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Donald B. McDaniels et al., Plaintiffs-Appellants, v. Gerold J. Petrosky et al., Defendants-Appellees.

No. 97APE08-1027

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

1998 Ohio App. LEXIS 402

February 5, 1998, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: Anthony O. Mancuso, for appellants.

Mark C. Petrucci, for appellees.

JUDGES: YOUNG, J. DESHLER and BRYANT, JJ., concur.

OPINION BY: YOUNG

OPINION

(REGULAR CALENDAR)

DECISION

YOUNG, J.

This matter is before this court upon the appeal of Donald, Janice and Joshua McDaniels, appellants, from the June 19, 1997 decision and July 15, 1997 entry of the Franklin County Court of Common Pleas, which entered summary judgment in favor of Gerold and Patricia Petrosky, appellees.

The facts of this case are as follows: On March 18, 1994, appellants took possession of the rental property located at 146 Haldy Avenue in Columbus, Ohio. Appellants allege that they requested that a tree stump that was located in the backyard be removed by appellees. Appellees are the owners and lessors of the property. The tree stump was not removed and, according to appellants' complaint, on September 30, 1997, the minor child, Joshua, tripped on the tree stump and was injured. Appellants allege that Joshua suffered partial vision loss in one eye and permanent scarring as a result.

Appellants brought an action alleging that appellees [*2] had breached their duties as lessors of the property, specifically, the duties set forth in R.C. 5321.04(A)(1), (2) and (3). Appellees moved for summary judgment which was granted by the trial court, and appellants appealed, setting forth the following assignment of error for our review:

> "I. The trial court erred in granting Defendant-
>
> Appellee's Motion for Summary Judgment."

Summary judgment is proper when "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, such party being entitled to have the evidence or stipulation construed most strongly in his favor." Civ. R. 56(C). See, also, *Lytle v. Columbus* (1990), 70 Ohio App. 3d 99, 103, 590 N.E.2d 421.

Subsequent to the *Lytle* decision, the Ohio Supreme Court held that the moving party in a summary judgment context has the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 292, 662 N.E.2d 264. If the moving party has satisfied its initial burden, the "nonmoving party then [*3] has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial." *Id.* at 293.

Appellees moved for summary judgment on two

grounds. First, appellees argued that they owed no duty to remove the tree stump because, as a matter of law, it was not a dangerous condition and did not render the property uninhabitable. Second, the appellees argued that they owed no duty to appellants because the tree stump was open and obvious and appellants could be expected to have discovered and protected against it. The trial court found that appellees had no duty to remove the tree stump and further found that, because the tree stump was open and obvious, appellants had no duty to appellees with respect to the tree stump.

R.C. 5321.04 sets forth the landlord's duties as follows:

> "(A) A landlord who is a party to a rental agreement shall do all of the following:
>
> "(1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;
>
> "(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable [*4] condition;
>
> "(3) Keep all common areas of the premises in a safe and sanitary condition; *** "

Appellants alleged violations of R.C. 5321.04(A)(1), (2), and (3) in their complaint. (Complaint, paragraphs 4, 6-9.)

As noted by appellees, appellants have pointed to no applicable building, housing, health and/or safety code that requires a landlord to remove a tree stump. In his affidavit, appellee Mr. Petrosky asserted that the tree stump itself was not the subject of any building, health, safety or other regulatory code. See R.C. 5321.04(A)(1). A review of the record demonstrates that appellants did not refute this testimony. As noted by the Trumbull County Court of Appeals: "In the absence of any evidence or submission demonstrating a violation of any other building, housing, health, or safety code, appellant's reliance on R.C. 5321.04(A)(1) is misplaced." *Taylor v. Alexander*, 1986 Ohio App. LEXIS 7530 (July 11, 1986), Trumbull App. No. 3550, unreported.

Pursuant to R.C. 5321.04(A)(2), appellants have the burden of proving that (1) the landlord, appellees herein, received notice of the defective condition of the rental premises; (2) that the landlord knew of the defect; or (3) that [*5] the tenant had made reasonable but unsuccessful attempts to notify the landlord. See *Shroades v. Rental Homes* (1981), 68 Ohio St. 2d 20, 25-26, 427 N.E.2d 774. All of the above presumes the existence of a defect. Absent the existence of a defect, notice to the landlord is immaterial.

In order to constitute a defect such that R.C. 5321.04(A)(2) applies, appellants must demonstrate that the tree stump made the premises unfit and uninhabitable. See *Aldridge v. Englewood Village, Ltd.*, 1987 Ohio App. LEXIS 8232 (July 22, 1987), Montgomery App. No. 10251, unreported. As noted by the *Aldridge* court, "having not shown a defect rendering the premises unfit and uninhabitable, liability may not be predicated under R.C. 5321.04(A)(2)."

In a similar case, *Taylor, supra*, the landlord was asked to install a handrail because both tenants had children who used the staircase. The court rejected the argument with respect to R.C. 5321.04(A)(2) noting that "it cannot seriously be contended that the lack of a handrail, in and of itself, renders the premises substantially or wholly uninhabitable. Consequently R.C. 5321.04(A)(2) cannot be used as a basis for imposing liability on appellee." *Id.* A review of the [*6] record demonstrates, that, for purposes of withstanding summary judgment, appellants failed to demonstrate that the tree stump constituted a defect that rendered the property unfit or uninhabitable.

Pursuant to case law and R.C. 5321.04(A)(3), a landlord owes a tenant the duty of ordinary care to keep portions of a leased premises that remain under the control of the landlord in a reasonably safe condition. See *Davies v. Kelley* (1925), 112 Ohio St. 122, 146 N.E. 888, paragraph one of the syllabus; R.C. 5321.04(A)(3). More recently, the Ohio Supreme Court analyzed the legal duty that a landlord owes a tenant as follows:

> "The legal duty that a landlord owes a tenant is not determined by the common-law classifications of invitee, licensee, and a 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. *** In

> point of fact, the exceptions nearly have swallowed up the general rule of landlord immunity. *Some of the commonly accepted exceptions that give rise to landlord liability include the* [*7] *following: concealment or failure to disclose known, nonobvious latent defects, defective premises held open for public use; defective areas under the landlord's control; failure to perform a covenant to repair; breach of a statutory duty; and negligent performance of a contractual or statutory duty to repair.* [Fn. omitted.] *** " *Shump v. First Continental-Robinwood Assoc.* (1994), 71 Ohio St. 3d 414, 418, 644 N.E.2d 291. (Emphasis added.)

Absent a contractual provision to the contrary, the Ohio Supreme Court in *LaCourse v. Fleitz* (1986), 28 Ohio St. 3d 209, 503 N.E.2d 159, noted its rejection of the argument that R.C. 5321.04(A)(3) imposed a duty on the landlord to keep common areas free from accumulated ice and snow. Because there was no duty on the part of the landlord, the Ohio Supreme Court found that the landlord was entitled to judgment as a matter of law. *Id.* at 212.

In a similar case, the Court of Appeals of Hamilton County likened the existence of dead trees in a heavily wooded area to the natural accumulation of snow and ice. *Kueber v. Haas* (1988), 47 Ohio App. 3d 62, 546 N.E.2d 1351. In that case, a minor and his father filed a negligence suit [*8] against the lessors from whom they had rented a house. Apparently, the minor son was walking through the woods when a dead tree fell and struck him on the head. It was also alleged that the lessors had failed to keep the premises in a fit and habitable condition pursuant to R.C. 5321.04(A)(2). Summary judgment was granted in favor of the lessors and the Court of Appeals of Hamilton County affirmed, noting as follows:

> "The sole question posed by this appeal is whether the Haases had a duty either at common law, or by virtue of R.C. 5321.04(A)(2) or under the lease, to remove dead trees from the wooded area of the leased premises. *We hold no duty existed*, and we therefore affirm the judgment of the trial court.
>
> "We liken the existence of dead trees in a heavily wooded area to the natural accumulation of snow and ice. Natural accumulations of ice and snow are not chargeable to the owner of the premises, who did not create them. *** It is no less reasonable to expect a tenant to protect himself from dead trees in a natural, wooded area.
>
> "Kueber did not allege that the Haases' knowledge of the condition was greater than his own. *** " (Emphasis added.) [*9] 47 Ohio App. 3d at 63-64.

For all of the above reasons, this court holds that appellees had no duty to remove the tree stump, and accordingly, summary judgment was appropriate. In order to defeat summary judgment, appellants must demonstrate that a duty was owed, that the appellees breached that duty, and that such breach was the proximate cause of Joshua McDaniels' injury. *Id.* If there is no duty, summary judgment is appropriate and appellees are entitled to judgment as a matter of law. See, also, *Shump, supra*, stating that *if* a listed exception to the landlord's immunity applies, *then* a landlord's duty is defined by general principles of negligence. 71 Ohio St. 3d at 418, fn. 3.

The trial court also held that because the tree stump was open and obvious, appellees had no duty to appellants with respect to the tree stump. It is undisputed that a tree stump existed in the back yard when the appellants took possession of the leased property. The record reflects that the tree stump was known to all parties and was readily discernable. Appellants argue that, because appellees were the owners of the property, appellees had the duty to remove the tree stump. In *Anderson v. Ruoff* [*10] (1995), 100 Ohio App. 3d 601, 654 N.E.2d 449, this court discussed the duty owed by a landowner to an invitee and held as follows:

> "Under the 'open and obvious' doctrine, an owner or occupier of property owes no duty to warn invitees entering the property of open and obvious dangers on the property. *Sidle v. Humphrey* (1968), 13 Ohio St. 2d 45, 42 Ohio Op. 2d 96, 233 N.E.2d 589, paragraph one of the syllabus. The rationale behind the doctrine is that the

> open and obvious nature of the hazard itself serves as a warning, and that the owner or occupier may reasonably expect that [a] [person] entering the premises will discover those dangers and take appropriate measures to protect themselves. *Simmers[v.* Bentley Constr. Co.], supra, [64 Ohio St. 3d 642] at 644[, 597 N.E.2d 504 (1992)], [citation omitted].

> " *** The open and obvious doctrine is determinative of the threshold issue, the landowner's duty." 100 Ohio App. 3d at 604

Although we recognize that the classifications of invitee, licensee and trespasser do not control in this matter as it involves a landlord-tenant relationship, see *Shump, supra,* we find that the trial court properly applied the open and obvious doctrine insofar as the landlord's [*11] duty to keep all common areas in a safe and sanitary condition is analogous to an owner's duty to a business invitee. The cases discussing an owner's duty to use due care in maintaining areas that are accessible to the public, clearly provide exceptions for natural hazards such as natural accumulations of ice and snow. See *LaCourse, supra,* wherein the Ohio Supreme Court held:

> "This court has repeatedly held that an owner of property is not liable for injuries to business invitees who slip and fall on natural accumulations of ice and snow. *** The common thread running through these cases is the principle that the owner or occupier has a right to assume that his visitors will appreciate the risk and take action to protect themselves accordingly. *** It is only where it is shown that the owner had superior knowledge of the particular danger which caused the injury that liability attaches, because in such a case the invitee may not reasonably be expected to protect himself from a risk he cannot fully appreciate. *** " (Citations omitted.) 28 Ohio St. 3d at 210.

A landowner has the duty to keep the premises free from dangers not discernible by a reasonably prudent person [*12] and to warn invitees of concealed dangers of which the landlord knows or should know. However, the duty of ordinary care does not impose responsibility on the landowner to protect against dangers that are so obvious and apparent that the invitee may reasonably be expected to discover them and protect against them. *Anderson, supra.*

This court holds that the open and obvious doctrine is also determinative of the threshold issue of the landlord's duty in this case.

On appeal, appellants argue that a four year old child could not appreciate the risk posed by a tree stump and, that, therefore, the open and obvious doctrine should not be applied. A review of the complaint demonstrates that appellants did not allege that the appellees' knowledge of this tree stump was greater than their own.

Moreover, a review of the cases involving children of tender years and a landlord's duty, demonstrates that a child's age, and inability to appreciate a risk or danger, does not necessarily abrogate the open and obvious doctrine. See Kueber, supra (summary judgment appropriate in favor of landlord when minor was struck in the head by a dead tree branch and rendered unconscious); *Riley v.* [*13] *Housing Authority* (1973), 36 Ohio App. 2d 44, 301 N.E.2d 884 (landlord not liable for injuries sustained by twenty-three month old child who fell out of a window that did not have a screen, despite the fact that tenant had asked landlord to put screens in the window); *Stevens v. Ohio Fuel Gas Co.* (1960), 26 Ohio Op. 2d 345, 193 N.E.2d 317 [1] (noting that no danger is more commonly realized or risk appreciated than that of falling and that any child old enough to be allowed at large knows that if he/she slips from a tree, he/she will fall to the ground and be hurt). The court in *Stevens* further noted that, while the owner of a premises may owe more duty to a child than an adult, such owner is not bound to guard every tree, so that such a child cannot climb to a precipitous place and fall off. 193 N.E.2d at 320. See, also, 145 A.L.R. 321.

> 1 It should be noted that the *Riley* and *Stevens* decisions were rendered prior to the enactment date of R.C. 5321.04. *Riley* involved premises that were in the exclusive control of the tenant; *Stevens* involved premises that were more accessible to the public.

[*14] For all of the above reasons, this court holds that summary judgment was appropriate, as appellees were entitled to judgment as a matter of law. Accordingly, appellants' sole assignment of error is hereby overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

DESHLER and BRYANT, JJ., concur.