

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
OTTAWA COUNTY

Linda L. Riehl

Court of Appeals No. OT-09-003

Appellant

Trial Court No. 07-CVC-342

v.

Bird's Nest, Inc.

**DECISION AND JUDGMENT**

Appellee

Decided: December 18, 2009

\* \* \* \* \*

Paul Knott, for appellant.

Jeanne M. Mulling, for appellee.

\* \* \* \* \*

PIETRYKOWSKI, J.

{¶ 1} This is an appeal of a trial court judgment granting summary judgment on the issue of liability in an action for personal injuries based on premises liability.

Appellant is Linda Riehl. Appellee is Bird's Nest, Inc. ("Bird's Nest"). On June 25, 2005, Riehl fell from the rear steps of a cottage located on premises owned by Bird's Nest located at Put-In-Bay, Ohio. Bird's Nest operates a resort consisting of cottages and

motel buildings on the site. Riehl was a guest of the resort at one of its cottages when she fell.

{¶ 2} Riehl filed suit against the Bird's Nest in the Ottawa County Court of Common Pleas on June 21, 2007, for personal injuries arising from the incident, claiming that Bird's Nest's negligence caused her fall. In a judgment filed on January 12, 2009, the trial court granted Bird's Nest's motion for summary judgment and dismissed the case. Riehl appeals that judgment to this court. She asserts one assignment of error on appeal:

{¶ 3} "I. The Trial Court erred in Granting Appellee's Motion for Summary Judgment and Dismissing Appellant's Claim."

{¶ 4} Riehl's testimony, both by deposition and by affidavit, was submitted for court consideration on the motion for summary judgment. Riehl testified that she arrived at the cottage at approximately 5:30 p.m. on June 24, 2005, during daylight, and that she fell, in the dark, at approximately 10:20 p.m. the following night. Riehl fell while descending rear stairs to the cottage where she was staying at the resort. Although there were two doors to the cottage, appellant testified that she used the rear door consistently during her stay.

{¶ 5} The rear stairs were wooden and led from the door of a rear, screened porch. The stairs had no landing at the top of the stairs, the height of stair risers varied from step to step, and there were no handrails on either side of the steps. As you

descended, the stairs included a slight step down from the porch door, followed by three wooden steps.

{¶ 6} Appellant testified to an unobstructed view of the stairs and her awareness as to a lack of a handrail upon arrival at Bird's Nest:

{¶ 7} "Q. When you first arrived at the Bird's Nest, you were able to see the stairs that you ultimately fell on; is that right?

{¶ 8} "A. Yes.

{¶ 9} "Q. They were clearly visible to you?

{¶ 10} "A. Yes, it was daylight.

{¶ 11} "Q. There were no shrubs or anything like that covering your view of the stairs?

{¶ 12} "A. Not that I recall.

{¶ 13} "Q. No garbage cans, no other things covering the view of the stairs when you first arrived, that you recall?

{¶ 14} "A. Not that I recall.

{¶ 15} "Q. You had no problem getting into the cabin the first time you tried to, did you?

{¶ 16} "A. No.

{¶ 17} "Q. I'm assuming that you were aware that at that point that there was no hand railing on that staircase?

{¶ 18} "A. Yes."

{¶ 19} Appellant testified that she had been up and down the stairs "several times" in daylight hours before she fell and that it was "very dark" out when she fell. At the time appellant fell, the only source of light for the rear stairs was from lighting from within the interior main room of the structure, moonlight, and light from an outdoor grill. The rear porch light, located inside the rear porch, had been left off due to mayflies.

{¶ 20} Cameron Newpher, who handled check-in for the group staying at the cottage, testified by affidavit that he was instructed by a resort representative at check-in not to use the front light to the cottage in the evening in order to avoid mayflies. Cameron stated in his affidavit that he relayed those instructions to appellant.

{¶ 21} Steven Elliott is a part owner of the Bird's Nest. In 2005, he was responsible for day to day maintenance of the cottages and motels at the Bird's Nest. Elliott testified that during mayfly season, it was the practice of the resort to warn patrons staying at the resort that if they left exterior lights on all night that they would have a lot of bugs. Elliott denied that the Bird's Nest instructed patrons not to use exterior lighting at night.

{¶ 22} Appellant submitted the affidavit and opinions of an architect in opposition to the motion for summary judgment. According to the architect, the stairs violated various sections of the applicable Ohio Basic Building Code. By affidavit, the expert contended that lack of a landing at the top of the stairs constituted a violation of Ohio

Adm.Code 4101:2-23-48, that the heights of the risers violated Ohio Adm.Code 4101:2-6-09 and 4101:2-23-47, and that lack of handrails violated Ohio Adm.Code 4101:2-23-40.

{¶ 23} Appellant also testified as to other claimed defects. She testified that the door to the porch was a spring door and that the spring was forceful, pushing those using the stairs to the right as they descended. Appellant testified that this was significant in that the last step, at the bottom of the stairs, extended to the right of the sidewalk below for approximately five inches in length. For that distance, the bottom step extended over ground that was lower than the surface of the sidewalk. Appellant testified that the deviation in height between the ground and surface of the sidewalk was two and one-half inches to three inches. Appellant's expert measured the deviation in heights to run from two to one and one-half inches, running from the front edge of the lowest step to five to ten inches away. Steven Elliott of the Bird's Nest testified that he understood the deviation between the two surfaces to be approximately one to one and one-half inches.

{¶ 24} Appellant testified as to how the fall occurred:

{¶ 25} "Q. All right, describe for me, to the best that you can, how the actual fall occurred?

{¶ 26} "A. I came out onto the porch, ice in the left hand, beer in the right hand, opened the door, was forced to the right side, it was a very, very strong spring.

{¶ 27} "So I was distracted on that, and trying to keep—because there's no railing, and didn't want to go off the edge of the stairs, so I was getting down the stairs as quickly as I could, stepped off the last – so stepped off the last step, because I would have been on the second step, left foot on the bottom step, stepped with my right foot down to what I thought was going to be the landing and there was nothing, just air.

{¶ 28} "So I twisted my right ankle, and fell off to the right, and as I fell, my left leg came across that sidewalk and hit on the concrete edge of that sidewalk, which was at least two and a half, three inches from the ground. And that's the point where I shattered my ankle. \* \* \*"

{¶ 29} R.C. 3731.10 requires that "[e]very hotel and SRO facility shall have proper plumbing, lighting, and ventilation which shall conform to Chapter 3781. and 3791. of the Revised Code." The Board of Building Standards establishes such standards under R.C. Chapter 3781 through adoption of the Ohio Basic Building Code pursuant to authority granted in R.C. 3781.10. See *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 568. Appellant's expert, by affidavit, stated that it was his opinion that the exterior lighting at the cottage failed to comply with the 1979 Ohio Basic Building Code with respect to exterior lighting and, therefore, failed to comply with the requirements of R.C. 3731.10. The regulation sets a standard for egress lighting including a requirement that "[l]ighting shall be \* \* \* provided to illuminate the exitway discharge." Ohio Adm.Code 4101:2-6-10.

{¶ 30} The expert's opinion provided:

{¶ 31} "The only lighting in the vicinity of the exterior stairway was located on the interior porch wall approximately 10-12 feet away from the exterior door that leads outward onto the stairway where the fall incident occurred. Shadows from the door and/or persons walking outward through that door would have prevented lighting from reaching the stairway. Under the best conditions, light would not have reached the bottom tread and/or pavement where the fall incident occurred."

{¶ 32} Appellee argues that the opinion testimony of appellant's architect is based "on pure conjecture and speculation" because the architect was not present to inspect the premises at nighttime. He inspected the premises only during daylight hours. Secondly, appellee argues that appellant's arguments as to deficiencies in the exterior lighting are without merit as appellant chose not to use the available rear porch light.

Availability of the Open and Obvious Doctrine as a Defense in Negligence  
Claims based upon Violations of the Ohio Basic Building Code

{¶ 33} In *Chambers v. St. Mary's School*, 82 Ohio St.3d at 568, the Ohio Supreme Court held that the Ohio Basic Building Code, adopted by the Board of Building Standards under authority of R.C. 3781.10, sets forth administrative rules and that violation of the Ohio Basic Building Code alone does not establish negligence per se. In *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, ¶ 16-21, the Ohio Supreme Court reaffirmed that holding in *Chambers* and also held that "the open-and-

obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code." *Lang v. Holly Hill Motel, Inc.*, at ¶ 24.

{¶ 34} The decisions in *Chambers* and *Lang* are based upon the Ohio Supreme Court's determination that establishing standards of care that when violated constitute negligence per se is a matter best left to the legislative process rather than to administrative rule making. *Lang* at ¶ 18; *Chambers* at 568. Where compliance with the safety requirements of the Ohio Basic Building Code is also mandated by statute, however, the Supreme Court of Ohio has held that violation of the building code under such circumstances constitutes negligence per se. *Sikora v. Wenzel* (2000), 88 Ohio St.3d 493.

{¶ 35} *Sikora* considered violation of R.C. 5321.04(A)(1), which mandates that a landlord is to "[c]omply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety." In *Sikora v. Wenzel*, the court held that violation of a landlord's duties under R.C. 5321.04(A)(1) constitutes negligence per se. *Sikora v. Wenzel*, 88 Ohio St.3d at 498.

{¶ 36} In like manner here, R.C. 3731.10 mandates that motels comply with plumbing, lighting, and ventilation standards established under the Ohio Basic Building Code. Under *Sikora v. Wenzel* analysis, a violation by motels of applicable lighting standards under the Ohio Basic Building Code is to be treated as a violation of a specific statutory safety standard and constitutes negligence per se. The distinction is significant

in that the defense of the open and obvious doctrine is not available where liability is asserted based upon negligence per se. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6342, ¶ 25; *Lang v. Holly Hill Motel, Inc.*, at ¶ 12-15.

### Open-and-Obvious Doctrine

{¶ 37} "To prevail in a negligence action, a plaintiff must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21, citing *Menifee v. Ohio Welding Prods., Inc.* (1984), 15 Ohio St.3d 75, 77, 15 OBR 179, 472 N.E.2d 707." *Lang v. Holly Hill Motel, Inc.*, at ¶ 10.

{¶ 38} In *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, the Ohio Supreme Court restated and reaffirmed the open and obvious doctrine in Ohio:

{¶ 39} "The open-and-obvious doctrine remains viable in Ohio. Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 42 O.O.2d 96, 233 N.E.2d 589 approved and followed." *Armstrong* at syllabus.

{¶ 40} In *Armstrong*, the Ohio Supreme Court explained the rationale for the rule:

{¶ 41} "The rationale underlying this doctrine is 'that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take

appropriate measures to protect themselves.' *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 644, 597 N.E.2d 504. A shopkeeper ordinarily owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 18 OBR 267, 480 N.E.2d 474; *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 12 O.O.3d 321, 390 N.E.2d 810. When applicable, however, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims." *Armstrong* at ¶ 5.

#### Summary Judgment

{¶ 42} The standard of review of judgments granting motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ. R. 56(C) provides:

{¶ 43} "\* \* \*Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.\* \* \*"

{¶ 44} Summary judgment is proper where the moving party demonstrates:

"\* \* \*(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 45} Material facts, for purposes of motions for summary judgment, are facts "that would affect the outcome of the suit under the applicable substantive law. *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, 675 N.E.2d 514, 519-520, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211-212." *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304.

{¶ 46} Where a motion for summary judgment is made and supported by appropriate evidence showing the absence of a dispute of material fact, the burden shifts to the opposing party to present evidence showing the existence of a genuine issue of fact for trial: "\* \* \*an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ. R. 56(E).

Liability Asserted Based Code Violations with respect to  
Landing, Handrails and Risers

{¶ 47} Appellant's claims of liability based upon a claimed violation of the Ohio Basic Building Code with respect to lack of a landing in violation of Ohio Adm.Code 4101:2-23-48, the varying heights of stair risers in violation Ohio Adm.Code 4101:2-6-09 and 4101:2-23-47, and lack of handrails in violation of Ohio Adm.Code 4101:2-23-40, concern safety standards set by administrative regulations alone and are subject to the open and obvious doctrine defense. It is undisputed that appellant had been up and down the stairs several times before she fell in daylight and that the view of the stairs was clear and unobstructed. Construing the evidence most favorably to appellant, we must agree with the trial court that there is no dispute of material fact and that these claimed defects were open and obvious and of the type appellee could reasonably assume appellant would discover and protect herself against.

Liability Asserted Based Upon Bottom Stair's Extending Beyond Sidewalk  
and Over Lower Surface of Uneven Ground

{¶ 48} Appellant also testified that the bottom stair was observable in daylight-- there was nothing blocking her view of the stair or preventing her from observing that it was wider than the sidewalk below. She agreed that a person using the steps in daylight would have been able to see where the concrete sidewalk ended. She had used these stairs several times before she fell.

{¶ 49} Photographs submitted by the parties on the motion for summary judgment show that the area immediately to the right of the sidewalk at the base of the stair was a grass lawn that extended to the rear of the property. As depicted in photographs, the area was on the side of the stairs away from the cottage, and was open to an unobstructed view. It is at the base of the stair where the ground abutted the sidewalk and where appellant states she stepped from the stairs and fell. She testified that the area where she stepped was to the right of the sidewalk and two and one-half to three inches lower in height than the surface of the sidewalk.

{¶ 50} To establish that a defect is open and obvious does not require proof that a party saw the defect before she fell, but, rather, requires proof that it was observable. *Armstrong* at ¶ 16; *Hunter v. Jamin Bingo Hall*, 6th Dist. No. L-08-1084, 2008-Ohio-4485, ¶ 11; *Cooper v. Meijer Stores Ltd. Partnership*, 10th Dist. No. 07AP-201, 2007-Ohio-6086, ¶ 13.

{¶ 51} With respect to the difference in height of the sidewalk and adjoining ground at the base of the steps, appellee argues that the photographs taken by appellant's own expert and entered into evidence demonstrate that that the adjoining grass/dirt area is not flush with the cement surface of the sidewalk and that this fact was "easily discernable from ordinary inspection of the area, if not common sense." We agree.

{¶ 52} Upon review of the record, we conclude that the difference in width between the bottom stair and the sidewalk and the fact that there was a difference in

height between the sidewalk surface and ground where appellant stepped were open and obvious conditions that were observable by appellant from her use of the stairs. They represent conditions on the property that appellee could reasonably expect appellant to discern and to protect herself against.

#### Attendant Circumstances

{¶ 53} Attendant circumstances may present a dispute of material fact as to whether a defect is open and obvious. "[T]here is no precise definition of 'attendant circumstances' but they generally include 'any distraction that would come to the attention of a pedestrian in the same circumstances and reduce[d] the degree of care an ordinary person would exercise at the time.'" (Citations omitted.) *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 499, 693 N.E.2d 807. Attendant circumstances "must significantly enhance the danger of the defect, and contribute to the fall." *Id.*, quoting *Stockhauser v. Archdiocese of Cincinnati* (1994), 97 Ohio App.3d 29, 33-34, 646 N.E.2d 198, 201.

{¶ 54} Appellant argues that the multiple claimed defects in the stairs and the pressure from the spring to the porch door against persons using the door while descending the stairs, were attendant circumstances that diverted her attention and make the open and obvious doctrine unavailable as a defense to her claim.

{¶ 55} Appellant had used these steps several times. The claimed defects in the stairs were observable. She also had knowledge of the strength of the spring to the porch

door. Appellant entered onto the steps with ice in one hand and carrying a beer in the other. Appellant testified that she went down the steps "as quickly as I could."

{¶ 56} Construing the evidence most favorably to appellant, we conclude that there is no dispute of material fact and that no distraction or attendant circumstance existed at the time of her fall that would reduce the degree of care an ordinary person would exercise in using the stairs.

{¶ 57} We have previously recognized that darkness is a naturally occurring event and not an attendant circumstance. *Hunter v. Jamin Bingo Hall* at ¶ 13-14. In *Hunter v. Jamin Bingo Hall*, we considered a personal injury claim of a business invitee who, as a pedestrian, tripped over a sewer drain in a parking lot. It was dark out at the time the pedestrian fell and the pavement was black. We rejected an argument that darkness was an attendant circumstance in the case concluding that "the darkness at 10:00 p.m. should increase the degree of care a person would exercise when walking though the parking lot." *Id.* at ¶ 14.

{¶ 58} Accordingly, we find appellant's contention that there was a dispute of material fact as to attendant circumstances and that summary judgment should not have been granted due to attendant circumstances to be without merit. We also conclude that appellant's argument that there was a dispute of material fact precluding the grant of summary judgment based upon the open and obvious doctrine with respect to defects in

the stairs and difference in surface levels of the sidewalk and adjoining grass/dirt at the base of the stairs is also without merit.

#### Negligence Per Se for Violation of Lighting Code

{¶ 59} Where negligence per se is established through proof of violation of a statutory safety standard, a plaintiff must also prove that the breach of the statutory duty by the defendant, upon which negligence per se is based, proximately caused injury to the plaintiff and the amount of damages. *Robinson v. Bates* at ¶ 24.

{¶ 60} Appellant submitted expert witness testimony in opposition to the motion for summary judgment. The expert testified, by affidavit, that the Bird's Nest failed to comply with Ohio Basic Building Code Requirements for motel lighting of exitways as mandated by R.C. 3731.10. Although there was evidence to question the weight to be given the expert testimony, the expert did not inspect the premises at dark, we nevertheless agree with appellant that there was a dispute of material fact on whether the Bird's Nest was negligent per se in failing to comply with code requirements for exterior lighting of exitways.

{¶ 61} Even were negligence per se established, however, appellant is required to establish proximate cause for recovery. The exterior lighting for the rear of the cottage was provided by a porch light located inside the porch. Appellant intentionally chose to leave the light off at the time of her fall in order to avoid mayflies.

{¶ 62} Appellant argues that the illumination from the porch light was insufficient to meet code requirements under Ohio Adm.Code 4101:2-6-10 for which compliance is mandated by R.C. 3731.10. As appellant was not using the porch light at the time of her fall, the degree of illumination that the porch light would have provided is legally irrelevant in this case as it cannot be said that insufficient illumination from the light proximately caused appellant's fall.

{¶ 63} We find that appellant's Assignment of Error No. I is not well-taken.

{¶ 64} The court finds that substantial justice has been done the party complaining. The judgment of the trial court is affirmed. Appellant is ordered to pay costs pursuant of App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

\_\_\_\_\_  
JUDGE

Mark L. Pietrykowski, J.

\_\_\_\_\_  
JUDGE

Arlene Singer, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

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