectly concluded that it did not owe her a duty of care because the condition was “open and obvious.” She has not argued that questions of fact exist regarding whether the ice beneath the water was open and obvious. Her only argument is that the open and obvious

doctrine does not apply to her situation under *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362.

{¶14} As noted in the previous section of this opinion, in *Robinson*, the Ohio Supreme Court held that “[t]he ‘open and obvious’ doctrine does not dissolve the statutory duty to repair.” *Id.* at ¶25. Ms. Shumaker’s argument fails because a landlord only owes a duty to repair under Section 5321.04 to tenants and “persons lawfully upon the leased premises.” *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St. 3d 414, syllabus (1994). There is no genuine issue of material fact that Ms. Shumaker was on a road outside her son’s apartment building at the time of her fall. Accordingly, the open and obvious doctrine still applies. Ms. Shumaker’s second assignment of error as to Park Lane is overruled.

POLITICAL SUBDIVISION IMMUNITY

{¶15} Ms. Shumaker’s second assignment of error regarding the City is that the trial court incorrectly determined that the City was entitled to immunity under Section 2744.03 of the Ohio Revised Code. “Determining whether a political subdivision is immune from liability . . . involves a three-tiered analysis.” *Lambert v. Clancy*, 125 Ohio St. 3d 231, 2010-Ohio-1483, at ¶8. “The starting point is the general rule that political subdivisions are immune from tort liability[.]” *Shalkhauser v. Medina*, 148 Ohio App. 3d 41, 2002-Ohio-222, at ¶14. Section 2744.02(A)(1) provides that “[a] political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision . . . in connection with a governmental or proprietary function.” “At the second tier, this comprehensive immunity can be abrogated pursuant to any of the five exceptions set forth at R.C. 2744.02(B).” *Shalkhauser*, 2002-Ohio-222, at ¶16. “Finally,

immunity lost to one of the R.C. 2744.02(B) exceptions may be reinstated if the political subdivision can establish one of the statutory defenses to liability.” *Id.*; see R.C. 2744.03(A).

{¶16} The dissent argues that, because the City argued it was acting as a private contractor, Chapter 2744 of the Ohio Revised Code does not apply. It does not cite any authority in support of its contention. To the contrary, Section 2744.02(A)(1) specifically divides all functions of a political subdivision into two categories: governmental functions and proprietary function. There are no exceptions for occasions in which the City claims to be acting as a private contractor. In fact, the definition of proprietary function contains a catch-all provision, defining any function that is not a governmental function as a proprietary function if it “promotes or preserves the public peace, health, safety, or welfare and . . . involves activities that are customarily engaged in by nongovernmental persons.” R.C. 2744.01(G)(1). The City can not recharacterize itself as anything other than a political subdivision, whose functions are either governmental or proprietary. Accordingly, Chapter 2744 applies to its decision to repair Park Lane’s private water main.

{¶17} As previously noted, the starting point of the Chapter 2744 analysis is that the City is immune from liability. *Shalkhauser v. Medina*, 148 Ohio App. 3d 41, 2002-Ohio-222, at ¶14. Ms. Shumaker has argued that the City’s immunity should be abrogated under Section 2744.02(B)(2) because it was engaged in a proprietary function when it agreed to repair the water main and her injuries were the result of its negligence. The City has argued that Section 2744.02(B)(2) does not apply because it was engaged in a governmental function and, even if it was engaged in a proprietary function, it was not negligent. The City has further argued that, even if it was negligent, it established one of the statutory defenses to liability under Section 2744.03(A).

{¶18} For purposes of this opinion, we will assume, without deciding, that the City was engaged in a proprietary function and that genuine issues of material fact exist with respect to whether the City was negligent. We, therefore, will proceed to the third step of the political subdivision immunity analysis. Under Section 2744.03(A)(3), a “political subdivision is immune from liability if the action or failure to act by the employee . . . that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.” Under Section 2744.03(A)(5), a “political subdivision is immune from liability if the injury . . . resulted from the exercise of judgment or discretion in determining . . . how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.” The trial court concluded that the City was immune under Section 2744.03(A) “because any decision made concerning the repair project involved discretion and allocation of the city’s resources in the midst of sub-freezing weather and in light of a total of nine water main breaks occurring between Friday and Sunday.”

{¶19} This Court has held that “the exceptions to immunity set forth in R.C. 2744.03 must be narrowly construed.” *Sturgis v. E. Union Twp.*, 9th Dist. No. 05CA0077, 2006-Ohio-4309, at ¶18. “Routine decisions are not shielded by immunity under R.C. 2744.03(A)(3) or 2744.03(A)(5).” *Id.* “A ‘discretionary’ act necessarily involves ‘[s]ome positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved[.]’” *Id.* (quoting *Addis v. Howell*, 137 Ohio App. 3d 54, 60 (2000)).

{¶20} The City has argued that its decision to postpone the Park Lane repair until Monday was a discretionary allocation of its limited resources. It has noted that there were nine

other water main breaks from December 16-18, 2005, and has explained that the reason others were given priority is because “they involved leaks to major City water mains and involved potential significant damage to City property, roadways, and sidewalks if left unattended for any length of time.”

{¶21} Ms. Shumaker has argued that the City was making a routine decision requiring little judgment or discretion, noting that the water distribution superintendent testified that it was a minor leak that was not an urgent matter. We disagree. It is evident from the superintendent’s testimony that, although the City initially thought it could repair the leak on Saturday, there ended up being a number of other water main breaks that presented a more significant risk to City property. The water department, therefore, decided to allocate its limited resources to the more significant water main breaks first, postponing the Park Lane repair until Monday morning. The City’s decision reflects a “positive exercise of judgment” in light of the dangers presented. Ms. Shumaker has not argued, let alone pointed to any evidence, that its decision was made in bad faith. Accordingly, the trial court correctly concluded that, even if the City was negligent, there is no genuine issue of material fact that its immunity was restored under Section 2744.03(A)(3) or (5). Ms. Shumaker’s second assignment of error as to the City is overruled. Because the City has political subdivision immunity, Ms. Shumaker’s first assignment of error regarding whether the City owed her a duty is moot, and is overruled on that basis. See App. R. 12(A)(1)(c).

CONCLUSION

{¶22} The trial court correctly granted summary judgment to Park Lane and the City. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

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 Summit, 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 Appellant.

DONNA J. CARR
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

BAIRD, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶23} I agree with the majority's conclusions regarding Park Lane Manor. I dissent with respect to the City, however, because I believe that it does not have political subdivision immunity. Throughout this case, including the arguments made to this Court, the City has maintained that it was acting as a private contractor. Having characterized its activity as that of a private contractor, the City must accept whatever rights and responsibilities a private contractor

would have in such circumstances. Chapter 2744 of the Ohio Revised Code applies to actions of cities, not private contractors. Since the activities herein were acts of a private contractor, the statutory provisions regarding political subdivision immunity are not applicable. Accordingly, I would reverse the trial court's grant of summary judgment to the City.

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

ROBERT W. HIGHAM, Attorney at Law, for Appellant.

JOYCE KIMBLER, Attorney at Law, for Appellee.

CHERI CUNNINGHAM, Director of Law, JOHN C. REECE, and JANET M. CIOTOLA, Assistant Directors of Law, for Appellee.