[Cite as *Packman v. Barton*, 2009-Ohio-5282.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

LYNNE N. PACKMAN, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-03-009
	:	O P I N I O N
- vs -		10/5/2009
	:	
ROBERT BARTON, JR., et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 2007CV-06-220

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HENDRICKSON, J.

{¶1} Plaintiff-appellant, Lynne N. Packman, appeals from the decision of the Madison County Court of Common Pleas granting summary judgment to defendants-appellees, Robert Barton, Jr., and his wife, Pamela Barton. We affirm the trial court's decision.

{¶2} The Bartons are the owners and operators of residential rental property located on Three J Court in Madison County through their jointly owned corporation, Three J Court, LLC. At all times relevant, appellant, along with her minor daughter, Kayla, and her roommate, Kari Morris, rented an apartment from the Bartons.[1]

{¶3} At approximately 9:00 p.m. on June 30, 2005, appellant, who was barefoot, exited through the back door of the apartment and began to descend the rear staircase. As she made her way down the stairs, appellant slipped and fell to the ground fracturing her right ankle.

{¶4} Appellant filed suit against the Bartons, her landlords, alleging that they had negligently maintained the apartment's rear staircase. The Bartons moved for summary judgment, which the trial court granted. Appellant now appeals the trial court's decision granting summary judgment in favor of the Bartons, raising one assignment of error.

{¶5} "THE TRIAL JUDGE ERRED BY FAILING TO APPRECIATE THAT DEFENDANT/APPELLEE BARTON CREATED THE DANGEROUS CONDITION OF THE STEPS BY GRADING AROUND THEM IMPROPERLY AS THE GENERAL CONTRACTOR DURING CONSTRUCTION AND CAUSING THE STEPS TO SINK SIGNIFICANTLY BELOW THE THRESHOLD OF THE PREMISES, AND INSTEAD HELD THAT PLAINTIFF/APPELLANT WAS REQUIRED TO PUT HIM ON NOTICE OF THE DEFECT THAT HE CREATED, WHICH WAS AGAINST THE MANIFEST WEIGHT OF THE

1. The Bartons' rental property located on Three J Court contains four separate buildings each containing two apartment units. Appellant rented one unit, Apartment A, a part of the building located at 10 Three J Court.

EVIDENCE."

{¶6} In her sole assignment of error, appellant argues that the trial court erred by granting summary judgment to the Bartons. We disagree.

{¶7} At the outset, we note that appellant's assignment of error suggests this court should analyze the trial court's decision to grant summary judgment under a manifest weight of the evidence standard. However, contrary to appellant's claim, this court does not review an entry of summary judgment under a manifest weight of the evidence standard, but instead, this court reviews such an entry pursuant to the requirements of Civ.R. 56. See *Welco Indus., Inc. v. Applied Cos.,* 67 Ohio St.3d 344, 346, 1993-Ohio-191.

{¶8} Challenging a trial court's decision granting summary judgment as against the manifest weight of the evidence is a non-sequitur because, upon review of such an entry on appeal, this court does not weigh the evidence. *White v. Westfall*, Franklin App. No. 09AP-175, 2009-Ohio-4490, ¶9; *Urbanek v. All State Mtge. Co.*, 178 Ohio App.3d 493, 2008-Ohio-4871, ¶38. As a result, because this court does not weigh the evidence when reviewing an entry granting summary judgment on appeal, we may summarily overrule any assignments of error seeking reversal of summary judgment based on the manifest weight of the evidence standard. See *White* at ¶9; *Urbanek* at ¶38; *Cincinnati v. Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., AFL-CIO* (1994), 93 Ohio App.3d 162, 165. Nonetheless, despite her confusion, and in the interest of justice, we find it appropriate to address appellant's intended assignment of error as though it had been properly argued. See, e.g., *Trust of Washington v. Washington*, Butler App. Nos. CA2007-05-131, CA2007-05-132, 2009-Ohio-560, ¶12; *Justice v. Justice*, Butler App. Nos. CA2004-03-074, CA2004-04-084, 2005-Ohio-1802, ¶5.

{¶9} An appellate court's review of a summary judgment decision is de novo. *Uhl v. Thomas,* Butler App. No. CA2008-06-131, 2009-Ohio-196, ¶7, citing *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, the appellate

court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran,* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. In turn, the appellate court must review a trial court's decision to grant or deny summary judgment independently, without any deference to the trial court's judgment. *Bravard,* citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶10} A court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Burress v. Associated Land Group*, Clermont App. No. CA2008-10-096, 2009-Ohio-2450, ¶8; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment bears the initial burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. The nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. Id. at 293. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505. In deciding whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.,* Butler App. No. CA2001-10-249, 2002-Ohio-3730, ¶10.

{¶11} A tenant seeking to establish a claim of negligence against her landlord may do so under Ohio's Landlord-Tenant Act or common-law premises liability. *Ryder v. McGlone's Rentals*, Crawford App. No. 3-09-02, 2009-Ohio-2820, ¶15, citing *Mounts v. Ravotti,* Mahoning App. No. 07 MA 182, 2008-Ohio-5045, ¶15-17.

{¶12} Generally, in order to avoid summary judgment in a negligence action, the plaintiff must show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. *Rigdon v. Great Miami Valley YMCA*, Butler App. No. CA2006-06-155, 2007-Ohio-1648, ¶11; *Ahmad v. AK Steel Corp.*, Butler App. No. CA2006-04-089, 2006-Ohio-7031, ¶6; *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶21. The plaintiff's failure to prove any of these elements would be fatal to her claim of negligence. *Whiting v. Ohio Dept. of Mental Health* (2001), 141 Ohio App.3d 198, 202.

I. Ohio's Landlord-Tenant Act: Statutory Negligence

{¶13} Initially, in regard to her statutory negligence claim based on Ohio's Landlord-Tenant Act, appellant, although not particularly clear, essentially argues that the trial court erred by granting summary judgment as there existed genuine issues of material fact as to whether the Bartons breached their statutory duty by failing to properly maintain the allegedly defective rear staircase of her apartment. This argument lacks merit.

{¶14} The purpose behind Ohio's Landlord-Tenant Act, which requires landlords to, among other things, comply with all safety codes and to maintain the premises in a fit and habitable condition, is to protect persons using rented residential premises from injury. See R.C. 5321.04(A); *Abner v. Day* (May 24, 1993), Butler App. No. CA92-09-173, at 5; *Wilhelm v. Heritage Mgt. Co.* (Jan. 26, 1998), Butler App. No. CA97-07-144, at 4; *Hubbard v. Crutchfield* (Apr. 7, 1997), Clermont App. No. CA96-06-050, at 4-5. A landlord's violation of the statutory duty imposed by Ohio's Landlord-Tenant Act constitutes negligence per se. *Allstate Ins. Co. v. Henry*, Butler App. No. CA2006-07-168, 2007-Ohio-2556, ¶9, citing *Sikora v. Wenzel,* 88 Ohio St.3d 493, 2000-Ohio-406, syllabus; *Robinson*, 2006-Ohio-6362 at ¶23. With negligence per se, proof of a landlord's violation of the statute dispenses with the plaintiff's burden establishing the existence of a duty and the breach of that duty. *Henry* at

¶10, citing *Morgan v. Mamone,* Cuyahoga App. No. 87612, 2006-Ohio-6944, ¶19; *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184.

{¶15} However, negligence per se does not equate to liability per se, as negligence per se does not dispense with the plaintiff's obligation to prove the landlord's breach was the proximate cause of the injury complained of, nor does it obviate the plaintiff's obligation to prove the landlord received actual or constructive notice of the condition causing the statutory violation. *Turner v. Teimeyer* (Feb. 12, 1996), Clermont App. No. CA95-08-053, at 3; *Henry* at ¶11, citing *Trammel v. McDonald*, Defiance App. No. 4-04-15, 2004-Ohio-4805, ¶14; *Baraby v. Swords*, 166 Ohio App.3d 527, 2006-Ohio-1993, ¶11. In turn, landlords will be excused from liability where they "neither knew nor should have known of the factual circumstances that caused the violation." *Mounts v. Ravotti*, Mahoning App. No. 07 MA 182, 2008-Ohio-5045, ¶30, quoting *Sikora*, 88 Ohio St.3d at 498, 2000-Ohio-406; *Scott v. Kirby*, Lucas App. No. L-05-1287, 2006-Ohio-1991, ¶24.

{¶16} In his deposition, Robert Barton testified that he was not present when the allegedly defective steps were constructed, and that his "permitting agency" did not require the installation of handrails before obtaining "final occupancy." When asked if appellant ever had a conversation with him about the allegedly defective rear staircase, Mr. Barton testified that appellant, even after breaking her ankle, only "talk[ed] to [him] about a handrail [for] the front." In addition, even though he was aware that appellant had broken her ankle, Mr. Barton testified that she "never made [him or his wife] aware that she was injured on [their] property," and that he only learned that she had broken her ankle on their property "when [they] got the suit."

{¶17} In her deposition, appellant testified that the Bartons were "responsive to [her] needs," but that they "didn't come around very often." Appellant also testified that she knew, based on the conditions of her lease, that it was her responsibility to notify the Bartons of any

items that were in need of repair, but that she never informed them of the allegedly defective condition of the rear staircase before her injury occurred. In fact, during her deposition, appellant testified as follows:

{¶18} "Q: At any time prior to you breaking your ankle, did you or [your roommate] ever request a handrail or make any mention to [the Bartons] of the dangerous condition on the ground or the stoop?

{¶19} "A: No.

{¶20} "* * *

{¶21} "Q: Just so I'm clear, you or [your roommate] never made any mention of a need for handrails prior to June 30, 2005?

{¶22} "A: No.

{¶23} "Q: Okay. And you and [your roommate] never made mention of the dangerous condition in the ground by the stoop prior to June –

{¶24} "A: No.

{¶25} "Q: -- 30, 2005; correct?

{¶26} "A: No."

{¶27} Furthermore, although she testified that her roommate eventually asked the Bartons to install a handrail for the allegedly defective rear staircase, appellant admitted that even this request came after she had already sustained her ankle injury.

{¶28} In addition to the deposition testimony, the record contains an affidavit of Carol Schiff, appellant's former neighbor, which states that she "almost fell" after she "stepped out onto the concrete steps leading from the side of the unit" while touring the apartment unit in March of 2005.[2] The affidavit also states that Schiff "told Mr. Barton that the steps needed a

2. Schiff later rented one unit, Apartment B, a part of the building located at 10 Three J Court, the same unit that she toured in March of 2005, and the unit located adjacent to appellant's unit.

handrail." However, although appellant presented Schiff's affidavit to the trial court, Schiff, during her own deposition, testified that she "never stepped down" onto the stairs and that she did not remember "almost falling" during her March 2005 tour. Moreover, Schiff testified that she never had a conversation with the Bartons about the installation of a handrail, or about any concerns that she may have had with "distance of the step to the ground."

{¶29} In granting summary judgment in favor of the Bartons, the trial court determined that appellant failed to submit any evidence to indicate that her landlords "knew or should have known about the condition of the stairs." In so holding, the trial court concluded that "[appellant] herself did not notify the Bartons as to the allegedly defective condition of the stairs until after her accident," and that Schiff's affidavit, which appellant claims was sufficient to establish notice to the Bartons, was "suspect" since her deposition testimony "flatly contrict[ed]" the statements she provided in her affidavit. In addition, the trial court found Schiff's affidavit, even when taken in a light most favorable to appellant, would, "at best," merely establish that she made "some statement" to the Bartons about the condition of "her own steps," and not that of the allegedly defective rear staircase of appellant's next door apartment.

{¶30} After a thorough review of the record, and after construing the evidence in a light most favorable to appellant, something which this court must do when reviewing the trial court's decision to grant summary judgment, we agree with the trial court's conclusion, and find that appellant failed to establish a genuine issue of material fact as to whether the Bartons knew or should have known about any alleged defect with the rear stairs prior to appellant's ankle injury. See *Turner*, Clermont App. No. CA95-08-053, at 3; see, also, *Blount-White v. Pund*, Cuyahoga App. No. 86093, 2005-Ohio-6382, ¶17-25. In addition, even if we were to assume that Mr. Barton was the general contractor during the construction of the apartment building, something which appellant now claims, this fact alone is

insufficient to establish the Bartons' constructive notice of the allegedly dangerous condition of the rear staircase prior to her injury. See *Abner*, Butler App. No. CA92-09-073, at 3; *Norwood v. Everman* (Oct. 10, 1997), Huron App. No. H-97-012, 1997 WL 640605, at *2. Therefore, because the record is devoid of any evidence indicating the Bartons had actual or constructive notice of the allegedly defective rear staircase prior to her injury, appellant has failed to show that they owed her a duty to construct the staircase in a reasonable manner or that they breached a duty to keep the staircase safe from any defective condition. *Turner* at 3. Accordingly, we find the trial court did not err by granting summary judgment to the Bartons in regard to appellant's statutory negligence claim under Ohio's Landlord-Tenant Act.

II. Premises Liability: Common-Law Negligence

{¶31} Next, in regard to her common-law negligence claim based on premises liability, appellant argues that the trial court erred by granting the Bartons summary judgment because "whether or not the condition of the steps in the current case was open and obvious would be a question of fact for the jury." This argument lacks merit.

{¶32} As noted above, negligence claims require a showing of (1) a duty owed; (2) a breach of that duty; and (3) an injury proximately caused by the breach. *Wallace v. Ohio Dept. of Commerce,* 96 Ohio St.3d 266, 2002-Ohio-4210, ¶22. "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." *Adelman v. Timman* (1997), 117 Ohio App.3d 544, 549. Determination of whether a duty exists is a question of law for the court to decide, and therefore, is a suitable basis for summary judgment. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318; *Galinari v. Koop*, Clermont App. No. CA2006-10-086, 2007-Ohio-4540, ¶10, 13.

{¶33} "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus. In determining whether a condition is open and obvious, "the

determinative question is whether the condition is *discoverable* or *discernible* by one who is acting with ordinary care under the circumstances." *Galinari* at ¶13, citing *Earnsberger v. Griffiths Park Swim Club*, Summit App. No. 20882, 2002-Ohio-3739, ¶14. The open and obvious doctrine, which is based on a common-law duty to warn invitees of latent or hidden dangers, applies to common-law premises liability even when it involves claims against a landlord. *Burress*, 2009-Ohio-2450 at ¶14; *Mounts*, 2008-Ohio-5045 at ¶50, citing *Robinson*, 2006-Ohio-6362 at ¶25. In turn, if the danger resulting from the allegedly defective rear staircase was open and obvious to appellant, then the Bartons owed her no duty of care. *Burress* at ¶14; *Mounts* at ¶16.

{¶34} After reviewing the record, the evidence indicates that the danger resulting from the allegedly defective rear staircase was open and obvious to appellant. In fact, during her deposition, appellant testified that she learned of the allegedly defective rear steps "literally after" she moved into the apartment, and that, because she had lived there for over a year, she believed that the stairs were dangerous even though they were not cracking, chipping, or crumbling. Appellant also testified that because she thought the stairs were dangerous she "didn't like" her roommate using them, and did not allow her minor daughter to use them.

{¶35} In addition, although appellant originally testified that she "never used" the rear staircase, she later testified that she used the allegedly defective rear staircase to enter the apartment on numerous occasions, including acknowledging that she had used the stairs two days prior to injuring her ankle. Furthermore, when asked if she "recognized before this incident occurred potential for injury" by using the allegedly defective rear staircase to exit her apartment, appellant responded affirmatively. As a result, because the allegedly defective staircase was an open and obvious danger to appellant, the Bartons owed her no duty of care. Therefore, we find the trial court did not err by granting summary judgment to the Bartons in regard to appellant's negligence claim based on common-law premises liability.

{¶36} Appellant's sole assignment of error is overruled.

{¶37} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.

[Cite as *Packman v. Barton*, 2009-Ohio-5282.]