[Cite as *Swader v. Paramount Property Mgt.*, 2012-Ohio-1477.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

REBECCA SWADER, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2011-05-084
	:	O P I N I O N
- vs -		4/2/2012
	:	
PARAMOUNT PROPERTY MANAGEMENT, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-06-2546

T. Tod Mollaun, Maislin Professional Center, 214 East 9th Street, 5th Floor, Cincinnati, Ohio 45202, for plaintiffs-appellants

Paramount Property Management, c/o Christopher Lee DeSelms, 3090 Beckman Street, Cincinnati, Ohio 45225, defendant

Regan B. Tirone, 36 East 7th Street, Suite 2420, Cincinnati, Ohio 45202, for defendant-appellee, Gerald L. Boeckmann

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POWELL, P.J.

{¶ 1} A couple sued both their landlord and the owner of the property after the wife

suffered injuries when she fell on a buckled floorboard in the house they were subleasing. The Butler County Common Pleas Court granted summary judgment to the property owner, and entered a default judgment against the landlord. The couple appeal the grant of summary judgment to the property owner. Finding summary judgment appropriate in this case, we affirm the trial court's decision.

{¶ 2} Appellants, Earl and Rebecca Swader, sued their landlord, Paramount Property Management, L.L.C., and the owner of the property, Gerald L. Boeckmann, alleging both were liable for Rebecca's injuries caused when she stepped on a soft floorboard and it "gave way."

{¶ 3} According to the record submitted for purposes of summary judgment, Earl Swader worked as a construction subcontractor for Christopher DeSelms and DeSelms' company, Paramount.

{¶ 4} Boeckmann owns a farm that includes a number of dwellings. He entered into an agreement with DeSelms and Dawn Lafferty, for the "lease-purchase" of this farm in 2006. Boeckmann understood DeSelms and Lafferty would live in one of the houses on the property and lease the others.

{¶ 5} DeSelms and Earl Swader agreed in late 2006 that the Swaders would lease one of the houses DeSelms said he was buying. Paramount was listed on the lease as the landlord; DeSelms and Lafferty signed the lease. The Swaders indicated they did not know the name of the person who actually owned the house and had no contact with the owner.

{¶ 6} The Swaders reportedly moved into the house in November 2006. Rebecca Swader said she sustained injuries in a June 2007 fall. The Swaders sued Paramount and Boeckmann. Boeckmann moved for summary judgment, which was granted by the trial court. Paramount failed to appear or answer the complaint and a default judgment was entered against Paramount after a damages hearing in April 2011. The trial court ordered

Paramount to pay an amount for damages for Rebecca Swader's injuries, for Earl Swader's loss of consortium claim, and for medical expenses paid on behalf of Rebecca Swader by the state of Ohio.

{¶ 7} The Swaders now appeal the grant of summary judgment against Boeckmann, raising two assignments of error for our review.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANT BY DISREGARDING THE TESTIMONY OF EARL SWADER ON THE ISSUE OF NOTICE ON THE GROUNDS IT CONTRADICTS THE TESTIMONY OF DEFENDANT-APPELLANT GERALD BOEKMANN. [sic]

{¶ 10} The Swaders argue in this assignment of error that Boeckmann had actual or constructive notice of the condition of the floor. And, in considering a summary judgment motion, the trial court erred in making a determination that Boeckmann's claimed ignorance about the floor defect was more credible than Earl Swader's deposition testimony.

{¶ 11} According to Earl Swader's deposition testimony, he has several years of construction experience. Swader inspected the house before moving in and pointed out a number of repair issues to DeSelms, including a soft board on the uncarpeted wood floor. Swader claims that an addition was placed on the house years ago that required a change in the ductwork. He states that a flimsy or "junk" piece of boarding was placed over a hole left in the wood floor after the duct work was moved.

{¶ 12} The Swaders allege Boeckmann had either actual notice of the condition of the floor because he created it by extending the structure of the house, or, if a previous owner added the extension, Boeckmann had constructive notice because he owned and had exclusive control over the house since 1989.

{¶ 13} Swader testified the floor was carpeted when they moved in and he assumed

the floor had been fixed. Rebecca Swader testified in her deposition that she did not know what caused the floor to give way. Swader, who was not at home when his wife fell, said the "junk" board buckled when his wife stepped on it. The Swaders did not check under the carpet to view the condition of the floor after Rebecca Swader fell. Swader said he told DeSelms about his wife's fall, and they moved out of the house about a month later because DeSelms failed to repair numerous things in the house.

{¶ 14} Boeckmann testified that his agreement with DeSelms and Lafferty gave control of maintenance of the properties to DeSelms and Lafferty, but Boeckmann had to approve any change to the "major systems" on the property. Boeckmann testified that he received a copy of the Swader lease, but none of the other leases.

{¶ 15} Boeckmann testified that he inspected the property over the years and was not aware of any problems with the floor. Boeckmann evicted DeSelms and Lafferty from the entire parcel in the summer of 2009 for failure to pay rent. Boeckmann said he had the carpeting replaced after the tenants moved out of the house the Swaders previously rented. He said no one reported any defects with the floor.

{¶ 16} Turning now to the law pertaining to summary judgment, we are mindful that in reviewing the trial court's ruling on summary judgment, a court of appeals conducts an independent review of the record and stands in the shoes of the trial court. *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997).

{¶ 17} Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can come only to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. *See* Civ.R. 56(C); *see also Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978); *Walters v. Middletown Properties Co.*, 12th Dist. No. CA2001-10-249, 2002-Ohio-3730, ¶ 9-10.

{¶ 18} A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond. *See State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 513, 2009-Ohio-1523, ¶ 27.

{¶ 19} In order to avoid summary judgment in a negligence action, the plaintiff must show the following: (1) that the defendant owed the plaintiff a duty of care, (2) that the defendant breached the duty of care, and (3) as a direct and proximate result of the defendant's breach, the plaintiff was injured. *Angel v. The Kroger Co.*, 12th Dist. No. CA2001-07-073, 2002-Ohio-1607, citing *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75 (1984). The plaintiff's failure to prove any of these elements would be fatal to his negligence claim. *Butler v. Wyndtree Housing Ltd. Partnership*, 12th Dist. No. CA2011-03-056, 2012-Ohio-49, ¶ 15.

{¶ 20} R.C. 5321.04 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 with the purpose to protect persons using rented residential premises from injuries. *Au v. Waldman*, 5th Dist. No. 2010 CA 112, 2011-Ohio-2233, ¶ 31.

{¶ 21} R.C. 5321.04(A) states, in part, that a landlord who is a party to a rental agreement shall comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety; make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition; keep all common areas of the premises in a safe and sanitary condition; and maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him.

{¶ 22} A violation of the statute that sets forth specific duties constitutes negligence

per se. *Waldman* at ¶ 31. However, negligence per se does not equate to liability per se, as negligence per se does not dispense with a plaintiff's obligation to prove the landlord's breach was the proximate cause of the injury complained of, nor does it remove a plaintiff's obligation to prove the landlord received actual or constructive notice of the condition causing the statutory violation. *Packman v. Barton*, 12th Dist. No. CA2009-03-009, 2009-Ohio-5282, ¶ 15; *Waldman* at ¶ 31 (must be shown that landlord received notice of the defective condition of the rental premises, or the landlord knew of the defect, or the tenant made reasonable, but unsuccessful, attempts to notify the landlord).

{¶ 23} Landlords will be excused from liability where they neither knew nor should have known of the factual circumstances that caused the statutory violation. *Sikora v. Wenzel*, 88 Ohio St.3d 493, 493 (2000), syllabus.

{¶ 24} "Actual notice" is defined as notice "given directly to, or received personally by, a party." *Black's Law Dictionary*, 1090 (8th Ed.2004). "Constructive notice" is notice "arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of." *Id*. "Constructive notice," refers to "that which the law regards as sufficient to give notice and is regarded as a substitute for actual notice or knowledge." *Cox v. Estate of Wallace*, 12th Dist. No. CA87-06-078, 1987 WL 32746 (Dec. 31, 1987).

{¶ 25} Constructive notice of an unsafe condition can be proven by showing that the unsafe condition "existed in such a manner that it could or should have been discovered, that it existed for a sufficient length of time to have been discovered, and that if it had been discovered it would have created a reasonable apprehension of a potential danger or an invasion of private rights." *Patterson v. Ahmed*, 6th Dist. No. L-09-1222, 2010-Ohio-4160, ¶ 19.

{¶ 26} The Swaders argue the trial court erroneously considered the credibility of the deposition witnesses when it made its summary judgment determination. We note the trial

court commented it found credibility issues with the testimony of Earl and Rebecca Swader, but the trial court indicated that it must take all permissible inferences and resolve all questions of credibility in favor of the Swaders, the non-moving party. We will presume the trial court followed this principle.

{¶ 27} The Swaders also argue that evidence admitted at the default judgment damages hearing against Paramount further supports their assertion that Rebecca Swader fell on the soft floorboard. In addition, the Swaders present additional arguments they did not raise when they responded to Boeckmann's summary judgment motion.

{¶ 28} Whether or not a trial court errs in granting a motion for summary judgment depends upon the state of the evidence before it at the time it made the ruling, not upon something that may have come into the evidence at a subsequent hearing. *Burton v. City of Middletown*, 4 Ohio App.3d 114, 116-117 (12th Dist.1982).

{¶ 29} In addition, we will not address new arguments presented by the Swaders that were not argued to the trial court for purposes of summary judgment because an appellant cannot present new arguments for the first time on appeal. *OhioHealth Corp. v. Ryan*, 10th Dist. No. 10AP-937, 2012-Ohio-60, fn. 2; *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81 (1997) (generally, appellate courts will not consider arguments that were never presented to the trial court whose judgment is sought to be reversed).

{¶ 30} Construing the evidence most favorably for the Swaders, we find no genuine issue of material fact remains on the issue of whether Boeckmann received notice of a flooring defect or soft board on the floor, and reasonable minds could come to but one conclusion and that conclusion is adverse to the Swaders.

{¶ 31} Before they moved in, the Swaders told DeSelms that the floor had a soft board that needed to be repaired, but they did not provide notice of the soft floorboard to Boeckmann, the property owner. The Swaders were unable to provide any time frame for

when the "junk" floorboard was applied to the floor, or when it became a hazard. They acknowledge they did not check the condition of the floor when Rebecca Swader fell or after her fall. The Swaders failed to show that Boeckmann was aware or should have been aware of a defect in the floor or the danger presented by the floor.

{¶ 32} Reasonable minds could only conclude the Swaders did not provide notice – actual or constructive – to Boeckmann that the floor had a condition that required his attention. The Swaders failed to prove that Boeckmann violated a duty owed to them. Boeckmann was entitled to judgment as a matter of law. The trial court did not err in granting summary judgment to Boeckmann. The Swaders' first assignment of error is overruled.

{¶ 33} Assignment of Error No. 2:

{¶ 34} THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS BY RULING ON THE ISSUE OF PROXIMATE CAUSE "SUA SPONTE."

{¶ 35} The Swaders argue the trial court erred in granting judgment on the issue of proximate cause because Boeckmann never argued proximate cause in his motion for summary judgment. As we previously noted, a party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond. *Sawicki*, 121 Ohio St.3d 507, 2009-Ohio-1523, at ¶ 27.

{¶ 36} It does not appear that Boeckmann specifically raised the issue of proximate cause until his reply brief in the trial court below. However, based upon our finding under the first assignment of error that Boeckmann was entitled to summary judgment on the issue of notice and duty, the Swaders' second assignment of error is rendered moot. S*ee Wyndtree*, 2012-Ohio-49, at ¶ 15 (failure to prove any of the elements of negligence can be fatal to a negligence claim).

{¶ 37} Judgment affirmed.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.