[Cite as *Cook v. The Crossings, L.L.C.*, 2015-Ohio-923.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

JOSEPH COOK	C.A. No. 13CA010463
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
THE CROSSINGS, LLC, et al.	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 12CV178076

DECISION AND JOURNAL ENTRY

Dated: March 16, 2015

PER CURIAM.

{¶1} Appellant, Joseph Cook, appeals the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} This matter stems from an incident that occurred at the swimming pool at The Crossings apartment complex in Elyria, Ohio, on June 4, 2010. Cook and his son, who was almost three-years-old at the time, were the only individuals at the pool that afternoon. As the two were practicing different strokes in the deep end, Cook's son began to throw a fit. Cook lifted him out of the water and placed him onto the pool deck so that he could walk to the stairs at the shallow end. As his son began to walk, Cook remained in the water and followed by walking along the side of the pool. When his son began to run, Cook also began to move faster and shouted for him to stop. At that time, Cook ran his hand across a damaged tile on the side of the pool, causing a laceration on his hand. The tile in question was several inches below the

surface of the water. Cook subsequently went to the emergency room where he received care for his wound, a tetanus shot, and stitches. Cook later received additional medical treatment for his hand injury.

{¶3} On October 4, 2012, Cook filed a complaint against The Crossings, LLC, as well as J&L Contractors, LLC, alleging one count of negligence against each defendant, and one count of negligence per se against The Crossings. Both defendants filed answers to the complaint. Shortly thereafter, the trial court issued a journal entry dismissing with prejudice all claims against J&L Contractors pursuant to a stipulation by the parties. The Crossings subsequently filed a motion for summary judgment. Cook filed a memorandum in opposition to the motion, and The Crossings replied thereto. On August 13, 2014, the trial court issued a journal entry granting The Crossings' motion for summary judgment.

{¶4} Cook filed a timely notice of appeal. Now before this Court, Cook raises one assignment of error.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S NEGLIGENCE PER SE CLAIM BASED UPON A LACK OF NOTICE WHEN THE EVIDENCE DEMONSTRATES THAT APPELLEE HAD CONSTRUCTIVE AND/OR ACTUAL NOTICE OF THE DEFECT THAT CAUSED THE INJURY TO APPELLANT.

{¶5} In his sole assignment of error, Cook argues that the trial court erred in granting the motion for summary judgment on the basis that The Crossings did not have notice of the defect that caused his injury. This Court disagrees.

{¶6} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial

court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶7} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶8} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once a moving party satisfies its burden of supporting its motion for summary judgment with acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated at trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶9} In his complaint, Cook alleged that The Crossings failed to properly maintain its premises, particularly the common area that included the swimming pool, in a fit and habitable condition pursuant R.C. 5321.04, a section of Ohio's Landlord-Tenant Act. R.C. 5321.04(A) sets forth the obligations of landlords and states, in pertinent part:

> 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 condition;
>
> (3) Keep all common areas of the premises in a safe and sanitary condition[.]

{¶10} "A violation of a statute which sets forth specific duties constitutes negligence per se." *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 25 (1981). The high court in *Shroades* concluded that a landlord's failure to make repairs under the Landlord-Tenant Act constitutes negligence per se, but a landlord's notice of the condition is a prerequisite to liability. *Id*. at 25-26. Subsequently, in *Sikora v. Wenzel*, 88 Ohio St.3d 493, 498 (2000), the Supreme Court extended its general holding in *Shroades* and specifically held that a landloard's violation of the duties imposed by R.C. 5321.04(A)(1) or R.C. 5321.04(A)(2) constitutes negligence per se. The Supreme Court subsequently held that a landlord's violation of R.C. 5321.04(A)(3) constitutes negligence per se. *Mann v. Northgate Investors, LLC*, 138 Ohio St.3d 175, 2014-Ohio-455, ¶ 1. However, a landlord will be excused from liability under the Landlord-Tenant Act if he or she neither knew nor should have known of the factual circumstances that caused the violation. *Sikora*, 88 Ohio St.3d at 498.

{¶11} On appeal, Cook makes three arguments in support of his position that the trial court improperly granted summary judgment.

{¶12} First, Cook argues that while a landlord generally does not have a duty to inspect under the Landlord-Tenant Act, The Crossings had an affirmative duty to inspect the condition of the pool tiles in this case pursuant to the Ohio Administrative Code. Specifically, Cook points to the former OAC 3701-31-06(I), a rule in place at the time of the incident that has since been repealed, which states that public pools are to be maintained in a "clean, safe, and sanitary condition and in good repair at all times when the pool or spa is in use." Cook maintains that

OAC 3701-31-06(I) integrates a duty to inspect into R.C. 5321.04, and that The Crossings should be charged with constructive notice of the damaged tile because it did not prospectively inspect the pool. In interpreting R.C. 5321.04(A)(1) and (2) in *Sikora*, the Ohio Supreme Court confirmed that lack of notice of a defective condition constituted a legal excuse to negligence per se. *Sikora*, 88 Ohio St.3d at 495 (Though failing to comply with the administrative code as mandated by R.C 5321.04(A)(1) constitutes negligence per se, such liability will be excused by a landlord's lack of actual or constructive notice of the defective condition.). In applying the Supreme Court's decisions in *Sikora* and *Shroades*, this Court has further recognized that R.C. 5321.04 does not impose an affirmative duty to inspect on the part of the landlord. *Boyd v. Hariani*, 9th Dist. Summit No. 22500, 2005-Ohio-4536, ¶ 32. Instead, the focus of the analysis is "whether the landlord had actual or constructive notice of the defect and whether factual circumstances exist whereby the landlord should have known of the defective condition." *Id.*; *see also Renzi v. Hillyer*, 11th Dist. Lake No. 2012-L-041, 2012-Ohio-5579, ¶ 20 ("It is equally important to recognize what *Shroades* and *Sikora* did not do: they did not impose a duty on landlords to inspect premises and be an insurer of a tenant's safety at all times. That is, under R.C. 5321.04, a landlord or owner has no affirmative duty to inspect a tenant's premises to find prospective dangers."). It follows that the trial court did not err by declining to impose an affirmative duty to inspect on The Crossings.

{¶13} Cook's second argument is that The Crossings had actual notice of the defective condition because the pool failed an inspection by the City of Elyria Health Department on the morning of the incident. In support, Cook asserts that The Crossings should have done more to ensure the safety of those using the pool because it had an understanding that swimming pools "create[] unique dangers." A review of the summary judgment materials reveals that nobody

affiliated with The Crossings was aware of the defective tile in the pool prior to the incident. While the inspection revealed that the pool should remain closed due to issues with the chemical balance and quality of the water, there is nothing in the record to suggest that the inspection put The Crossings on notice of the need to repair defective tiling. Michael Mechling, the owner and managing member of The Crossings, testified the pool appeared to be in "brand-new" condition, and that he was unaware of any structural issues with the pool prior to the incident. Cook himself stated in his deposition that he had no idea if The Crossings was aware of the damaged tile prior to the incident. Cook further testified that it would have been difficult for someone to notice any damage to the tile prior to the incident, and that only a "seam-line crack" in the tile might have been visible. Under these circumstances, we cannot agree with Cook's assertion that The Crossings had actual knowledge of the defective tile that caused the injury to his hand.

{¶14} Cook's final argument on appeal is that there is a question of material fact because Mechling testified in his deposition that the pool opened on June 4, 2010, and then subsequently stated in his affidavit that the pool opened "on or about June 3, 2010." Cook contends that this discrepancy calls Mechling's credibility into question as it stems from an attempt by The Crossings to avoid the issue of why the pool was open in the face of the failed inspection on the morning of June 4, 2010. A review of the judgment entry in this matter reveals that the trial court granted summary judgment on the basis that there was simply no evidence in the record that The Crossings had actual or constructive notice of the tile issue that caused Cook's injury. That issue is also at the heart of Cook's assignment of error. This Court has recognized that "a 'material' fact is one which would impact the outcome of the suit under the applicable substantive law." *Am. Fam. Ins. Co. v. Chamunda, Inc*., 9th Dist. Summit No. 23524, 2008-Ohio-1910, ¶ 23; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248 (1986) ("By its

very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."). Though Cook points out a technical factual discrepancy regarding the date the pool opened, he has not identified a factual dispute that is material to the issue of whether Mechling or any employee of The Crossings had actual or constructive notice of the defective tile. Thus, as Cook has not identified a genuine issue of material fact relating to whether anyone affiliated with The Crossings either knew or should have known about the defective condition that gave rise to Cook's injury, we cannot accept Cook's contention that summary judgment must be reversed.

{¶15} Cook's assignment of error is overruled.

III.

{¶16} Cook's assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas 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 Lorain, 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

HENSAL, P. J.
MOORE, J.
CONCUR.

CARR, J.
DISSENTING.

{¶17} I respectfully dissent. This case hinges on the issue of notice. The Crossings claims it is absolved from responsibility because it lacked actual or constructive notice of the pool defect. Cook, on the other hand, claims that while notice is generally required under R.C. 5321.01, et. seq., notice was not required in this case due to the specific duty imposed upon landlords when operating a pool pursuant to OAC 3701-31-06(I).

{¶18} Although acknowledging that a landlord generally has no duty to inspect under the Landlord-Tenant Act, Cook asserts that The Crossings had an affirmative duty to inspect the condition of the pool in this case pursuant to former OAC 3701-31-06(I), an administrative rule in place at the time of the incident, which states that public pools are to be maintained in a "clean, safe, and sanitary condition and in good repair at all times when the pool or spa is in use." In its counter-argument in support of the proposition that a landlord does not have a duty to prospectively inspect its premise for hazardous conditions, The Crossings points to several cases which involve conditions such as defective staircases and malfunctioning fire alarms. *See,*

e.g., *Boyd v. Hariani*, 9th Dist. Summit No. 22500, 2005-Ohio-4536; *Renzi v. Hillyer*, 11th Dist. Lake No. 2012-L-041, 2012-Ohio-5579; *Lily v. Bradford Invest. Co.*, 10th Dist. Franklin No. 06AP-1227, 2007-Ohio-2791; *Butler v. Wyndtree Hous. Ltd. Partnership*, 12th Dist. Butler No. CA2011-03-056, 2012-Ohio-49. Unlike a staircase or a defective fire alarm, however, a swimming pool is inherently hazardous even when not altered by a defect. When the intrinsic dangers of a swimming pool are compounded by a hidden defect or a dangerous condition, the potential risk for death or serious bodily harm dramatically increases. *Mullens v. Binsky*, 130 Ohio App.3d 64, 71 (10th Dist.1998). In other contexts, Ohio courts have recognized that swimming pools give rise to a unique set of dangers. *Rounds v. Camelot Estates Homeowner's Assn. of Avon*, 9th Dist. Lorain No. 06CA009036, 2007-Ohio-4343, ¶ 22 (generally recognizing that "the design of a swimming pool may give rise to safety concerns."); *Uddin v. Embassy Suites Hotel*, 113 Ohio St.3d 1249, 2007-Ohio-1791, ¶ 9 (O'Connor, J., dissenting) (recognizing the increased dangers when water in a swimming pool is opaque and murky). Given the very safety risks associated with swimming pools, I would conclude that the mandate in OAC 3701-31-06(I) to keep swimming pools in "good repair at all times when the pool [] is in use" necessarily includes a duty of routine inspection. To hold otherwise would allow for dangerous defects that result from natural wear and deterioration to go otherwise unnoticed, increasing the risk of injury exponentially.

{¶19} Moreover, in analyzing whether The Crossings knew or should have known of the defective tile condition in the instant case, I find it significant that the pool failed an inspection by the City of Elyria Health Department just hours before the incident. On June 4, 2010, the health department determined that the pool should remain closed due to issues with both water clarity and water quality. The inspection report specifically stated that re-inspection was

required and that the pool was to remain "closed until corrected." One of the conspicuous dangers presented by opaque and murky water is that it could conceal otherwise visible dangers in the pool, such as a defective tile. In his deposition, Mr. Cook testified that the defective tile that sliced his hand was below the surface of the water. The health department put The Crossings on notice of the issues with the water clarity and ordered that the pool remain closed. Yet, inexplicably, the pool was opened to tenants almost immediately after the failed inspection. Under these circumstances, I cannot accept the unmitigated proposition that The Crossings did not have actual or constructive knowledge of the defective condition when, in fact, The Crossings was ordered to keep the pool closed due to another defect which would have concealed the defective tile. While passing an inspection might give the operator of a pool reason to believe that a pool is in safe condition, *see, e.g., Bae v. Dragoo & Assoc., Inc.*, 156 Ohio App.3d 103, 2004-Ohio-544 (10th Dist.), certainly a failed inspection should give the operator of a pool reason to pause before opening the pool. Given that the health department ordered that the pool remain closed due to a hazard which would have obscured the ability to identify other dangerous conditions, it is apparent that there is a question of fact regarding whether the owner is charged with constructive knowledge of defects which would have been revealed by reasonable inspection. *See Honabarger v. Wayne Sav. Community Bank*, 9th Dist. Wayne No. 12CA0058, 2013-Ohio-2793, ¶ 23.

APPEARANCES:

DAVID M. GAREAU, MICHAEL R. GAREAU, and MICHAEL R. GAREAU, JR., Attorneys at Law, for Appellant.

RICHARD W. DUNSON, Attorney at Law, for Appellant.

MICHAEL D. LINN and JAMES J. COSTELLO, Attorneys at Law, for Appellee.