

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. :

MERIT BRIEF OF PLAINTIFF-APPELLEE LAUREN MANN

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

BRIAN D. SULLIVAN (0063536)
Counsel of Record
101 W. Prospect Ave., Suite 1400
Cleveland, Ohio 44115-1093
(216) 687-1311
(216) 687-1841-fax
bsullivan@reminger.com

KEVIN FOLEY (0059949)
NICOLE M. KOPPITCH (0082129)
65 E. State Street, 4th Floor
Columbus, Ohio 43215
(614) 232-2416
(614) 232-2410-fax
Attorneys for Defendant-Appellant

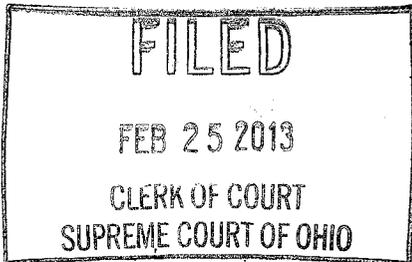


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
CERTIFIED QUESTION	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
LEGAL ANALYSIS	5
Whether the Landlord owes the statutory dues 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	
A. A Residential Landlord's Duty of Care to Tenants and Persons Lawfully Upon the Leased Premises Includes the Provisions of R.C. 5321.04.	5
B. The Open and Obvious Doctrine is Not Available as a Defense To a Residential Lessor's Violation of R.C. 5321.04.	8
C. Under R.C. 5321.04, a Residential Landlord Owes the same Duties of Care to a Tenant's Guests as it Owes to the Tenant when Injured in a Common Area.	10
D. A Landlord's Violation of R.C. 5321.04 is Negligence Per Se.	12
CONCLUSION	15
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Armstrong v. Best Buy Co., Inc.</u> , 99 Ohio St.3d 79 (2003)	8
<u>LaCourse v. Fleitz</u> , 28 Ohio St.3d 209 (1986)	13, 14
<u>Mann v. Northgate Investors LLC</u> , Tenth Dist. No. 11AP-684, 2012-Ohio-2871	10
<u>Robinson v. Bates</u> , 112 Ohio St.3d 17, 2006-Ohio-6362	9, 12
<u>Schoefield v. Beulah Road</u> , FR App. No. 98AP-145, 1999 WL 645273	9
<u>Shump v. First Continental-Robinwood Associates</u> , 71 Ohio St.3d 414 (1994)	6, 7,
<u>Sikora v. Wenzel</u> , 88 Ohio St.3d 493, 2000-Ohio-406	9, 12
Black’s Law Dictionary	10
STATUTES:	
R.C. 5321.04	5, 8, 10, 12

CERTIFIED QUESTION

Whether the 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?

STATEMENT OF THE CASE

On October 5, 2010, plaintiff timely filed a Complaint (R.2) alleging that defendant apartment complex 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. Defendant timely filed an Answer to Plaintiff's Complaint (R.17). The parties exchanged written discovery requests. The depositions of Plaintiff Lauren Mann and witness Michelina Markiewicz were taken by defense counsel on April 29, 2011. On June 20, 2011, the defense served its Motion for Summary Judgment (R.23). On June 30, 2011, plaintiff served her Motion in Opposition to Defendant's Motion for Summary Judgment (R.26) with appended Affidavits from plaintiff-appellant and witness Markiewicz. On July 11, 2011, defendant served its Reply in Support of its Motion for Summary Judgment (R.27). On July 22, 2011, the Court granted Defendant-Appellee's Motion for Summary Judgment by its Decision and Entry (R.28) and terminated the case. Plaintiff appealed the trial court's Decision to the Tenth District Court of Appeals.

The Tenth District Court unanimously reversed the trial court's Decision on June 26, 2012 (appended to Appellant's Merit Brief). The Appellate Court granted Appellant Northgate's Motion to Certify a Conflict on August 30, 2012.

This Court determined, by Entry dated November 7, 2012, that a conflict exists and ordered that the certified question be briefed by the respective parties.

STATEMENT OF FACTS

On June 15, 2007 plaintiff-appellee, a 16-year-old high school student at DeSales, was visiting friends at defendant's north Columbus apartment complex. She was visiting a unit on the 2nd floor occupied by Michelina Markiewicz. Markiewicz's apartment was on the 2nd floor and was accessed by a common hallway which serviced three other apartments (two up, two down). Outside each of the four apartments, there are lighting fixtures to illuminate the common hallway during nocturnal hours. Markiewicz testified in her deposition, which immediately preceded plaintiff's deposition, that she had been a tenant of the building for approximately six months preceding plaintiff's fall and resulting injuries. Markiewicz further testified that none of the hallway lighting fixtures for the four apartments were operable at any time during her leasehold. She further testified that she complained to the apartment complex's management on several occasions that the interior lighting for the common hallway was not operating, and in fact, non-existent. She stated that she observed a maintenance person change the light bulbs in the fixtures which did not fix the electrical problem. As such, defendant-appellant had approximately six months notice of the defective electrical system and non-existent lighting. (See Affidavit of Markiewicz appended to Plaintiff's Motion in Opposition to Summary Judgment, R.26).

The plaintiff-appellee visited the premises for the first time on June 15, 2007. She entered Markiewicz's 2nd floor apartment through the common hallway at approximately noon. During her visit, plaintiff, Markiewicz and a few other friends played cards and watched movies. Plaintiff-appellee ingested no alcohol or drugs. She left the apartment for the first time at some point between 10:00 and 11:30 p.m., well after sunset. At the time of her departure, she was unaware that there was no interior lighting to guide her egress from the 2nd floor apartment. The

hallway was completely dark. The hand rail was painted black. The carpeting on the stairs was dark gray. The common stairway is the only means of egress from the apartment. She carefully navigated her way down the first flight of stairs to the landing with her hand on the handrail. She turned right and proceeded down the 2nd flight of stairs. As she stepped off the last tread (step), anticipating that there might be another step, she stumbled and fell through a glass panel adjacent to the glass exit door. She testified in her deposition that because the hallway and stairs were so dark, she could not determine where the last stair step was located. She suffered serious lacerations on various parts of her body which have resulted in large scars and disfiguration which are not repairable.

Defendant-Appellant correctly states that plaintiff was unaware of the lighting conditions of the stair well (inoperable fixtures) until after she left Markiewicz's apartment well after sundown.

LEGAL ANALYSIS

Whether the Landlord owes the statutory duties of Revised Code 5321.04 to a tenant's guest who is properly on the premises but on the common area stairs at the time of injury?

The Tenth District Court of Appeals unanimously held that a landlord's statutory duties embodied in R.C. 5321.04 apply to a guest injured in a common area. The Court held that a violation by the landlord of the statutory duties of repair imposes negligence per se upon the landlord. The Court properly held that R.C. 5321.04 is a safety statute, the violation of which is negligence per se such that the "open and obvious" doctrine is not available as a defense.

Appellant challenges the Tenth District's Decision arguing that "because the common area is within the exclusive possession and control of the landlord, a violation of the safety statute is not negligence per se but instead, a landlord's common law duty of care applies." In essence, appellant urges the reversal of this Court's Decisions in Shump, Robinson and Sikora.

A. A Residential Landlord's Duty of Care to Tenants and Persons Lawfully Upon the Leased Premises Includes the Provisions of R.C. 5321.04.

While common law classifications of trespasser, licensee and invitee determine the legal duties that a tenant owes to persons who enter his rented leasehold, the same is not true regarding a landlord's duty of care owed to its tenants and guests. A landlord's common law duty of care was modified by the Ohio Landlord and Tenant Act of 1974 (R.C. 5321.04).

At common law (prior to R.C. 5321.04), it had long been the law of Ohio that apart from an express contract, a landlord out of possession and control owes no duty, either toward his tenant or toward any other person who enters the premises, to take care that the premises were safe, either at the commencement of the tenancy or during its term, unless there was a concealment of known dangers. Thus, prior to the enactment of the statute, a

landlord had virtually no common law duty of care. To correct that situation, in 1974, the Ohio legislature enacted the Landlord Tenant Act, eliminating the common law rule and replacing the same with the obligations set forth in the statute which control a landlord's duties concerning a residential lease. 65 Ohio Jur. 3d Section 410. Indeed, at common law, a lessor did not warrant that the premises were tenantable or in safe condition. Instead, a tenant took the premises as they were, with all defects. 65 Ohio Jur. 3d Section 411. Thus, a landlord's liability was limited to fraudulent misrepresentation or intentional concealment of defects. A landlord's duty of care under Ohio's common law provided little or no protections for tenants, guests or others who could be expected to enter the premises. Appellant suggests that we return to the common law standard of care and avoid the specific duties imposed by R.C. 5321.04. This Court examined a residential landlord's common law duties in Shump v. First Continental-Robinwood Associates, 71 Ohio St. 3d 414 (1994). Justice Wright acknowledged that at common law, an Ohio landlord generally was immune from tort liability for any injuries sustained by any person due to dangerous conditions on a leased premises, absent fraud or agreement to the contrary. Shump at pg. 417-418. Shump held that:

The legal duty that a landlord owes a tenant is not determined by the common-law classifications of invitee, licensee and trespasser under the law of premises liability; instead, a landlord's liability to a tenant is determined by a landlord's common law immunity from liability and any exceptions to that immunity that a court or a legislative body has created. Shump at pg. 418 (emphasis added)

Justice Wright noted that "exceptions nearly have swallowed up the general rule of landlord immunity." He wrote that common exceptions include concealment, failure to disclose latent defects, defective premises, defective areas under the landlord's control, failure to repair and breach of statutory duty. Shump at pg. 418. Thus, this Court has

previously determined that a breach of a statutory duty will negate a landlord's immunity previously enjoyed under Ohio common law. The case law authority relied upon by appellant concerning a residential landlord's common law liability predates the holding in Shump.

Aside from the well documented analysis of a landlord's liability under the common law, Shump specifically held that "A landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes the tenant." Shump at syllabus. Shump clarified that there should be no distinguishment between the duties a landlord owes a tenant and the duties a landlord owes to other persons lawfully upon the leased premises, which includes the tenant's guests because they are "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." Shump at pg. 419. In no uncertain terms, Shump held "that a landlord owes the same duties to persons lawfully upon the leases premises as the landlord owes to the tenant." Shump at pg. 419. More specifically, "The obligations imposed upon a landlord under R.C. 5321.04 would appear to extend to tenants and other persons lawfully upon the leased premises." Leaving no doubt whatsoever, "A landlord may be held liable to a tenant's guest for the breach of a statutory duty imposed upon a landlord." Shump at pg. 420.

Sections A(1), (2), (3) and (4) of R.C. 5321.04 have not been altered or amended since the effective date of the statute in 1974. While appellant concedes that a landlord's violation of the statutory duties imposed by A(1) and A(2) imposes negligence per se (whether injury befalls a tenant or guest), it somehow urges that a violation of A(3) does not produce the same result. To the contrary, Shump does not distinguish between any of

the sections, holding that all of the protections of R.C. 5321.04, “extend to tenants and to other persons lawfully upon the leased premises.” Shump at pg. 420.

Shump involved the death of a tenant’s guest as a result of the landlord’s violation of the local fire code. The Shump court held that there was “no doubt” that the purpose of the fire code was to protect any individual in an apartment from the risks of fire. It found that the guest was within the class of persons intended to have been protected by the fire code. So too, appellee herein, as a guest, is within the class of persons intended to be protected under the statutory obligation of appellant to provide and maintain electrical lighting fixtures within the internal stairwell of the apartment building. It cannot be argued that appellant’s tenant was not expected to have guests or other persons visit her apartment.

Appellant’s suggestion that we return to a residential landlord’s common law duty of care is misplaced because a landlord’s immunity has been usurped by the Landlord-Tenant Act of 1974.

B. The Open and Obvious Doctrine is Not Available as a Defense to a Residential Lessor’s Violation of R.C. 5321.04

Appellant argues that darkness is obvious and therefore the open and obvious doctrine acts as a complete bar to any negligence claim, relying on this Court’s holding in Armstrong v. Best Buy Co., Inc., 99 Ohio St.3d 79 (2003). Armstrong, however, involved injuries from a fall in a commercial setting. The instant case involves injuries occurring on residential premises. In a residential setting, a landlord’s obligations are governed by R.C. 5321.04.

Appellant fails to observe that the “open and obvious” defense is not available where liability is based upon negligence per se. The Tenth Appellate District held in

Schoefield v. Buelah Road, FR App. No. 98AP-145, 1999 WL 645273, that: “As a matter of law, the open and obvious danger doctrine did not abrogate appellant’s duty under R.C. 5321.41(A)(12) to repair the defective landing/steps . . . “. Citing Schoefield, this Court in Robinson v. Bates, 112, Ohio St. 3d 17, 2006-Ohio-6362, held that “The ‘open and obvious’ doctrine does not dissolve the statutory duty of repair. If the jury finds that Bates breached her duty to repair and keep the leased premises in a fit and habitable condition, the ‘open and obvious’ doctrine will not protect her from liability.” Robinson at para. 25. So far as the open and obvious doctrine is concerned, this Court recognized a marked distinction between injuries sustained in a commercial setting and those occurring as a result of a residential landlord’s violation of its statutory duties to repair. Robinson at para. 21. Robinson cited the Schoefield decision with approval. It further affirmed its holding in Sikora v. Wenzel, 88 Ohio St.3d 493, 2000-Ohio-406 “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.” Hence, this Court has already determined that a landlord’s violation of R.C. 5321.04, a safety statute, is negligence per se. Where negligence per se is established per a violation of a safety statute, the “open and obvious” doctrine will not protect (a residential landlord) from liability.

In the instant case, the Markiewicz Affidavit (R.26) (the tenant appellee was visiting) verifies that the hallway lights were inoperable for a period of approximately six months prior to appellee’s fall. The Affidavit is uncontested and there is nothing in the record indicating that the hallway lights were working. Indeed, the trial court found that “it is undisputed that the stairway was dark.” (R.28, pg.4). The Appellate Court’s Decision herein distinguished between natural darkness occurring in an external setting

as opposed to appellant's duty to maintain internal stairwell lighting in accordance with the safety statute. It observed: "Similarly, here, if defendant violated R.C. 5321.04, it was negligent per se." Mann v. Northgate Investors LLC, Tenth Dist. No. 11AP-684, 2012-Ohio-2871, paragraphs 24 and 25. Likewise, this Court must recognize a distinction between darkness occasioned by nightfall in an exterior setting and interior darkness due to a landlord's negligence in failing to discharge its statutory obligation to maintain electrical lighting fixtures in the stairwell.

C. Under R.C. 5321.04, a Residential Landlord Owes the Same Duties of Care to a Tenant's Guests as it Owes to the Tenant when Injured in a Common Area.

Relying on this Court's Decision in Shump, appellant argues that a residential landlord owes a lesser duty of care to a guest injured in a common area than it owes to a tenant. Appellant's interpretation of Shump is misplaced. The Shump court clearly held that the obligations imposed upon a landlord under R.C. 5321.04 extend to tenants and other persons lawfully on the premises and that a landlord may be held liable to a tenant's guest for the breach of a statutory duty imposed upon the landlord. Shump at pg. 420. Shump makes it very clear that whatever duties under the statute are owed to a tenant are the same duties it owes to a tenant's guest. Thus, so long as a guest is "lawfully upon the leased premises", that guest is entitled to all of the protections under the statute. "Premises" is defined by Black's Law Dictionary as "a house or building, along with its grounds." Black's Law Dictionary, 8th Ed., (2004). Thus appellee was entitled to have the internal stairwell lighted as specifically required by the safety statute. The artificial distinction drawn by appellant between injuries occurring to a guest inside the confines of an apartment and those sustained on the exclusive means of ingress/egress to that apartment is a fiction not contemplated by the express holding in Shump. Indeed, Shump

never even discussed injuries occurring in a common area. As discussed above, Shump held that a *tenant's* liability to his or her guests (and others) is based upon the common law classifications of trespasser, licensee and invitee. The *landlord's* liability to a guest, however, is not determined by common law classifications. Instead, the landlord's liability to tenants and guests is determined by the common law as modified by statutory duties as discussed above. A landlord's common law immunity, in a residential setting, has clearly been modified for the benefit of tenants and guests alike.

In short, appellant argues that because a tenant's liability to a guest is based upon common law classifications that a landlord's liability should be based upon common law classifications as well. Such a position flies directly in the face of the Shump decision which holds that a landlord's statutory obligation modifies its common law immunity.

Errantly, appellant alleges that the decedent's estate in Shump was able to recover "because the apartment was within the exclusive control of the tenant." Appellant's Merit Brief at pg. 10. However, a casual reading of the Shump decision demonstrates that death occurring within the confines of the apartment was irrelevant. Instead, the landlord's liability was based upon its violation of R.C. 5321.04, a safety statute, which inures to the benefit of tenants and guests alike. Herein, appellant's basic premise is that appellee should not recover "because the common area (stairwell) is within the exclusive possession and control of the landlord. . .". Appellant's Merit Brief at pg. 6. To the contrary, the stairwell is not within the exclusive possession of appellant. The stairwell is used as the exclusive means of access to the apartments by tenants and guests. Indeed, the use (possession) of the stairwell by tenants and guests is not only expected – it is mandatory. Because the stairway must be used by tenants and guests, the legislature

determined that this common area must be made safe by the landlord, including operational lighting, for the benefit of its users.

D. A Landlord's Violation of R.C. 5321.04 is Negligence Per Se.

This case is, and always has been, about appellant's failure to maintain adequate lighting in the interior stairwell. In Appellee's Complaint (R.2 at para. 7), it was alleged that: "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." Thus, it is clear that appellee alleges a violation of the specific statutory mandate articulated in R.C. 5321.04(A)(4). Appellant seeks to avoid liability by shifting appellee's allegations such that the claim being made should be considered as if it were stated under Section (A)(3) of the statute. Such a shift is a tacit recognition that violations under (A)(4) may also be considered under (A)(3). Appellant's re-characterization, however, ignores the specific provisions of (A)(4). Indeed, appellant does not even mention Section (A)(4) in its Merit Brief. Appellant complains that Section (A)(3) is too general and therefore the common law standard of care should apply. Ostensibly, appellant is arguing that because Section (A)(3) does not specify a landlord's obligation to maintain stairwell lighting, it would not be on notice that failure to do so would be a violation of the landlord's duties. Such an argument is without merit because Section (A)(4) specifically states a landlord's obligation to keep all electrical lighting fixtures in safe and operable condition.

This Court, in Robinson, at para. 23, 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", citing this Court's decision in Sikora v. Wenzel, 88 Ohio St.3d 493, 2000 Ohio 406. This Court

should note that Section (A)(2) is just as non-specific as is Section (A)(3). Nonetheless, this Court has held that a violation under Section (A)(2) constitutes negligence per se. So too, and for the same reasoning, this Court should hold that a landlord's violations under Sections (A)(3) and (A)(4) also constitute negligence per se.

Appellant's principle authority is this Court's decision in LaCourse v. Fleitz, 28 Ohio St.3d 209 (1986). LaCourse involved a tenant who slipped and fell on ice and snow on the walkway outside the building in which she rented an apartment. She testified that she was aware of the icy conditions and that she had traversed the walkway with icy conditions shortly before her fall. This Court held that 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. LaCourse at syllabus. This Court declined to impose liability on the landlord pursuant to R.C. 5321.04 because: (1) it was not demonstrated that the landlord had a superior knowledge of the risk than that of the tenant; (2) the lease did not impose a duty to clear the accumulation of ice and snow; (3) the accumulation of ice and snow was not chargeable to the landlord because he did not create it; and (4) there was no mention of an obligation to remove ice and snow in R.C. 5321.04. In the instant case, appellee had never before visited the apartment complex and did not leave the apartment until after sundown. The Affidavit of Markiewitz (tenant) provides that she had complained to management on several occasions that the stairwell lights were not working. Thus, appellee did not have equal or superior knowledge of the risk to that of appellant. Secondly, as the Appellate Court pointed out, there is a distinction between a lack of electrical lighting for an interior stairwell and "darkness solely from the presence of nighttime" which is a natural condition, similar to a weather-related condition. Mann

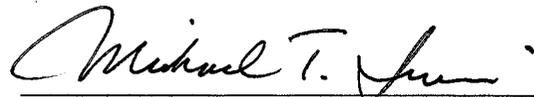
at para. 24. Lastly, the statute specifically contemplates appellant's obligation to maintain the electrical fixtures at Section (A)(4).

While LaCourse (1986) would not hold that a residential landlord's failure to remove ice and snow in an exterior setting constitutes negligence per se, it did not hold that a landlord's violation of R.C. 5321.04(A)(3) was not negligence per se. This Court in Shump determined that "A landlord may be held liable to a tenant's guest for a breach of a statutory duty imposed upon the landlord." Appellee suggests that if the trier of fact determines that a violation of R.C. 5321.04 exists, then such violation constitutes negligence per se because it is a breach of a statutory duty chargeable to the residential landlord. Such a holding would be consistent with this Court's decisions in LaCourse, Shump and Sikora.

CONCLUSION

This Court should affirm the Appellate Court's Decision. Further, this Court should hold that a landlord's violation of R.C. 5321.04(A)(3) and (A)(4) constitutes negligence per se. Such a holding does not expand a landlord's liability but instead promotes the legislative intent embodied in the Landlord Tenant Act of 1974 which was enacted for the benefit of residential tenants, their guests and other persons lawfully upon the leased premises. A return to a residential lessor's common law duty of care, as suggested by appellant, would render R.C. 5321.04 meaningless and require the reversal of this Court's holdings in Shump, Robinson and Sikora.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Plaintiff-Appellee Lauren Mann was served upon Brian Sullivan, Attorney for Defendant-Appellant, 101 West Prospect Ave., Suite 1400, Cleveland, Ohio 44115-1093 and Kevin P. Foley, Attorney for Defendant-Appellant, 65 E. State St., 4th Floor, Columbus, Ohio 43215; by ordinary U.S. Mail service, postage prepaid this 25 of February, 2013.



MICHAEL T. IRWIN (0007037)
Attorney for Plaintiff-Appellee