

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,*

v.

NORTHGATE INVESTORS LLC, dba  
NORTHGATE APARTMENTS,

*Defendant-Appellant*

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MERIT BRIEF OF APPELLANT, NORTHGATE INVESTORS, LLC,  
dba NORTHGATE APARTMENTS

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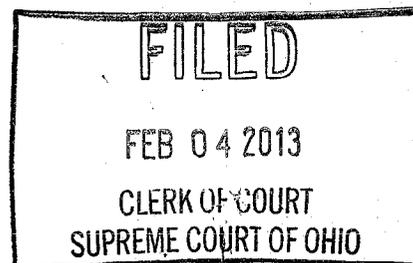
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**CERTIFIED QUESTION**

**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?**

## I. STATEMENT OF THE CASE

On October 5, 2010, plaintiff, Lauren J. Mann, filed a complaint in the Franklin County Court of Common Pleas for injuries she sustained while walking down an unlit stairwell at an apartment building owned by Northgate Investors, LLC, dba Northgate Apartments ("Northgate"). Transcript of Docket and Journal Entry ("T.d.") 2, Complaint. Specifically, Ms. Mann alleged that on June 15, 2007, she was an invitee at the Northgate Apartment because she was visiting a friend who was a tenant in the complex. T.d. 2, ¶¶ 1,2. Ms. Mann further alleged that, after socializing with her friend and others, she left the apartment between the hours of 10:30 p.m. and 11:00 p.m. T.d. 2, ¶ 4. She asserted that, when she exited her friend's apartment, she observed that the hallway and stairway lighting was not working, "making safe navigation of the building during nocturnal hours difficult and dangerous." T.d. 2, ¶ 5. Despite this apparent danger, Ms. Mann proceeded to walk down the stairway, where she stumbled forward and fell. She claimed that Northgate "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." T.d., ¶ 7.

On October 25, 2010, Northgate submitted its answer denying the substantive allegations of Ms. Mann's complaint. After discovery, Northgate moved for summary judgment. T.d. 23, Northgate's Motion for Summary Judgment. Northgate argued that it was entitled to summary judgment in its favor because there was no evidence that it breached a duty of care owed to Ms. Mann. Specifically, Northgate asserted

that it owed Ms. Mann, as an invitee, a duty of ordinary care in maintaining its property. T.d. 23, pg. 6. It further asserted that it was well-established that the open and obvious doctrine eliminated a premises owner's duty to warn invitees of dangers either known to the invitee or so obvious and apparent to the invitee that he or she may reasonably be expected to discover the dangers and protect against them. T.d. 23, pg. 6. Northgate argued that Ms. Mann's undisputed testimony that she was aware of the fact that the stairs and adjoining hallway were dark placed her on notice of the purported danger and relieved Northgate of its duty of care to her.

In response to Northgate's motion for summary judgment, Ms. Mann conceded "that darkness is an obvious danger," but she asserted that Ohio's Landlord Tenant Act, Revised Code §5321.04, imposes a duty on landlords to maintain electrical systems and lighting fixtures. T.d. 26, Ms. Mann's Memorandum in Opposition to Motion for Summary Judgment, pgs. 3, 7. Ms. Mann argued that Northgate's failure to warn her of the dangers presented by darkness and its failure to maintain proper lighting fixtures created a genuine issue of material fact for trial.

In reply, Northgate argued that common law principles concerning premises liability applied to determining the scope and extent of its duty to Ms. Mann. T.d. 27, Northgate's Reply in Support of Its Motion for Summary Judgment. Moreover, Northgate argued that the statutory obligations imposed under Revised Code §5321.04 established duties between landlords and tenants and did not extend to create a cause of action by an invitee.

On July 22, 2011, the trial court granted Northgate summary judgment. T.d.

28, Decision and Entry Granting Defendant's Motion for Summary Judgment. The trial court concluded that it was undisputed that Ms. Mann appreciated the fact that the stairway was dark and that, despite this appreciation, she decided to walk down the stairs. T.d. 28, pg. 4. The trial court determined that "the common-law duty, owed by a landlord to a business invitee of his tenant who was on a portion of the premises over which the landlord has retained control, should not be any greater than the common-law duty that any other occupier of premises would owe to his business invitee." T.d. 28, pg. 4, quoting *Sidle v. Humphrey*, 13 Ohio St.2d 45, 50 (1968). The trial court concluded that Northgate was not liable to Ms. Mann for her injuries because Northgate did not owe her a duty and Ms. Mann failed to present evidence establishing causation. T.d. 28, pg. 4.

On appeal, the Franklin County Court of Appeals reversed the entry of judgment in favor of Northgate and found that genuine issues of material fact existed for trial. The appellate court concluded that Revised Code §5321.04(A)(3) imposes a duty on a landlord to keep all common areas on the premises in a safe and sanitary condition. The appellate court further concluded that a landlord owed the same duty to a guest of a tenant in the common area that the landlord owed to the tenant. It found that a landlord's failure to keep all common areas of a premises in safe and sanitary condition imposed negligence per se on the landlord and that the open and obvious doctrine did not apply to negate liability caused by a guest's decision to proceed down a dark stairway despite appreciation for the obvious dangers in doing so.

The appellate court, recognizing its decision was in conflict with at least the Ninth District Court of Appeals, certified a conflict. Specifically, the appellate court certified 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?" On September 20, 2012, Northgate notified this Court of the appellate court's certification of conflict.

## II. STATEMENT OF FACTS

Ms. Mann has alleged that she was injured on June 15, 2007, while she was visiting a friend who was a tenant at an apartment building owned by Northgate. R. 2, Complaint, ¶ 1. Ms. Mann testified that she arrived at her friend's apartment at approximately 12:00 p.m. R. 22, Deposition of Lauren Mann, pg. 22. Ms. Mann's friend's apartment was located on the second floor of the building. She spent the day visiting with friends in the apartment and left between 10:00 p.m. and 11:30 p.m. R. 22, Mann Deposition, pg. 22. When Ms. Mann left her friend's apartment, she had to walk down two flights of stairs to reach the exit door. R. 22, Mann Deposition, pg. 26. Ms. Mann testified that, after she stepped out of her friend's apartment, the apartment door closed and the hallway and stairwell became dark because it was nighttime and there was no lighting. R. 22, Mann Deposition, pg. 29. She acknowledged that the hallway and stairwell were dark but that she nevertheless decided to proceed down the stairs:

Q. Okay. At that point, you are able to see - - at that point, are you aware that there's a flight of stairs you have to go down?

A. Yes, ma'am.

Q. Okay. You are also aware that it's dark and there's no lighting;  
Correct?

A. Yes.

\* \* \*

A. At no time while I was walking in the hallway, there was no light  
that went out.

Q. So you are aware that it's dark as you proceed down the stairwell;  
is that correct?

A. Yes, ma'am.

R. 22, Mann Deposition, pgs. 30-31.

Ms. Mann testified that she successfully made it down the first flight of stairs, crossed the landing and started her way down the second flight of stairs. Ms. Mann stated that she also made it down the second flight of stairs safely. R. 22, Mann Deposition, pg. 33. After she stepped off the last step, however, she stumbled forward through a glass side light adjacent to the exit door. R. 22, Mann Deposition, pg. 34. Ms. Mann, however, was not able to recall what caused her to stumble and fall other than agreeing with her counsel that "perhaps" she thought there was another step but couldn't see it because it was dark. R. 22, Mann Deposition, pgs. 38-39.

Ms. Mann's undisputed testimony established that she was aware of the darkness in the hallway and stairwell in the Northgate apartment building and decided to proceed down the stairs despite an appreciation for this dangerous condition. After proceeding down the stairs, Ms. Mann stumbled and fell through a glass side light. She was unable to identify what caused her to stumble and fall and

was unable to identify any other hazard or dangerous condition other than the darkness. Despite these facts, the appellate court concluded that Northgate was negligent per se in failing to properly maintain a common area in its apartment building and that the open and obvious doctrine did not negate Northgate's purported liability.

### III. LEGAL ANALYSIS

#### **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?**

The 10<sup>th</sup> District Court of Appeals has certified that a conflict exists among Ohio's appellate districts concerning the issue of whether the statutory duty embodied in R.C. § 5321.04(A)(3) applies to a guest injured in a common area thereby imposing negligence per se on a landlord who is found to have violated the statute. This court should determine that R.C. § 5321.04(A)(3) does not impose a separate statutory obligation on a landlord for injuries to a guest while in a common area because the common area is within the exclusive possession and control of the landlord and the common law duty of care applies. Moreover, even if the court finds that R.C. § 5321.04(A)(3) applies to a guest in a common area, a violation of the statute does not impose negligence per se because the statute embodies a common law duty of reasonable care and does not set forth a specific statutory obligation separate and distinct from the common law duty.

#### **A. Common Law Duty of Premises Owner.**

It is well-settled that, in order to prevail in a negligence claim, a plaintiff must

show: (1) the existence of a duty; (2) a breach of that duty; and (3) an injury proximately resulting from that breach. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75 (1984). A premises owner owes an invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition so that the invitee is not unnecessarily and unreasonably exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203 (1985). A landlord's liability for an unsafe condition on the premises rests upon the landlord's superior knowledge, actual or constructive, of the danger that causes the injury. *Debie v. Cochran Pharmacy-Berwick, Inc.* 11 Ohio St.2d 38, 40 (1967). This Court has long held that a landlord who retains possession and control over common hallways and stairwells in rental property has a "duty to exercise ordinary care to keep the same in a reasonably safe condition." *Davies v. Kelley*, 112 Ohio St. 122 (1925), paragraph one of syllabus.

It is equally well-established that a premises owner is not an insurer of an invitee's safety. *Paschal*, 18 Ohio St.3d at 203. Indeed, a premises owner is under no duty to protect an invitee from dangers which are known to the invitee or are so obvious and apparent to the invitee that he or she may reasonably be expected to discover them and protect against them. *Id.*, *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968), paragraph one of the syllabus. Towards that end, a premises owner owes no duty to persons entering those premises regarding dangers that are open and obvious. *Armstrong v. Best Buy Co., Inc.* 99 Ohio St.3d 79, 80 (2003). A premises owner may reasonably expect that persons entering the premises will discover those dangers that are open and obvious and take appropriate measures to protect themselves. *Simmers*

*v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644 (1992). As such, the open and obvious doctrine obviates a premises owner's duty to warn of an apparent hazard and acts as a complete bar to any negligence claim. *Armstrong*, 99 Ohio St.3d 79.

This court has recognized that "darkness is always a warning of danger, and for one's own protection it may not be disregarded." *Jeswald v. Hutt*, 15 Ohio St.2d 224 (1968), paragraph three of the syllabus. Other Ohio courts have likewise reaffirmed that darkness is an open and obvious condition that should not be disregarded. *McDonald v. Marbella Restaurant*, 8<sup>th</sup> Dist. No. 89810, 2008-Ohio-3667; *Rezac v. Cuyahoga Falls Concerts, Inc.*, 9<sup>th</sup> Dist. No. 23313, 2007-Ohio-703, *Leonard v. Modene & Assoc., Inc.*, 6<sup>th</sup> Dist. No. WD-05-085, 2006-Ohio-5471; *Swonger v. Middlefield Village Apts.*, 11<sup>th</sup> Dist. No. 2003-G-2547, 2005-Ohio-941, ¶ 13 ("[s]ince darkness itself constitutes a sign of danger, the person who disregards a dark condition does so at his or her own peril"); *McCoy v. Kroger Co.*, 10<sup>th</sup> Dist. No. 05AP-7, 2005-Ohio-6965, at ¶ 16 ("darkness increases rather than reduces the degree of care an ordinary person would exercise"). Thus, the presence of darkness creates an open and obvious hazard which relieves a premises owner of a duty to warn of the dangers of the apparent hazard.

**B. The Statutory Duties Between a Landlord and Tenant under R.C. § 5321.04(A)(3) do not Extend to a Business Invitee with Respect to Areas Other Than the Leased Premises.**

Similar to the common law duty a premises owner owes to an invitee of using ordinary care in maintaining its premises in a reasonably safe condition, R.C. § 5321.04(A)(3) obligates a landlord who is a party to a rental agreement to "[k]eep all common areas of the premises in a safe and sanitary condition." The appellate court

concluded that the statutory obligations imposed upon a landlord under R.C. § 5321.04(A)(3) extend to tenants and to other person lawfully on leased premises even when those invitees are in common areas of leased property. *Mann v. Northgate Investors, LLC*, 10<sup>th</sup> Dist. No. 11AP-684, 2012-Ohio-2871, ¶20. The court concluded that a violation of this statutory duty, unlike a violation of a common law duty, constituted negligence per se, which negated application of the defense that the hazard was open an obvious to an invitee who knowingly proceeded down a dark stairwell in a common area. This determination is inconsistent with Ohio law and the legislature's intent in enacting the Landlord Tenant Act of 1974. Moreover, this reasoning greatly expands the potential liability a landlord faces for persons on leased property for which he has limited control.

It is clear that the duties imposed on a landlord under R.C. § 5321.04 are applicable to tenants and to other persons lawfully upon the leased premises. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414 (1994). These statutory obligations, however, only apply while the invitee is within the leased premises and not when they are occupying a common area. This court explicitly recognized this distinction in *Shump*.

In *Shump*, an administrator of the estate of a woman who had died from fumes of a fire in an apartment in which she was an overnight guest brought an action for wrongful death against the landlord. The administrator alleged that the decedent's death was proximately caused by the landlord's failure to install a smoke detector on the first floor of the apartment in violation of a city ordinance. The landlord argued

that the decedent was an invitee in the apartment and that its only duty to her was to refrain from willful or wanton misconduct. The Ohio Supreme Court determined, however, that the landlord owed the decedent the same duty that it owed the tenant of the apartment in which she died, because the apartment was within the exclusive control of the tenant:

[T]he common-law classifications of trespasser, licensee, and invitee determine the legal duty that a *tenant* owes others who enter upon rental property that is in the exclusive control of the tenant. However, with regard to areas within the exclusive possession of a tenant, the common-law classifications do not affect the legal duty that a *landlord* owes a tenant or others lawfully upon the leased premises. \* \* \* In the case at hand, it is undisputed that the apartment was in the exclusive possession of [the tenant] when the fumes from the fire in his apartment overtook [the decedent].

*Id.* at 417 (emphasis in original). This court recognized that a tenant only owes a common law duty to invitees while in the confines of an apartment unit under the exclusive possession and control of the tenant. Similarly, it stands to reason that a landlord would only owe an invitee a common law duty of care when an invitee is in an area of the property- such as a common area- that is under the exclusive possession and control of the landlord.

This distinction is significant and has lead numerous appellate courts to conclude that the statutory obligations imposed by R.C. § 5321.04 are not applicable to a tenant's guest in a common area. For example, the Ninth District Court of Appeals has held that *Shump* imposes a tenant-landlord duty on invitees only when an injury to the invitee occurs within an area in the exclusive control of the tenant. *Shumaker v. Park Lane Manor of Akron, Inc.*, 9<sup>th</sup> Dist. No. 25212, 2011-Ohio-1052, ¶12. The court noted that, because the plaintiff was injured in a parking lot controlled by the

landlord, but common to all tenants, the Supreme Court's holding in *Shump* did not impose the duties required by R.C. § 5321.04 on the landlord. See also *Sheline v. Denman*, 5<sup>th</sup> Dist. No. CT2009-0033, 2010-Ohio-2041 (finding that a tenant's guest was owed no duty when the common area danger was open and obvious); *Briskey v. Gary Crim Rentals*, 7<sup>th</sup> Dist. No. 04 MA 7, 2004-Ohio-6508 (noting a distinction exists between the duty owed to a tenant's guest in a leased portion of the property versus a common area); *Westbrook v. Elden Properties*, 9<sup>th</sup> Dist. No. 98CA007257, 2000 Ohio App. LEXIS 1486; *Owens v. French Village Co.*, 9<sup>th</sup> Dist. No. 99CA0058, 2000 Ohio App. LEXIS 3345; and *Sanders v. Bellevue Manor Apartments*, 9<sup>th</sup> Dist. No. 95CA006067, 1996 Ohio App. LEXIS 3; *Carrozza v. Olympia Mgmt. Ltd.*, 12<sup>th</sup> Dist. No. CA96-11-228, 1997 Ohio App. LEXIS 3896 (holding that open-and-obvious is a defense to landlord's violation of R.C. 5321.04 as to a tenant's guest in a common area).

Thus, the 5<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, and 12<sup>th</sup> appellate districts have all concluded that the obligation imposed on a landlord under R.C. § 5321.04 do not apply to invitees in a common area of the leased premises. The logic behind these appellate court decisions is compelling. First, the legislative purpose of the landlord tenant act was to codify the law regarding rental agreements for residential premises, and to govern the rights and duties of both landlords and tenants. *Vardeman v. Llewellyn*, 17 Ohio St. 3d 24, 26 (1985). The landlord tenant act was not enacted for the benefit of protecting invitees or guests who are not parties to a written rental agreement. Thus, it makes little sense to extend the requirement of the act beyond those who were intended to

benefit from it.

Moreover, a premise owner has little control over the guests who may be invited onto the premises by a tenant. Application of a statutory duty over and above the common law duty for injuries that occur to guests in common areas would greatly expand the potential liability of a landlord in an unreasonable manner. The landlord tenant relationship imposes special duties and obligations on each party. A guest of a tenant is not bound by these same duties and obligations. Indeed, a tenant could have hundreds of guests traveling through the common areas to which a landlord may be subjected to liability despite the fact that liability should be negated because a guest appreciates an obvious hazard yet chooses to disregard it. Such an imposition of liability was not intended by the legislature when it enacted the landlord tenant act and should not be imposed by judicial fiat.

The obligations imposed on a landlord to ensure that all safety and building codes are satisfied and that a landlord makes all reasonable repairs to ensure that a residential premise is habitable inure to the benefit of a tenant's guest when those guests are within the confines of the rented space. A landlord's violation of these statutory duties imposes negligence per se whether the violation causes injury to a tenant or his or her guest. See *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 23; *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406. This imposition of negligence per se liability, however, is limited to when the guest is in the leased space of the tenant – an area that is under the exclusive control of the tenant. The imposition of this negligence standard in situations beyond the confines of the tenant's

rented space is not warranted under the statutory language of R.C. 5321.04(A)(3). The common law duty on premises owners to use reasonable care is well developed and provides a workable framework within which to resolve disputes over injuries caused by a landlord's negligence in these areas.

In this case, Ms. Mann has alleged that Northgate negligently failed to maintain adequate lighting in the hallway and stairway of its apartment building. The only hazard created by Northgate's alleged negligent conduct was darkness. Darkness, however, always serves as a warning of danger and an individual who disregards the warning does so at his or her own peril. The legislature did not intend to relieve guests of their duty to exercise care for their own safety while in common areas of leased property. Yet, extension of the duties imposed on a landlord by R.C. § 5321.04(A)(3) to protect invitees from injury while in common areas will have that effect. This court should refrain from extending this duty to circumstances not contemplated by the legislature and that would frustrate the application of fundamental common law principles.

**C. Violations of Duties Imposed by R.C. § 5321.04(A)(3) Do Not Establish Negligence Per Se.**

R.C. § 5321.04(A)(3) imposes a general duty on a landlord to keep common areas in a safe condition. Where a statute contains a general, abstract description of a duty, a plaintiff proving that a defendant violated the statute must nevertheless prove each of the elements of negligence in order to prevail. *Eisenhuth v. Moneyhon*, 161 Ohio St. 367 (1954), paragraph three of the syllabus. Thus, in order to establish liability for violation of a statute countering a general duty of care, proof is necessary

that a defendant failed to act as a reasonably prudent person under like circumstances. *Id.*; See also, *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677 (1998).

Where a statute, however, sets forth “a positive and definite standard of care \* \* \* whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact,” a violation of that statute constitutes negligence per se. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998), quoting *Eisenhuth*, 161 Ohio St. at 374–375. 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*, 82 Ohio St.3d at 565. In such instances, the statute “serves as a legislative declaration of the standard of care of a reasonably prudent person applicable in negligence actions.” Thus, the “reasonable person standard is supplanted by a standard of care established by the legislature.” 57A American Jurisprudence 2d, *supra*, at 672, Negligence, Section 748., *Sikora v. Wenzel*, 88 Ohio St.3d 493 (2000).

The distinction between whether a statutory violation will be considered as evidence of negligence or will support a finding of negligence per se depends upon the degree of specificity with which the particular duty is stated in the statute. *Sikora*, 88 Ohio St.3d 493, 496. R.C. § 5321.04(A)(3) does not supplant the reasonable person standard of care and, as such, does not constitute the creation of a different standard of care by the legislature. Moreover, it does not state, with the necessary degree of specificity, a particular duty on a landlord that is separate and distinct from the

common law duty of reasonable care. Rather, the statutory duty set forth in R.C. § 5321.04(A)(3) requires a landlord to exercise reasonable care to keep common areas safe.

It is a firm principle of statutory construction that liability imposed by statute shall not be extended beyond the clear import of the terms of the statute. *Eiher v. Phillips*, 103 Ohio St. 249 (1921), paragraph one of the syllabus. Courts may not presume that the statute was intended to abrogate the common law. *LaCourse v. Fleitz*, 28 Ohio St.3d 209 (1986). Such an intention must be expressly declared by the legislature or necessarily implied in the language of the statute. *Id.*

In *LaCourse*, this court specifically refused to expand the requirements of R.C. § 5321.04(A)(3) to impose a “novel duty” on landlords to keep common areas free from ice and snow. In so doing, the court observed that it would be “judicially untenable” to create liability for injuries resulting from the natural accumulation of ice and snow by expanding the statutory duty to keep common areas in a safe and sanitary condition. *Id.* The Court observed that it was not free to dismantle a long-standing rule of common law:

We are not free to add words to a statute on the basis that the addition strikes us as desirable, or because we believe the legislature “meant” to include it. \* \* \* Had the legislature intended to dismantle a long standing rule of the common law, it would have expressly so declared.

*Id.*, citing *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St.2d 24, 28 (1970).

This court has held that “a landlord's violation of the duties imposed by R.C. § 5321.04(A)(1) or R.C. § 5321.04(A)(2) constitutes negligence per se.” *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 23, citing *Sikora v. Wenzel*, 88 Ohio St.3d 493,

2000-Ohio-406. R.C. § 5321.04(A)(1) requires a landlord to comply with all applicable housing, safety and building codes, and R.C. § 5321.04(A)(2) requires a landlord to make all repairs necessary to keep the premises fit and habitable. This court has never decided, however, that a landlord's violation of R.C. § 5321.04(A)(3), which requires a landlord to keep common areas safe, constituted negligence per se.

In *Shroadess v. Rental Homes, Inc.*, this court concluded that R.C. § 5321.04(A)(2) imposes duties on the landlord to make repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition. 68 Ohio St.2d 20 (1981). In so doing, the court concluded that the purpose of the Landlord-Tenant Act of 1974 was to protect persons using rented residential premises from injuries. The court held that a violation of the statute requiring a landlord to make "all repair" necessary to keep a premises habitable constituted negligence per se. *Id.* Similarly, in *Sikora*, the court concluded that a violation of R.C. § 5321.04(A)(1), which required compliance with the Ohio Basic Building Code, constituted negligence per se. *Sikora v. Wenzel*, 88 Ohio St. 3d at 493.

These cases, and the statutory duties embodied by the specific statutory provisions reviewed in them, stand in stark contrast to the general duty to keep common areas safe, as articulated in R.C. § 5321.04(A)(3). The legislature imposed a specific requirement to comply with applicable building codes or to make all repairs reasonably necessary to keep the premises habitable when it enacted R.C. §§ 5321.04(A)(1) and(A)(2). R.C. § 5321.04(A)(3), however, simply obligates a landlord to keep all common areas of a premises in a safe condition. Like the court in *LaCourse*,

this court should refrain from creating additional duties not expressly imposed by the legislature when construing R.C. § 5321.04(A)(3).

Additionally, it is important to note that a statutory violation which creates liability as negligence can be “excused.” As set forth in the Restatement of Torts 2d, *supra*, at 37, Section 288B(1): “The *unexcused* violation of a legislative enactment \* \* \* which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.” (Emphasis added.) But “[a]n *excused* violation of a legislative enactment \* \* \* is not negligence.” (Emphasis added.) Restatement of Torts 2d, *supra*, at 32, Section 288A(1). See, also, *Reynolds v. Ohio Div. of Parole & Community Serv.* (1984), 14 Ohio St.3d 68, 71, fn. 5, quoting Prosser, *Law of Torts* (4 Ed.1971) 200–201, Section 36; *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 37 (applying the concept of a legal excuse in the context of motor vehicle operation); *Zehe v. Falkner*, 26 Ohio St.2d 258, 261 (1971).

In this case, any finding of negligence per se against Northgate for violation of R.C. § 5321.04(A)(3) should be excused. Again, the hazard which was allegedly created by Northgate’s failure to keep all common areas of the premises in a safe and sanitary condition was the presence of darkness. Darkness, in and of itself, constitutes a sign of danger and increases the degree of care that an ordinary person must exercise to avoid injury. To the extent that this Court finds that a violation of R.C. §5321.04(A)(3) constitutes negligence per se, liability for such a violation should be excused by the open and obvious doctrine.

#### IV. CONCLUSION

For the foregoing reasons, this court should answer the certified question in the negative. This court should conclude that a landlord does not owe an invitee the statutory duties of R.C. §5321.04(A)(3) for injuries which the invitee sustains as a result of an alleged hazardous condition in a common area. Moreover, the court should conclude that a violation of a duty to keep common areas in a safe condition as set forth in R.C. § 5321.04(A)(3) does not impose negligence per se. The judgment of the appellate court should be reversed and judgment in favor of Northgate entered.

Respectfully submitted,



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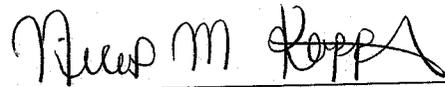
**CERTIFICATE OF SERVICE**

A copy of the foregoing *document* was sent by regular U.S. mail this 4<sup>th</sup>

day of February, 2013 to:

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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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SEP 20 2012

CLERK OF COURT  
SUPREME COURT OF OHIO

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*, 10<sup>th</sup> 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.*, 10<sup>th</sup> 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.*, 9<sup>th</sup> 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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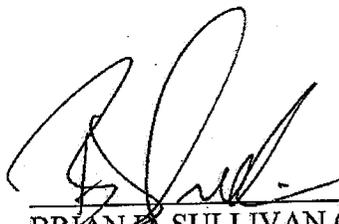
**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice of Certified Conflict was sent by regular U.S. mail this

17<sup>th</sup> day of September, 2012 to:

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\_\_\_\_\_  
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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. :  
 :

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D E C I S I O N

Rendered on June 26, 2012

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*Michael T. Irwin*, for appellant.

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

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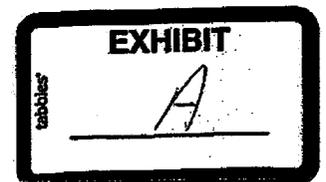
APPEAL from the Franklin County Court of Common Pleas.

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 *Gevin 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.

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12

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN COUNTY  
2012 AUG 30 PM 12:59  
CLERK OF COURTS

Lauren J. Mann,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

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No. 11AP-684  
(C.P.C. No. 10CVC-10-14595)  
(REGULAR CALENDAR)

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MEMORANDUM DECISION

Rendered on August 30, 2012

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*Michael T. Irwin*, for appellant.

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

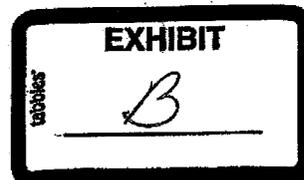
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ON MOTION TO CERTIFY A CONFLICT

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



No. 11AP-684

"[w]henever 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 CORRECT FROM THE ORIGINAL
MARVELLEN O'SHAUGHNESSY, Clerk	
By _____	Deputy

FILED ON FILE WITH THE BUSINESS MAIL AND SEAL OF SAID COUNTY THIS 30th DAY OF Aug. 2012

*Motion to certify a conflict granted*

20885 - E39

FILED  
JULY 1 OF APPEALS  
2012 AUG 30 PM 1:02  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Lauren J. Mann,	:	
	:	
Plaintiff-Appellant,	:	No. 11AP-684
	:	(C.P.C. No. 10CVC-10-14595)
v.	:	
	:	(REGULAR CALENDAR)
Northgate Investors LLC, d.b.a.	:	
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 *Peggy Bryant*  
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, 2012.  
MARVELLEN O'SHAUGHNESSY, Clerk  
By \_\_\_\_\_ Deputy

EXHIBIT  
C

[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

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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.

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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.

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