[Cite as *Sauter v. One Lytle Place*, 2005-Ohio-1183.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ANNA B. SAUTER	:	APPEAL NO. C-040266 TRIAL NO. A-0209249
and	:	
KARL SAUTER,	:	*O P I N I O N.*
Plaintiffs-Appellants,	:	
vs.	:	
ONE LYTLE PLACE, an Ohio Limited Partnership,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: March 18, 2005

Stephen K. Shaw, for Plaintiffs-Appellants,

Peter Stackpole, for Defendant-Appellee.

GORMAN, Judge.

{¶1} The plaintiffs-appellants, Anna B. Sauter and her husband, Karl Sauter, appeal from the trial court's order granting summary judgment in favor of the defendant-appellee, One Lytle Place, on their claims for personal injuries and loss of consortium. The claims arose as a result of Anna Sauter slipping on the floor of a kitchenette located near a swimming pool at the One Lytle Place luxury apartment complex. Because genuine issues of material fact exist concerning whether One Lytle Place had sufficient superior knowledge of the floor's slipperiness to trigger a duty to warn, we reverse.

{¶2} On January 4, 2002, Sauter and her five-year-old granddaughter were at the swimming pool on the lower level of One Lytle Place. Sauter and her husband had recently signed a lease for an apartment located in One Lytle Place and were still in the process of moving in. After swimming, Sauter went to the adjoining bathroom and took a shower in her bathing suit. She then left the bathroom and walked down the hall, returning to the pool area. She noticed a Coke can left on the table where she and her granddaughter had been sitting and retrieved it. She then headed toward a trash receptacle that she had earlier seen in the kitchenette, less than ten feet from the pool.

{¶3} Sauter testified in her deposition that as soon as she stepped over the threshold of the kitchenette, onto the linoleum floor, her foot suddenly slipped out from under her, and she "flew across the room." The fall caused a left wrist fracture, a right ankle sprain, and a bruised shoulder. Although there is no direct evidence in the record of the cause of her fall (an examination of the floor an hour later by the complex's property manager revealed no wetness), Sauter maintained that the only possible cause of

her fall was slipperiness at the point of contact between the wet rubber sole of her sandal and the floor.

{¶4} The Sauters' complaint alleged that the cause of her fall, and the source of One Lytle Place's negligence, was the floor's unusual slipperiness. They alleged that One Lytle Place had superior knowledge of the floor's unusual slipperiness and that, given this superior knowledge, it had a duty as landlord to take measures to warn tenants who, given the proximity of the pool and kitchenette, should have been expected to enter the kitchenette dripping water. The trial court granted One Lytle Place's motion for summary judgment and overruled the Sauters' cross-motion for the same.

Standard of Review

{¶5} Because summary judgment presents only questions of law, an appellate court reviews the record de novo. See *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186, 738 N.E.2d 1243. Summary judgment is appropriate where it is clear from the underlying facts set forth in the pleadings, depositions, answers to interrogatories, written admissions, and affidavits, when viewed in a light most favorable to the party opposing the motion, that (1) no genuine issue of fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion. See Civ.R. 56(C); see, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

Premises Liability

{¶6} At common law, a landlord's duty was to exercise reasonable care to keep the premises retained under his control for the common use of the tenants in a reasonably

safe condition. See *Shroades v. Rental Homes* (1981), 68 Ohio St.2d 20, 427 N.E.2d 774. In 1974, the General Assembly enacted R.C. 5321.01, the Landlord and Tenant Act, in which it attempted to broaden, but not abrogate, the common-law duties owed to tenants. Id. at 25, 427 N.E.2d 774. Specifically, R.C. 5321.04(A)(3) states that a landlord must "[k]eep all common areas of the premises in a safe and sanitary condition."

{¶7} The landlord's duty to tenants, as recognized by the Ohio Supreme Court, is not materially distinct from that of a business owner to its invitees. *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 210, 211, 503 N.E.2d 159; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 50, 233 N.E.2d 589. Like a business owner, a landlord's liability for an unsafe condition rests upon its superior knowledge, actual or constructive, of the danger that causes an injury. *LaCourse* at 210, 503 N.E.2d 159, citing *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 40, 227 N.E.2d 603. See, also, *Klump v. Douglas* (Dec. 31, 1991), 1st Dist. No C-910060. Although not an insurer of the safety of tenants and their guests, a landlord owes a duty to maintain the premises under its control in a reasonably safe condition and to warn of unreasonably dangerous latent conditions of which the landlord has or should have knowledge. See *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 53, 372 N.E.2d 335; *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203, 480 N.E.2d 474.

Analysis

{¶8} When One Lytle Place supported its motion for summary judgment by pointing to the absence of evidence in the record of both negligence and proximate cause, the Sauters had a reciprocal burden to demonstrate the existence of such evidence. See *Dresher*, supra, at 293-294, 662 N.E.2d 264. In its memorandum of decision, the trial

court gave the following reasons for granting summary judgment to One Lytle Place: (1) the Sauters were unable to identify what Anna slipped on, thus rendering the cause of her fall a matter of speculation, and (2) other causes of her fall were equally reasonable.

{¶9} We reject the trial court's reasoning that the Sauters' claims were subject to summary judgment because of Anna's admission that she could point to no foreign substance on the floor either before or after she fell. Concededly, negligence is never presumed. The plaintiff must show how and why the injury occurred. See *Wesley v. The McAlpin Company* (May 25, 1994), 1st Dist. No. C-930286. A "plaintiff who cannot produce any affirmative evidence of the defendant's negligence, leaving it but one of severally equally valid theoretical causes for the actionable injury, must then undertake a process of elimination where all other negligent causes are effectively disproved. Otherwise the plaintiff would be asking the fact finder merely to speculate in his or her favor, a latitude the law does not grant." *Lonaker v. Cincinnati Youth Sports* (Nov. 12, 2004), 1st Dist. No. C-030672, citing *Laura v. Adler* (Aug. 9, 1995), 1st Dist. No. C-940312. See, also, *Gedra v. Dallmer Co.* (1950), 153 Ohio St. 258, 91 N.E.2d 256, paragraph two of the syllabus; *Westinghouse Electric Corp. v. Dolly Madison Corp.* (1975), 42 Ohio St.2d 122, 127, 326 N.E.2d 621: *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, 398, 473 N.E.2d 1199.

{¶10} But we have consistently held that even though a business invitee may not have seen a substance on the floor before falling, a genuine issue of material fact as to negligence and proximate cause may be predicated upon circumstantial evidence. See *Wesley*, quoting *Boles v. Montgomery Ward & Co.* (1950), 153 Ohio St. 381, 389, 92 N.E.2d 9. Whether a genuine issue of material fact exists depends on whether the

evidence presents "a substantial disagreement to require submission to a jury" or whether it is so "one-sided that one party must prevail as a matter of law." *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123, citing *Anderson v. Liberty Lobby, Inc.* (1986), 447 U.S. 242, 251-252,106 S.Ct. 2505

{¶11} Here, Anna Sauter stated that when she stepped on the tile of the kitchenette, her feet "zoomed" out from under her. She stated that prior to falling she did not see any "spilled fluids or other foreign substances on the floor." But she described the floor as having a "high sheen" and "far more slippery than I could have imagined under the circumstances." She stated that "the only explanation of which [she could] imagine [for her fall] is that the slippery condition of the floor caused my wet or damp sandal to slip out from under me when I stepped onto the floor." Clearly, in our view, there was sufficient circumstantial evidence to create a triable issue whether Anna's fall was caused by the unusual slipperiness of the floor.

{¶12} One Lytle Place next argues that even if it is assumed that Anna slipped because the floor was unusually slippery, the Sauters did not produce evidence that it knew or should have known of the risk posed by the floor's slipperiness, because no one had fallen on the kitchenette floor before. This argument is not persuasive, however, in light of the testimony of David Hayden, One Lytle Place's maintenance supervisor. He testified that an employee mopped the kitchen floor every two weeks. He testified also that a diluted amount of wax was applied to the floor even though the tile was "no-wax." After the floor was cleaned and mopped, the janitorial crew was instructed to put up a "wet floor" sign because of the floor's noticeable slipperiness. He responded negatively when asked whether he was aware of any condition that might have caused Anna to fall

other than water or wetness. Giving the Sauters the benefit of all favorable inferences, as is required by Civ.R. 56, we hold that Hayden's testimony was sufficient to create a triable issue whether One Lytle Place had knowledge of the floor's slipperiness superior to that of its tenants and their guests.

{¶13} Given the evidence concerning the unusual slipperiness of the floor and One Lytle Place's superior knowledge of its slipperiness, we also hold that the Sauters created a triable issue of whether One Lytle Place had a duty to warn its tenants and their guests, particularly those coming in from around the pool area, to take particular caution upon entering the kitchenette. As noted by Prosser, a possessor of land is "under an obligation to disclose to the licensee [and, by extension, an invitee] any concealed dangerous conditions of the premises of which he had knowledge." Prosser, Law of Torts (4 Ed.1971) 381, Section 60. "The licensee [or invitee] may be required to accept the premises as the occupier uses them, but he is entitled to at least equal knowledge of the danger, and should not be expected to assume the risk of a defective bridge, an uninsulated wire, *an unusually slippery floor*, or a dangerous step, in the face of a misleading silence." Id. (Emphasis supplied.)

{¶14} Our holding, it bears emphasis, is only that the evidence here creates a triable issue of a duty to warn, not necessarily that the facts at trial will persuade a jury that such a duty existed. As Prosser also notes, the duty of the owner or landlord does not include warning licensees or invitees of dangers that are known or ought to have been known to the person suffering injury. Id. at 381-382. As One Lytle Place points out, everyone knows, or indeed ought to know, that tile is generally slippery and becomes more so when wet. We agree with this general proposition and readily acknowledge that

property owners are not insurers guaranteeing an accident-free environment. But this case presents a unique factual scenario in that the kitchenette was located near the pool and obviously designed for users of the pool. Arguably, therefore, the kitchenette's location and particular use created an extra risk with a heightened degree of foreseeability and a greater duty to warn, similar to that of a janitorial crew warning of a freshly mopped floor. Prosser makes clear that a possessor of land has a duty to "take reasonable precautions to protect the invitee from dangers which are foreseeable from [the premises'] *arrangement or use*." Id. at 393, Section 61 (emphasis supplied). As Prosser further notes, "The obligation [to warn] extends to the original construction of the premises, where it results in a dangerous condition." Id. at 393 (emphasis supplied).

{¶15} In sum, we hold that the Sauters presented evidence that (1) the floor of the kitchenette was unusually slippery, whether because of its construction or treatment, or the presence of water brought in on Anna's sandals or on others entering from around the pool; (2) that One Lytle Place had knowledge of the unusual slipperiness of the floor that could be construed as superior to that of its tenants and their guests; and (3) in view of the arrangement and use of the kitchenette in relation to the pool, such superior knowledge of the floor's unusual slipperiness gave rise to a duty to warn, the breach of which either proximately caused or contributed to Anna Sauter's injury.

Ancillary Issues

{¶16} Parenthetically, we note that the complex's property manager stated that the leasing consultant had told her that when the Sauters were first shown their apartment, Anna almost fell and "admitted to having several strokes and that she was

unsteady on her feet." The trial court correctly did not mention this statement in its decision, as the statement was blatant hearsay and inadmissible under Evid.R. 802.

{¶17} Finally, it is unnecessary to address the Sauters' claim that the trial court abused its discretion by permitting withdrawal of the admissions by One Lytle Place due to their failure to timely answer its request for admissions under Civ.R. 36(A). This issue is rendered moot by our earlier discussion. See App.R. 12(A)(1)(c).

{¶18} Accordingly, we sustain the Sauters' assignment of error, reverse the trial court's judgment, and remand this case to the trial court for further proceedings according to law.

Judgment reversed and cause remanded.

HILDEBRANDT, P.J., concurs.
SUNDERMANN, J., dissents.

SUNDERMANN, J., dissenting.

{¶19} I respectfully dissent. The facts of this case are not in dispute. The law cited by the majority is correct; but I disagree about how that law applies to these facts. Mrs. Sauter had been swimming in the community pool at her apartment building. She went into an adjacent kitchenette. When she stepped into the kitchenette, she slipped and was injured. She admitted that she did not know what had caused her fall. She further admitted that she did not see any foreign substance on the floor, and there was no claim that there was any.

{¶20} A landlord's duty is to exercise reasonable care and to warn of latent defects of which it is aware or has superior knowledge. In this case, One Lytle Place had no such knowledge of any dangerous condition in the kitchenette. No one ever slipped on the floor before or after Mrs. Sauter's fall, and One Lytle Place had no knowledge of

any foreign substance on the floor, as all agree that there was none. The only time that the floor would have been slippery was just after it was mopped, and the undisputed testimony was that, after mopping, a sign was always posted to warn of recent mopping, but that no mopping had been done near the time of the fall. A sign was appropriate after mopping because One Lytle Place itself had made the floor wet, not the tenants.

{¶21} The majority cites the law correctly in stating that an owner is not an insurer of the premises, but they then effectively make One Lytle Place an insurer in this case. One Lytle Place did nothing wrong. The floor was made from normal material for a kitchen floor, and it was not, as the majority characterizes it, "unusually slippery" before Mrs. Sauter walked in. The floor was not wet when Mrs. Sauter came in, and there was not any substance on the floor that would have caused a fall. One Lytle Place was not on any notice that a dangerous condition existed.

{¶22} The majority finds a triable issue on a duty to warn under these circumstances. The duty agruably arose because of "the unusual slipperiness of the floor." But there was no evidence of this. Mrs. Sauter, not One Lytle Place, created any slipperiness.

{¶23} In its summation, the majority again says first that the floor was unusually slippery. But the floor was dry, substance-free and not slippery when Mrs. Sauter came in. Following the logic of the majority, every business, apartment building, or public building would be required to post a warning in the event it rained; presumably this warning would tell visitors that they might have water on their shoes and that an otherwise normal floor might become more slippery if visitors tracked water in on their shoes. This would be an intolerable burden on businesses and others, when it otherwise

can be presumed that people are smart enough to figure this out on their own. Certainly Mrs. Sauter could have done so in this case. If one would walk into a room with water, wax, or grease on her shoes and slip, she would have a cause of action according to this opinion if she was not first warned by the owner of the premises that she might slip.

{¶24} The second summation point of the majority is that One Lytle Place had knowledge of the slipperiness superior to any tenant. As mentioned, the floor was not slippery before Mrs. Sauter came in, and no one had slipped before, so how could One Lytle Place have had any knowledge of a problem? If the knowledge referred to is that one with water on her shoes might slip on a floor, any tenant's knowledge of that fact would be equal to an owner; it is just common sense. From these two flawed premises, the majority draws the conclusion that there is a triable issue concerning a duty to warn whenever someone comes into a room with water on her shoes and slips. We should affirm the good judgment of the trial court.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Opinion.