ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO: 2012-1600

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. dba NORTHGATE APARTMENTS :

Defendant-Appellant :

APPELLEE MANN'S MOTION TO CONSIDER SUPPLEMENTAL CASE LAW

BRIAN D. SULLIVAN (0063636)
Counsel of Record
MARTIN T. GALVIN (0063624)
REMINGER CO., L.P.A.
101 W. Prospect Ave., Ste. 1400
Cleveland, Ohio 44115-1093
(216) 687-1311
(216) 687-1841-fax
bsullivan@reminger.com
mgalvin@reminger.com

MICHAEL T. IRWIN (0007037)
Attorney for Plaintiff-Appellee
280 S. State Street
Westerville, Ohio 43081
(614) 891-7112
(614) 891-3187-fax
mtilaw@aol.com

KEVIN P. FOLEY (0059949)
NICOLE M. KOPPITCH (0082129)
Attorney for Defendant-Appellant
REMINGER CO., L.P.A.
65 E. State St., 4th Floor
Columbus, Ohio 43215
(614) 232-2416
(614) 232-2410-fax

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Now comes Plaintiff-Appellee Lauren J. Mann, in and through counsel, moving this Court to consider recent decisional law from the 9th Appellate District prior to making a determination of conflict as requested by Defendant-Appellant per its Notice of Certified Conflict filed herein on September 20, 2012.

FACTUAL BACKGROUND

In June 2007, Appellee Mann was visiting an acquaintance at appellant's apartment complex in Columbus, Ohio. She had not been to the complex on any prior occasion. The acquaintance's apartment was on the second floor which was accessed through a common interior stairwell which serviced three other apartments. She exited the apartment between 10:00 and 11:00 p.m., during nocturnal hours. While she was descending the staircase, she was in complete darkness because the internal light fixtures were completely inoperable. The evidence is that the internal light fixtures were inoperable for a period of approximately six months. Upon reaching the bottom of the stairwell, darkness prevented her ability to appreciate that there were no more steps. She stumbled and fell through a plate glass window suffering very serious injury and permanent disfiguration.

She filed suit in Franklin County Common Pleas Court alleging that appellant (landlord) had violated the provisions of R.C. 5321.04 (Landlord-Tenant Statute) which requires a landlord to: (a) make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition; (b) keep all common areas of the premises in a safe and sanitary condition (emphasis added); and (c) maintain in good and safe working order and condition all electrical fixtures.

STATEMENT OF THE CASE

On July 22, 2011 the trial court granted Landlord-Appellant's Motion for Summary Judgment holding that the protection of R.C. 5321.04 applies to tenants only (and does not apply to a tenant's guests) and that the "open and obvious doctrine" acts as a complete bar to a recovery. On June 26, 2012, the 10th District Court of Appeals unanimously reversed the trial court's decision holding that: (1) a landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant (citing the syllabus of Shump v. First Continental-Robinwood Assoc., 71 Ohio St. 3d 414 (1994); and (2) a violation of R.C. 5321.04 is negligence per se and the open and obvious doctrine does not apply to obligations and liability created by statute. Robinson v. Bates, 2006-Ohio-6362. On August 30, 2012, the 10th District granted Northgate's Motion to Certify a Conflict with Shumaker v. Park Lane Manor of Akron, Inc., 9th Dist. No. 25212, 2011-Ohio-1052 which held that the statute 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. In short, Northgate maintains the position that a guest is only entitled to the protection of the statute when the injury occurs within the four walls of the leased apartment, but is not afforded such protection in common areas such as stairwells.

RECENT CASE LAW

On September 12, 2012, the 9th District Court of Appeals decided Harris-Coker v. Abraham, 2012-Ohio-4135. Therein, Harris-Coker fell as she ascended the concrete steps leading to her daughter's leased apartment. Harris-Coker was a guest of her daughter (tenant). She sustained injuries on the steps used as access to the leased space. She filed suit alleging

negligence and arguing the landlord's liability under R.C. 5321.04(A)(2) and (3). Summary judgment was granted in favor of the landlord (Abraham). The 9th District Court of Appeals unanimously reversed the trial court's decision granting summary judgment and remanded the case to the trial court with instructions to consider the claim of negligence per se under the provisions of the statute. In short, the 9th District has recognized that a violation of the Landlord-Tenant Statute in common areas (stairway outside the leased apartment) applies to guests which may result in a finding of negligence per se. Simply stated, there would be no need to remand the matter to the trial court if the 9th District Appellate Court felt that R.C. 5321.04 does not apply to guests injured in common areas. If the 9th District believed that the Landlord-Tenant Statute only applied to guests who are injured within the four walls of a leased apartment (as Appellant urges), it would have said so and affirmed the trial court's decision in favor of the landlord.

Given the recent decision by the 9th District Court of Appeals in Harris-Coker, it is clear that R.C. 5321.04 applies to guests in common areas such as stairways leading to the confines of leased apartment space. As such, there is no conflict between the instant case and the 9th Appellate District. A copy of the Harris-Coker Decision is appended hereto.

Respectfully submitted,

MICHAEL T. IRWIN (0007037)
Attorney for Plaintiff-Appellant
280 S. State Street
Westerville, Ohio 43081
(614) 891-7112
(614) 891-3187-fax
mtilaw@aol.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Appellee Mann's Motion to Consider Supplemental Case Law was served, via regular U.S. Mail, postage prepaid upon Brian D. Sullivan, Attorney for Northgate Investors LLC, 101 W. Prospect Ave., Suite 1400, Cleveland, Ohio 44115-1093; by ordinary U.S. Mail service, postage prepaid this 12th day of October, 2012.

MICHAEL T. IRWIN (0007037)
Attorney for Plaintiff-Appellant
280 S. State Street
Westerville, Ohio 43081
(614) 891-7112
(614) 891-3187-fax
mtilaw@aol.com

[Cite as *Harris-Coker v. Abraham*, 2012-Ohio-4135.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
ROWENA HARRIS-COKER Appellant v. DANIEL M. ABRAHAM, et al. Appellees	C.A. No. 26053 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2010-08-5255

DECISION AND JOURNAL ENTRY

Dated: September 12, 2012

CARR, Judge.

{¶1} Appellant Rowena Harris-Coker appeals the judgment of the Summit County Court of Common Pleas which granted summary judgment in favor of appellees Daniel and Patricia Abraham. This Court reverses in part.

I.

{¶2} Ms. Harris-Coker fell as she ascended the concrete steps leading to her daughter's residence. Her daughter was renting the premises from the Abrahams. Ms. Harris-Coker filed a complaint against the Abrahams, alleging negligence. The Abrahams moved for summary judgment, Ms. Harris-Coker responded in opposition, and the Abrahams replied. The trial court granted summary judgment in favor of the Abrahams. Ms. Harris-Coker appealed, raising three assignments of error for review. The assignments of error have been rearranged to facilitate review.

II.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR [OF] THE DEFENDANT[S] WHEN IT FAILED TO APPLY, MISAPPLIED, OR FAILED TO CONSIDER THE APPLICABLE LAWS.

{¶3} Ms. Harris-Coker argues that the trial court erred by granting summary judgment to the Abrahams because it failed to apply or consider the applicable law. This Court agrees.

{¶4} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983). However, this Court remains a reviewing court. As such, this Court will not consider the issues relevant to a motion for summary judgment in the first instance. *Mourton v. Finn*, 9th Dist. No. 26100, 2012-Ohio-3341, ¶ 9, citing *Neura v. Goodwill Industries*, 9th Dist. No. 11CA0052-M, 2012-Ohio-2351, ¶ 19.

{¶5} Ms. Harris-Coker argues that the trial court erred by failing to consider her negligence per se argument and by granting summary judgment to the Abrahams solely on the basis of common law negligence.

{¶6} To prevail on a claim of negligence, Ms. Harris-Coker must establish the existence of a duty, a breach of that duty, and an injury proximately resulting from the breach of duty. *Menifee v. Ohio Welding Prod., Inc.*, 15 Ohio St.3d 75, 77 (1984).

{¶7} R.C. 5321.04(A) sets out various duties of a landlord. The breach of some of those duties has been held to constitute negligence per se. Although she did not cite the statute

in her complaint, Ms. Harris-Coker alleged facts relevant to the following two statutory provisions:

> A landlord who is a party to a rental agreement shall do all of the following: * * * (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition; (3) Keep all common areas of the premises in a safe and sanitary condition[.]

R.C. 5321.04(A)(2) and (3). Moreover, she argued in support of her claim of negligence per se in her brief in opposition to the Abrahams' motion for summary judgment. The trial court, however, failed to analyze the issue of negligence per se in its judgment entry. Accordingly, we are compelled to reverse and remand the matter to the trial court to consider the claim of negligence per se in the first instance. *See Mourton* at ¶ 9.

{¶8} We note, however, that although Ms. Harris-Coker argued in both her brief in opposition to the motion for summary judgment and her appellate brief that the Abrahams violated their duty to "[c]omply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety[,]" pursuant to R.C. 5321.04(A)(1), she did not allege any code violations in her complaint. Accordingly, the trial court did not err by failing to address the issue of negligence per se in regard to this issue.

{¶9} Because the trial court failed to address Ms. Harris-Coker's articulated claims for negligence per se, her second assignment of error is sustained.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS, AS THE DEFENDANTS FAILED TO MEET THEIR BURDEN, GENUINE ISSUES OF MATERIAL FACTS REMAINED, AND THE COURT FAILED TO PROPERLY CONSIDER ALL THE FACTS BEFORE IT IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS, AS THE PLAINTIFF PROVIDED EVIDENCE AS TO EACH ELEMENT OF NEGLIGENCE AND NEGLIGENCE PER SE AND IT WAS NOT NECESSARY FOR PLAINTIFF TO HAVE AN EXPERT WITNESS.

{¶10} Ms. Harris-Coker argues that the trial court failed to consider the evidence in a light most favorable to her as the non-moving party. She further argues that genuine issues of material fact exist in regard to her claims of negligence and negligence per se. She asserts in these arguments, however, that she would or had developed these arguments in other assignments of error. Specifically, while she mentions the open and obvious doctrine and the element of duty in these two assignments of error, she does not develop her arguments in regard to those issues here. Moreover, she asserts in her first assignment of error that she briefed the issue of common area below, but she does not develop that issue in these assignments of error either. Instead, she refers to the arguments she makes in her second assignment of error. Based on our resolution of the second assignment of error, the first and third assignments of error have been rendered moot and we decline to address them. *See* App.R. 12(A)(1)(c).

III.

{¶11} The second assignment of error is sustained. We decline to address the remaining assignments of error. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
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 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(C). 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 equally to both parties.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
CONCURS.

BELFANCE, J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶12} I concur with the majority that the award of summary judgment should be reversed because the trial court did not consider Ms. Harris-Coker's per se statutory claims. However, I respectfully dissent from the majority's implicit affirmance of the trial court's award

of summary judgment on Ms. Harris-Coker's claim of common-law negligence because I believe that there still exist genuine issues of material fact.

{¶13} For example, it is unclear whether the steps were an open and obvious hazard. Whether something is open and obvious is determined by the totality of the circumstances. *See Neura v. Goodwill*, 9th Dist. No. 11CA0052-M, 2012-Ohio-2351, ¶ 10. While a person could readily see that the steps contain some chipping and pock marks, there was no testimony that one could observe that the railing was loose. Depending on how loose the railing was, it could greatly increase the hazard of the steps. Therefore, because the record is unclear as to whether Ms. Harris-Coker knew that the railing was loose, viewing the evidence in the light most favorable to her, I would conclude that the hazard posed by the steps was not open and obvious. Accordingly, I dissent in part.

APPEARANCES:

KANI HARVEY HIGHTOWER, Attorney at Law, for Appellant.

ADAM E. CARR, Attorney at Law, for Appellee.