[Cite as *Mounts v. Ravotti*, 2008-Ohio-5045.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

HOWARD MOUNTS,	)	
	)	CASE NO. 07 MA 182
PLAINTIFF-APPELLANT,	)	
	)	
VS.	)	O P I N I O N
	)	
KATHY RAVOTTI,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 06CV1885.

JUDGMENT: Affirmed in part; Reversed in part.

APPEARANCES:

For Plaintiff-Appellant:
Attorney John Chaney, III
305 Chase Tower
106 East Market Street
Warren, Ohio 44481

For Defendant-Appellee:
Attorney Craig Pelini
Attorney Kristen Campbell
8040 Cleveland Avenue NW, Suite 400
North Canton, Ohio 44702

JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 26, 2008

VUKOVICH, J.

{¶1} Plaintiff-appellant Howard Mounts appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of defendant-appellee Kathy Ravotti. Two issues are presented in this case. First, is whether the complaint raised a statutory claim under R.C. 5321.04. The second issue is whether the evidence presented created a genuine issue of material fact that Ravotti knew of the condition of the steps prior to the fall. For the reasons expressed below, the judgment of the trial court is affirmed in part and reversed in part.

STATEMENT OF FACTS AND CASE

{¶2} Ravotti[1] is the owner and landlord of a duplex located at 3411 Powers Way, Youngstown, Ohio. The duplex has two apartments: an upstairs apartment and a downstairs apartment. Mounts was a tenant of the upstairs apartment for a short duration.

{¶3} The only means of ingress and egress to the upstairs apartment was through the door located on the back porch. Four wooden steps led up to the back porch. (Mounts Depo. 25; Exhibit 1 attached to Ravotti Depo.) While the back porch was covered with an awning, the awning did not extend over the steps. (Mounts Depo. 29). Thus, they were subject to the elements. (Mounts Depo. 29).

{¶4} During his tenancy, Mounts observed that whenever it would rain at a moderate rate, the wooden steps would flood. (Mounts Depo. 29-30). He explained that each individual step would hold water and then at the base of the steps it "would be like shoe deep when it basically like rained hard." (Mounts Depo. 29). He further indicated that the back of the house had no gutters. (Mounts Depo. 31). Therefore, the rain water would flow off the roof and directly onto the steps.

{¶5} One afternoon in July 2004 while Mounts was a tenant, he exited his apartment, slipped on the first wooden exterior step and fell down the remaining steps injuring his back. (Mounts Depo. 32-33). He stated that it had been raining all day long and the steps were flooded. (Mounts Depo. 32).

{¶6} As a result of his fall and injuries, Mounts filed a complaint against Ravotti. In his first claim, he alleged that Ravotti failed to exercise reasonable care in

[1]Since the inception of this action, Ravotti has married and her last name is now Perry.

maintaining the premises and failing to warn of the dangerous condition. He also asserted the she knew or should have known about the condition and failed to repair it. In his second claim, Mounts asserted, pursuant to R.C. 4101.11, that Ravotti had a duty to protect employees and frequenters, which included him. 05/16/06 Complaint.

{¶7} Ravotti filed an answer on June 16, 2006. She asserted, among other defenses, that the condition of the steps was an open and obvious hazard which Mounts was aware of and that she had no duty to warn of it.

{¶8} Discovery then occurred. Both Ravotti and Mounts were deposed. Following discovery, Ravotti filed a motion for summary judgment. As to the common law premises liability claim, she contended that the condition of the steps was open and obvious thereby negating her duty to warn. As to a statutory duty for failure to remedy a defective condition, the steps, she claimed that the record fails to show that she had notice of the condition. She states she cannot be liable for a condition of which she had no notice. Lastly, as to the claims under R.C. 4101.11 for employees and frequenters, she argued that nothing in the record supports the position that Mounts was her employee. Thus, there is no duty of the employer to protect the employee under this statute. As to the frequenter, Ravotti maintained that the duty owed is that of the owner of the premises to a business invitee. As the open and obvious doctrine applies to business invitees, and the condition of the steps were open and obvious, she owed no duty to warn Mounts of their nature.

{¶9} Mounts filed a motion in opposition to the motion for summary judgment. In that motion he asserted that Ravotti failed to comply with R.C. 5321.04 (requirement that landlord do whatever is reasonably necessary to keep premises in a fit and habitable condition) by failing to maintain the sole means of ingress and egress into his apartment. He additionally contended that the open and obvious doctrine has no application to the facts at hand. He asserted that it does not apply to landlord-tenant situations where there is a duty under R.C. 5321.04(A)(2) to repair the premises. He argued that Ravotti had actual knowledge and constructive knowledge about the condition of the steps. In support of this, he attached an affidavit from Vince Chianese, the downstairs tenant.

{¶10} Ravotti then filed a reply in support of summary judgment. She argued, once again, that she had no notice of the condition, and without notice under R.C.

5321.04, she could not be liable. She indicated that the open and obvious doctrine is applicable.

{¶11} Following the motions, the trial court found that there were no genuine issues of material fact and that Ravotti was entitled to judgment as a matter of law. Mounts timely appealed from that order.

ASSIGNMENT OF ERROR

{¶12} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY GRANTING SUMMARY JUDGMENT TO APPELLEE, WHEN THERE ARE NUMEROUS GENUINE ISSUES OF MATERIAL FACT AND, THEREFORE, APPELLEE WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW."

{¶13} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.,* 95 Ohio St.3d 314, 2002-Ohio-2220, at ¶24. Summary judgment is properly granted when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) 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. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶14} Mounts' complaint against Ravotti asserted two claims.[2] The first claim asserted that Ravotti had a duty to exercise reasonable care, she breached that duty and that breach proximately caused Mounts' injuries. Or, in other words, he is asserting a negligence claim.

{¶15} In order to establish negligence, Mounts needed to present evidence to show that Ravotti failed to act with reasonable care. In the landlord-tenant area, the standard of care can be established in one of two ways. *Crawford v. Wolfe*, 4th Dist. No. 01CA2811, 2002-Ohio-6163. See *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶25.

{¶16} The first way would be through common-law premises liability. *Crawford*, 4th Dist. No. 01CA2811, 2002-Ohio-6163, ¶21. However, under that theory, the open and obvious doctrine would apply. *Robinson*, 112 Ohio St.3d 17, 2006-Ohio-6362,

[2]The second claim deals with R.C. 4101.11, an employer's duty to employees and frequenters. Mounts makes no argument concerning this cause of action in his appellate brief. Nor did he make any argument concerning this cause of action in his motion in opposition to summary judgment. As such, he has abandoned that claim and it is not addressed.

¶25. Therefore, if the danger was open and obvious, then the landowner, i.e. landlord, owed no duty of care to individuals lawfully on the premises, i.e. tenants. *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus.

{¶17} The second way the standard of care could be established is to look to statute. *Crawford*, 4th Dist. No. 01CA2811, 2002-Ohio-6163, ¶22-24. In Ohio, the Landlord-Tenant Act sets forth statutorily defined standards of care for landlords.

{¶18} Mounts' brief appears to assert that his complaint brought a statutory cause of action under the landlord-tenant act. Specifically, he references R.C. 5321.04(A)(1) and (2) in his brief. These sections state:

{¶19} "(A) A landlord who is a party to a rental agreement shall do all of the following:

{¶20} "(1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;

{¶21} "(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition."

{¶22} A landlord's violation of the duty imposed by R.C. 5321.04(A)(1) or (2) constitutes negligence per se. *Robinson,* 112 Ohio St.3d 17, 2006-Ohio-6362, ¶23 citing *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406. Moreover, the "open and obvious" doctrine does not dissolve this statutory duty to repair. *Robinson,* 112 Ohio St.3d 17, 2006-Ohio-6362, ¶25.

{¶23} Ravotti asserts in her appellate brief that this court should not consider the "statutory claim" because Mounts did not set forth "a claim for violation of any provision of R.C. 5321.04 in his Complaint, and he never amended his pleading to assert such a claim." (Appellee Brief 12).

{¶24} As Ravotti recognizes, Ohio is a notice pleading state. This means a complaint is sufficient if it puts defendants on notice of the general claims. Civ.R. 8(A) requires only that a pleading contain a short and plain statement of the circumstances entitling the party to relief and the relief sought. A party is not required to plead the legal theory of recovery. *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 526, 1994-Ohio-99. "The purpose of Civ.R. 8(A) is to give the defendant fair notice of the claim and an opportunity to respond." *Leichliter v. Natl. City Bank of Columbus* (1999), 134 Ohio App.3d 26, 31.

{¶25} Furthermore, "Civ.R. 8(F) * * * provides that '[a]ll pleadings shall be so construed as to do substantial justice.' The rules make it clear that a pleader is not 'bound by any particular theory of a claim but that the facts of the claim as developed by the proof establish the right to relief.' Id., quoting McCormac, Ohio Civil Rules Practice (2d Ed.1992) 102, Section 5.01. See also *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 82. Thus, the labels used in a particular cause of action do not control the nature of the cause of action. *Funk v. Rent-All Mart, Inc.* (2001), 91 Ohio St.3d 78, 80; *Sprouse v. Eisenman,* 10th Dist. No. 04AP-416, 2005-Ohio-463, ¶8. The object is not absolute technical conformity, but substantial justice." *Kramer v. Angel's Path, L.L.C.*, 174 Ohio App.3d 359, 2007-Ohio-7099, ¶13.

{¶26} The complaint does not reference R.C. 5321.04. However, the pleading clearly asserts that Ravotti had a duty to maintain the stairs, she knew or should have known about the condition of the stairs and she failed to abate the condition of the stairs. This language could be seen to assert a common law premises liability cause of action and a cause of action under R.C. 5321.04(A)(2) for failing to repair the steps.

{¶27} Thus, Ravotti had fair notice of the claim under R.C. 5321.04(A). In her motion for summary judgment, she clearly and directly addressed this issue in section C of the memorandum. She clearly maintained that she had no notice of the defective condition of the stairs, and therefore, she could not be liable.

{¶28} Likewise, Mounts' argued the statutory claim in his motion in opposition to summary judgment and Ravotti, similarly to her motion for summary judgment, argued it in her reply. She contended there was no evidence that she had notice of the condition prior to Mounts' fall.

{¶29} Consequently, Ravotti's argument that we should not consider a statutory claim is deemed meritless. The complaint raises a statutory claim under R.C. 5321.04 and a common law claim for premises liability. Thus, we will now address whether summary judgment should have been rendered on either claim starting with the statutory claim, R.C. 5321.04.

R.C. 5321.04

{¶30} The statutory arguments appear to be made under R.C. 5321.04(A)(1) and (2). Those sections impose a duty upon the landlord and a violation of that duty amounts to negligence per se. *Robinson*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶23;

Sikora, 88 Ohio St.3d at 498; *Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St.2d 20. However, violation of the statute does not in and of itself render the landlord liable. The tenant must also show proximate cause and that the landlord had knowledge of defective condition. *Shroades*, 68 Ohio St.2d 20. A landlord will be excused from liability if he "neither knew nor should have known of the factual circumstances that caused the violation." *Sikora*, 88 Ohio St.3d at 498.

{¶31} Hence, in order to survive summary judgment for the statutory claim, Mounts needed to show: 1) a violation of the statute; 2) that the violation proximately caused his injuries; and 3) that the landlord had notice (actual or constructive) of the defective condition.

{¶32} We will begin with whether there is evidence of a violation of R.C. 5321.04(A)(1) or (2). Section (A)(1) requires compliance with all housing, building and safety codes. Mounts did not allege and support his motion for summary judgment with any reference to a specific housing, building or safety code that Ravotti violated. He makes a general statement that it violates the Ohio Residential Code, but he does not indicate what sections or how it violates that code. Thus, without more it is difficult to conclude that a violation of section (A)(1) was shown.

{¶33} As to section (A)(2) a landlord must "make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." The Fourth Appellate District has stated "the maintenance of the sole means of ingress to a rented residence certainly invokes the requirement" of section (A)(2). *Crawford*, 4th Dist. No. 01CA2811, 2002-Ohio-6163, ¶28. Thus, this section would apply to the situation at hand as the alleged slippery steps were Mounts' sole means of ingress.

{¶34} The steps were alleged to be slippery because of their construction and the lack of a gutter on the back of the house. It is undisputed that the construction of the steps was that it had sides and a back. Accordingly, there was no means of drainage.

{¶35} As to the missing gutter, Mounts testified that on the day of his fall there was no gutter on the back of the house; he said after he fell the gutters were replaced. (Mounts Depo. 46). Attached to his motion in opposition to summary judgment is an affidavit from Vince Chianese. Chianese confirmed that there were no gutters on the rear of the house on the day Mounts fell. (Chianese Affidavit ¶11). He indicated that they were not replaced until after Mounts fell. (Chianese Affidavit ¶14). They both

indicated that with the absence of the gutter, rainwater flowed directly from the roof onto the steps. (Chianese Affidavit, ¶11, 15; Mounts Depo. 31).

{¶36} Ravotti disputed these statements. She indicated that in May 2004 Chianese told her something was wrong with the gutter in the back of the house. (Ravotti Depo. 40). She stated that she had the gutter replaced in June 2004. (Ravotti Depo. 28). She provided an invoice which indicated that the gutter in the back of the house was replaced on June 2, 2004. (Attached to motion for summary judgment).

{¶37} The testimony indicates a genuine issue of material fact as to whether the gutters were or were not on the house at the time of the fall. Lack of gutters along with the condition of the steps having no drainage, may create a duty to fix those issues especially when it is occurring where the only means of ingress and egress are located.

{¶38} Thus, we move on to whether the violation proximately caused the injuries. The issue of proximate cause is one of fact. *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110; accord *Ricciardo v. Weber* (Dec. 22, 1989), 5th Dist. No. CA-3452 (explaining that, "'Duty' is generally a question of law; 'breach of duty,' 'proximate cause,' and 'damages' are generally questions of fact").

{¶39} Mounts slipped on steps that were covered with water. It is a question of fact for the jury to determine whether or not the lack of a gutter proximately caused the excess water and his fall.

{¶40} The last factor is notice. As stated above, in order to be liable, Ravotti had to have actual or constructive notice of the condition of the steps and the gutter.

{¶41} Mounts testified that he never informed Ravotti about the steps holding water or the fact that he was slipping on them. (Mounts Depo. 30-31). He claimed that Chianese told him that he had told Ravotti about "the conditions of the steps." (Mounts Depo. 31). Further as to the missing gutter, Mounts stated that he had left a message for Ravotti informing her as such, however, he was unable to provide a date for when he told her this. (Mounts Depo. 26).

{¶42} In Chianese's affidavit[3] he avowed:

---

[3]It is noted that in Ravotti's brief she complains about Vince's affidavit. She contends that during depositions, Mounts did not know Vince's address. They seem to assert that Vince was conveniently located in order to have an affidavit executed for the motion in opposition to summary judgment. She implies that the affidavit should not be considered. However, she never moved to strike it.

{¶43} "13. The gutters remained on the ground at the rear of the real estate for several months, where they were visible to all parties visiting the real estate including, but not limited to, the landlord, Kathy A. Ravotti.

{¶44} "* * *

{¶45} "24. I personally spoke with the landlord, Kathy A. Ravotti, regarding the condition of the exterior stairway, which was located at the rear of the real estate, and advised her of the problems that occur when it rains.

{¶46} "25. I personally spoke with the landlord, Kathy A. Ravotti, regarding the problems caused by the lack of gutters on the rear of the real estate."

{¶47} Ravotti disputed the above. She indicated that in May Chianese told her something was wrong with the gutter. (Ravotti Depo. 40). However, she testified that she had the gutter fixed prior to Mounts' fall. (Ravotti Depo. 28). She also testified that no one informed her of the condition of the steps. (Ravotti Depo. 28).

{¶48} The above indicates that there is conflicting accounts of whether she had notice. Thus, there is a genuine issue of material fact.

{¶49} In conclusion, we find that there are genuine issues of material fact of notice and a violation of the statutory duty under R.C. 5321.04(A)(2). Consequently, summary judgment should not have been granted to Ravotti on the statutory claim.

Common Law Premises Liability

{¶50} As stated above, while the open and obvious doctrine does not apply to R.C. 5321.04 claims, it does apply to common law premises liability, even when it involves claims against a landlord. *Robinson*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶25. "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong,* 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus. The "open and obvious" doctrine is still viable in Ohio, which is based on a common-law duty to warn invitees of latent or hidden dangers. Id. at ¶11.

{¶51} The evidence here indicates that the water on the steps and the lack of the gutter contributing to the flooding of the steps was open and obvious. Mounts not only admitted to being aware of the water prior to his fall, but he also acknowledged that prior to falling, he had slipped on the steps numerous times. This clearly shows that the condition was open and obvious. Thus, the trial court's grant of summary judgment on the common law premises liability claims was correct.

{¶52} Mounts next argues that the water was an unnatural accumulation and therefore Ravotti could still be liable. Typically, courts discuss unnatural accumulations when referring to snow and ice. Rain could be considered along with snow and ice because in certain instances it makes traversing more difficult.

{¶53} That said, even if it is considered along with snow and ice, numerous appellate districts have held that the open and obvious doctrine applies to unnatural accumulations, thus rendering no duty on the part of the landowner. *Whitehouse v. Customer is Everything!, Ltd.*, 11th Dist. No. 2007-L-069, 2007-Ohio-6936, ¶72; *Prexta v. BW-3 Akron, Inc*., 9th Dist. No. 23314, 2006-Ohio-6969, ¶13; *Scholz v. Revco Discount Drug Ctr., Inc.*, 2d Dist. No. 20825, 2005-Ohio-5916, ¶17-19; *Bevins v. Arledge*, 4th Dist. No. 03CA19, 2003-Ohio-7297, ¶18-20.

{¶54} For instance, the Eleventh Appellate District has explained:

{¶55} "Next, even if Mr. Whitehouse slipped on the 'unnatural accumulation of ice,' summary judgment was still appropriate. It was established that the ice upon which Mr. Whitehouse slipped was an open and obvious danger. Under the open and obvious doctrine, the owner of a premises does not owe a duty to persons entering those premises regarding dangers that are open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 48 (Citations omitted.); See, also, *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶13. '[T]he 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.' *Armstrong,* supra, at ¶5, quoting *Simmers v. Bentley Constr. Co.,* 64 Ohio St.3d at 644. When the open and obvious doctrine is applicable, it 'obviates the duty to warn and acts as a complete bar to recovery.' *Armstrong,* supra, at ¶5. Therefore, based on this doctrine, it is clear that appellee owed no duty to Mr. Whitehouse, and appellee is entitled to judgment as a matter of law." *Whitehouse*, 11th Dist. No. 2007-L-069, 2007-Ohio-6936, ¶72.

{¶56} The courts that have held that the open and obvious doctrine applies to unnatural accumulations of ice and snow, do so by relying on the Ohio Supreme Court's decision in *Armstrong,* which rejected the characterization of the open and obvious doctrine as a defense that should be submitted to the jury as part of the comparison of relative fault because such an approach overlooks the axiom that where there is no duty, there is no fault to be apportioned. "Moreover, *Armstrong* also

specifically rejected Section 343(A) of the Restatement of the Law 2d, Torts (1965), which imposes a duty when the possessor should have anticipated the harm despite the invitee's knowledge of the obviousness of the condition. Id. at paragraph nine." *Bevins*, 4th Dist. No. 03CA19, 2003-Ohio-7297, ¶20.

{¶57} This reasoning is sound and applies to the situation at hand. Thus, as the water was open and obvious, Ravotti owed no duty to Mounts.

{¶58} For the foregoing reasons, the trial court's grant of summary judgment for Ravotti is reversed on the statutory claim as there are genuine issues of material fact. However, as to the common law premises liability claim, the trial court's judgment is affirmed since the condition was open and obvious.

Donofrio, J., concurs.
Waite, J., concurs.