[Cite as *Mayhew v. Massey*, 2017-Ohio-1016.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STACY MAYHEW, PLAINTIFF-APPELLANT, VS. LINDA G. MASSEY, INDIVIDUALLY AND AS TRUSTEE FOR EDWARD B. MASSEY TRUST, DEFENDANT-APPELLEE.	)))))))))))	CASE NO. 16 MA 0049 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 2015-CV-819

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 10, 2017

[Cite as *Mayhew v. Massey*, 2017-Ohio-1016.]
ROBB, P.J.

{¶1} Plaintiff-Appellant Stacey Mayhew (hereinafter "the tenant") appeals the decision of the Mahoning County Common Pleas Court granting summary judgment in favor of Defendant-Appellee Linda Massey, Individually and as Trustee for Edward B. Massey Trust (hereinafter "the landlord"). As to her common law negligence claim, the tenant contends the open and obvious danger of descending the familiar stairs leading to her apartment in total darkness during a known power outage was accompanied by sufficient "attendant circumstances" to avoid summary judgment. This argument lacks merit. Summary judgment was properly granted on her common law negligence claim due to the open and obvious doctrine.

{¶2} Next, the tenant correctly argues the open and obvious doctrine cannot be used to defeat a claim of negligence per se, which applies when there is a violation of a statutory duty such as that contained within R.C. 5321.04(A)(3). The issue becomes whether the lack of lighting over the stairs in the common area could be seen as a violation of the landlord's statutory duty to keep the common area safe. If there is a genuine issue of material fact as to whether a statutory duty was violated, the tenant asserts the defense of contributory negligence was improperly used to bar her claim. She states the doctrine of comparative negligence leaves a jury question as to whether her negligence was more than 50% of the cause of her injury. We conclude the landlord was entitled to summary judgment on this issue. In accordance, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶3} The tenant lived on Erskine Avenue in a four-unit apartment building owned by the trust and operated by the trustee. To reach her basement apartment, the tenant had to enter the apartment building's common area and descend four or five steps. There was overhead lighting above the stairs and a handrail. On May 2, 2013, the tenant called the landlord's agent to report a power outage. According to the recitation of facts presented by both parties, the City of Boardman had severed an electrical line while trimming trees.

{¶4} The next day, with the power still out, the tenant went to a meeting. She returned to the apartment building at approximately 10:00 p.m. On attempting to

descend the stairs to her apartment in complete darkness, the tenant "missed a step," fell down the stairs, and suffered injuries. The tenant filed a complaint against the landlord asserting common law negligence and negligence per se under R.C. 5321.04(A)(1)-(4).

{¶5} The tenant testified at deposition to the conditions existing before she attempted to walk down the stairs: "You couldn't see anything. It was pitch black in there. * * * I couldn't see my hand in front of my face." (Depo. at 15-16). The tenant said she was familiar with the stairs and used them multiple times a day. She acknowledged she previously traversed the stairs in the dark during this power outage, "maybe once." (Depo. at 17).

{¶6} The landlord filed a motion for summary judgment arguing: (1) no duty was breached as the darkness was an open and obvious danger; (2) the tenant's intentional step into total darkness is contributory negligence as a matter of law, which precludes her recovery; (3) the tenant cannot transform a previously-encountered, insubstantial condition into a dangerous condition merely because of a subsequent fall, relying on Ohio Supreme Court cases *Leighton* and *Raflo*; and (4) the landlord provided lighting over the stairs, but a one-time situation (over which the landlord had no control) caused a power outage.

{¶7} The tenant responded: (1) the open and obvious doctrine is not applicable to a negligence per se claim; (2) contributory negligence does not bar her recovery if her fault was not greater than 50%, which is a jury question; (3) the two Ohio Supreme Court cases are inapposite as they did not involve negligence per se or the duty of a landlord to a tenant; and (4) the cause of the outage is irrelevant as to whether the landlord must provide light over the stairs. In replying to the tenant's first response, the landlord asserted the open and obvious doctrine applies because there was no violation of R.C. 5321.04 and thus no negligence per se.

{¶8} On April 15, 2016, the trial court granted summary judgment for the landlord "on all of Plaintiff's claims." The court noted the plaintiff knew the electricity was out but failed to bring a flashlight to navigate the stairs of her building. The trial court divided its opinion into the four arguments set forth in the summary judgment motion and adopted each of those arguments: (1) the condition of darkness was

open and obvious; (2) the tenant was contributorily negligent when she intentionally stepped into total darkness, and her unreasonable disregard of the darkness precludes her recovery; (3) the landlord was entitled to summary judgment as the tenant previously and successfully traversed the stairs in the dark, citing *Leighton* and *Raflo*; and (4) the landlord provided overhead lighting and was not responsible for the power outage (as distinguished from a case where the property regularly suffered outages, which condition the landlord could have fixed). The tenant filed a timely notice of appeal from the entry of summary judgment.

SUMMARY JUDGMENT

{¶9} Summary judgment can be granted when there remains no genuine issue of material fact and when reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The movant has the initial burden to show that no genuine issue of material fact exists. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). The non-moving party then has a reciprocal burden. *Id.* The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing that there is a genuine issue for trial and may not rest upon mere allegations or denials in the pleadings. Civ.R. 56(E).

{¶10} In determining whether there exists a genuine issue of material fact to be resolved at trial, the court is to consider the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the non-movant. *See, e.g., Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 11. Any doubts are to be resolved for the non-movant. *Leibreich v. A.J. Refrig., Inc.*, 67 Ohio St.3d 266, 269, 617 N.E.2d 1068 (1993). A trial court “may not weigh the proof or choose among reasonable inferences.” *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187 (1980).

{¶11} Although courts are cautioned to construe the evidence in favor of the nonmoving party, summary judgment is not to be discouraged where a non-movant fails to respond with evidence supporting the essentials of his claim. *Leibreich*, 67 Ohio St.3d at 269. Civ.R. 56 must be construed in a manner that balances the right

of the non-movant to have a jury try claims that are adequately based in fact with the right of the movant to demonstrate, prior to trial, that the claims have no factual basis. *Byrd*, 110 Ohio St.3d 24 at ¶ 11, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

{¶12} We consider the propriety of granting summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Under a de novo standard of review, we review the case independently and give no deference to the trial court's decision. *See, e.g., Diley Ridge Med. Ctr. v. Fairfield Cty. Bd. of Revision*, 141 Ohio St.3d 149, 2014-Ohio-5030, 22 N.E.3d 1072, ¶ 10; *Hines v. State Farm Ins. Co.*, 146 Ohio App.3d 128, 131, 765 N.E.2d 414 (7th Dist.2001).

{¶13} In appealing the entry of summary judgment, the tenant sets forth three assignments of error: (1) attendant circumstances defused the open and obvious defense; (2) any contributory negligence must be determined by the jury; and (3) the open and obvious doctrine does not preclude a claim of negligence per se (and reasonable minds could differ as to whether there was a statutory violation). The first and third assignments correspond to the two claims set forth in the complaint, negligence and negligence per se, respectively. As the second assignment of error deals with the defense of contributory negligence, we address it last.

OPEN AND OBVIOUS DOCTRINE

{¶14} "The open and obvious doctrine remains viable in Ohio. 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, 788 N.E.2d 1088, syllabus. The rationale is that the owner or occupier of premises may reasonably expect the plaintiff to discover an open and obvious danger and take preventative measures to protect herself; the open and obvious nature of the hazard constitutes the warning to the plaintiff. *Id.* at ¶ 5.

{¶15} The parties agree the landlord cannot use the open and obvious doctrine to defeat a negligence per se claim. As will be explained further infra, negligence per se due to the violation of a statutory duty obviates the open and obvious doctrine. *See Mann v. Northgate Investors, L.L.C.*, 138 Ohio St.3d 175, 2014-Ohio-455, 5 N.E.3d 594, ¶ 24, 33; *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-

Ohio-6362, 857 N.E.2d 1195, ¶ 25. Therefore, the landlord can only utilize the open and obvious doctrine to argue against the tenant's common law negligence claim. *See Robinson*, 112 Ohio St.3d 17 at ¶ 25 (if there is no statutory breach by the landlord, it must be determined whether the danger was open and obvious under the principles of common law negligence).

{¶16} In a negligence action, the plaintiff must demonstrate: (1) the existence of a duty; (2) breach of that duty; and (3) an injury proximately resulting from the breach. *Robinson*, 112 Ohio St.3d 17 at ¶ 21. The open and obvious doctrine negates the threshold issue in a negligence action, the element of duty. *Armstrong*, 99 Ohio St.3d 79 at ¶ 8, 11, 13, 14. Where there is no duty, there is no fault to be compared. *Id.* at ¶ 11-12 (warning of the dangers of confusing the concepts of duty and proximate cause). "The fact that a plaintiff was unreasonable in choosing to encounter the danger is not what relieves the property owner of liability. Rather, it is the fact that the condition itself is so obvious that it absolves the property owner from taking any further action to protect the plaintiff." *Id.* at ¶ 13. After so holding, the *Armstrong* Court upheld summary judgment for Best Buy where the plaintiff would have noticed the guardrail for shopping carts had he looked down. *See id.* at ¶ 16.

{¶17} Evidence that a plaintiff actually knew of the allegedly dangerous condition can be used in evaluating the open and obvious doctrine. *See, e.g., St. Germain v. Newell*, 3d Dist. No. 9-5-14, 2015-Ohio-3713, ¶ 24 ("The open and obvious doctrine has not only been applied where a person would reasonably be expected to discover a hazard, but also where the tenant had actual knowledge of a particular hazard or condition"), citing *Mounts v. Ravotti*, 7th Dist. No. 07MA182, 2008-Ohio-5045, ¶ 51. *See also LaCourse v. Fleitz*, 28 Ohio St.3d 209, 503 N.E.2d 159 (1986) (tenant knew of natural accumulation of ice and snow). It has also been observed that a plaintiff cannot defeat knowledge where she just recently encountered the condition but forgot about it; rather, she can be "charged with knowledge." *See Raflo v. Losantiville Country Club*, 34 Ohio St.2d 1, 295 N.E.2d 202 (1973), ¶ 2 of syllabus, following *Leighton v. Hower Corp.*, 149 Ohio St. 72, 77 N.E.2d 600 (1948).

{¶18} In granting summary judgment in the case at bar, the trial court pointed out how various courts have concluded darkness is an open and obvious condition, which should not be disregarded. *See, e.g., Rezac v. Cuyahoga Falls Concerts, Inc.*, 9th Dist. No. 23313, 2007-Ohio-703, ¶ 18 ("The condition of darkness was an open and obvious hazard against which appellant failed to protect herself and disregarded at her own peril"); *Leonard v. Modene & Assoc., Inc.*, 6th Dist. No. WD-05-085, 2006-Ohio-5471, ¶ 51-53, 56 (if there was enough light to see, the realtor should have been able to observe the lack of steps, making the drop-off into a coal bin an open and obvious danger; if the room was too dark to see the drop-off, then he still "disregarded an open and obvious hazard - the darkness"); *Swonger v. Middlefield Village Apts.*, 11th Dist. No. 2003-G-2547, 2005-Ohio-941, ¶ 13 ("the darkness outside appellee's building and the dangers presented by navigating in such darkness were open and obvious to appellants, and appellee had no duty to protect them from such hazards").

{¶19} Here, the claimed defect is the lack of temporary lighting over the stairs leading to the tenant's apartment during a power outage caused by a non-party. The darkness was not concealing an unknown condition. The tenant had previously traversed the four or five stairs multiple times. She knew of the power outage and discussed the situation with the landlord's agent. The tenant successfully traversed the stairs at least once in the dark during the power outage. She did not utilize a flashlight or other battery-operated light source. Just prior to her fall, she intentionally commenced the descent down the familiar staircase in "pitch black" conditions during a known power outage. She did not encounter a defect but "missed a step," allegedly on account of the darkness.

{¶20} The tenant concedes this complete darkness over the known staircase during a recognized power outage could qualify as an open and obvious hazard. She believes other facts can be used to "defuse" the doctrine and allow the common law negligence case to proceed to trial. This leads to her first assignment of error.

<u>NEGLIGENCE CLAIM: ATTENDANT CIRCUMSTANCES</u>

{¶21} The tenant's first assignment of error alleges:

"THE TRIAL COURT ERRED IN GRANTING MASSEY'S MOTION FOR SUMMARY JUDGMENT WHERE ATTENDANT CIRCUMSTANCES DEFUSED THE OPEN AND OBVIOUS DEFENSE."

{¶22} The tenant argues the open and obvious doctrine can be defused if there are "attendant circumstances" that unreasonably increased the typical risk of a harmful result, citing *Daher v. Bally's Total Fitness*, 11th Dist. No. 2014-L-061, 2015-Ohio-953, ¶ 27. She alleges two attendant circumstances exist. First, the site of the hazard was where she lived (and she was not provided alternate housing). Second, the landlord failed to provide a battery-operated emergency lighting system in the common area.

{¶23} The landlord urges the tenant has not explained how living at the bottom of the stairs or the lack of temporary lighting during a power outage are attendant circumstances, pointing to the *Daher* case and this court's *Dominic* case. The landlord reiterates that the tenant purposely descended a well-known set of four or five stairs in complete darkness with prior knowledge of a power outage.

{¶24} In the cited *Daher* case, the plaintiff fell on a wet floor in a locker room near a swimming pool (which condition was not caused by the defendant). She alleged there was no alternate route and no other means for her to protect herself. The Eleventh District noted that the question of whether something is open and obvious cannot always be decided as a matter of law because the "attendant circumstances" of a fall may create a material issue of fact as to whether the danger was open and obvious. *Daher,* 11th Dist. No. 2014-L-061 at ¶ 27.

> Attendant circumstances include any distraction that would divert the attention of a pedestrian in the same circumstances and thereby reduce the amount of care an ordinary person would exercise. In short, attendant circumstances are all facts relating to a situation such as time, place, surroundings, and other conditions that would unreasonably increase the typical risk of a harmful result of an event.

(Citations omitted.) *Id.*

{¶25} The Eleventh District found the plaintiff was confusing the doctrine of assumption of risk (which applies after evidence is produced supporting a prima facie

negligence case) with the open and obvious doctrine (which negates the duty element). *Id.* at ¶ 29, 31. Although the court noted there was no evidence of a lack of alternative routes, the court also held: "Under the open and obvious doctrine, it does not matter whether the invitee had a viable alternative to encountering the open and obvious danger." *Id.* at ¶ 32, quoting *Steiner v. Ganley Toyota Mercedes Benz*, 9th Dist. No. 20767, 2002-Ohio-2326, ¶ 13-20.

{¶26} This court has described the open and obvious doctrine as an exception to the element of duty and attendant circumstances as an "exception to the exception." *Dominic v. Marc Glassman, Inc.*, 7th Dist. No. 08-MA-66, 2008-Ohio-5936, ¶ 14. In defining attendant circumstances, we stated:

> Attendant circumstances are attractions or distractions that divert or obscure the attention of the pedestrian, thereby significantly enhancing the danger of the defect and contributing to the fall. Attendant circumstances are such that it would come to the attention of a reasonable invitee in the same circumstance and reduce the degree of care that an ordinary person would exercise. *Huey v. Neal*, 152 Ohio App.3d 146, 2003-Ohio-391[, 787 N.E.2d 23]. "[A]n attendant circumstance is the circumstance which contributes to a fall and a circumstance which is beyond the control of the injured party." *Backus v. Giant Eagle* (1996), 115 Ohio App.3d 155, 158[, 684 N.E.2d 1273]. Examples of possible attendant circumstances include heavy vehicular or pedestrian traffic in the vicinity of the sidewalk, poor lighting that causes shadows to be cast over the sidewalk, or a foreign article or substance on the sidewalk. *Hudak v. 510 Gypsy Lane, Inc.* (Mar. 26, 1999), 11th Dist. No. 98-T-0129.

Id. at ¶ 15.

{¶27} The tenant admits the two circumstances she raises did not distract her from noticing it was "pitch black" or realizing she could not see her hand in front her face. The tenant's argument, that the failure to provide battery-operated lighting is an attendant circumstance, is akin to saying darkness was an attendant circumstance of darkness. The tenant knew of the darkness (prior to leaving her building), and *the*

darkness did not conceal a defect. Rather, the darkness over the familiar staircase was the alleged danger. *See Mann v. Northgate Investors, L.L.C.*, 10th Dist. No. 11AP-684, 2012-Ohio-2871, 973 N.E.2d 772, ¶ 11 (when a tenant's departing guest fell while traversing stairs with inoperable lighting, the Tenth District observed the open and obvious doctrine, while not a bar to the negligence per se action due to statutory duty, was a bar to the common law negligence action), affirmed by *Mann*, 138 Ohio St.3d 175. In addition, the fact that the tenant lived at the site did not make the condition of darkness less obvious or more dangerous. *See also Daher,* 11th Dist. No. 2014-L-061 at ¶ 32 (it is irrelevant whether the invitee had a viable alternative route to avoid encountering the open and obvious danger).

{¶28} The landlord stresses the tenant waived the argument of attendant circumstances as the tenant failed to set forth any argument on attendant circumstances in response to the summary judgment motion. *See, e.g., Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 34 (the failure to raise an issue before the trial court waives the party's right to raise that issue on appeal). The tenant's response referred to a right to enter her residence and noted the landlord failed to provide her with alternate housing. Although, this was mentioned in her statement of facts, the tenant did not assert these facts as an alleged reason the landlord failed to establish the open and obvious doctrine regarding her negligence claim. Nor did she cite to the doctrine of attendant circumstances. The legal arguments presented in appealing a summary judgment are to be presented to the trial court first. *See id.; Stanton v. Marc's Store*, 7th Dist. No. 15 MA 49, 2015-Ohio-5551, ¶ 35.

{¶29} This is more significant when read in light of the tenant's specific response to the landlord's argument that the darkness over the tenant's familiar staircase during a known power outage was an open and obvious hazard obviating the landlord's duty. Specifically, the tenant argued the landlord violated a statute, which defined the duty, and thus negligence per se barred the application of the open and obvious doctrine. This may have suggested to the trial court the tenant was only contesting the application of the open and obvious doctrine to her negligence per se

claim, i.e., she was not contesting its application to her common law negligence claim.

{¶30} In sum, because she has waived this argument, we overrule the tenant's first assignment of error, which applies to her common law negligence claim.[1] Before addressing the second assignment of error on contributory negligence, we address the negligence per se claim.

NEGLIGENCE PER SE

{¶31} The tenant's third assignment of error provides:

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY GRANTING MASSEY'S MOTION FOR SUMMARY JUDGMENT WHERE THE TRIAL COURT APPLIED THE 'OPEN AND OBVIOUS' DEFENSE TO A NEGLIGENCE PER SE CLAIM."

{¶32} Negligence per se arises where there is a violation of a statute which sets forth a positive and definite standard of care so that the violation conclusively proves the defendant violated a duty to the plaintiff. *Mann*, 138 Ohio St.3d 175 at ¶ 29. "The words of the statute tell the tale—whether a statutory violation gives rise to negligence per se 'depends upon the degree of specificity with which the particular duty is stated in the statute'." *Id.* at ¶ 28.

{¶33} As negligence per se involves a statute defining the defendant's duty, the standard of care in the particular statute supplants the reasonable person standard; the statute represents a legislative declaration of the standard of care. *Id.* at ¶ 29. Accordingly, as set forth supra, a defendant cannot use the common law open and obvious doctrine to eliminate such a statutory duty. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 14 (the open and obvious doctrine does not override the statutory duty). In other words,

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[1] At the end of this assignment of error, the tenant contends the court erred in applying the *Leighton* and *Raflo* cases, which held a plaintiff who falls on an extra high step can be "charged with knowledge" of the step's condition due to her recent use of the step. *Raflo*, 34 Ohio St.2d 1 at ¶ 2 of syllabus, following *Leighton*, 149 Ohio St. 72. Notably, this is not a case involving a defective condition unnoticed by the tenant when previously traversing the stairs; there was no issue with the staircase besides the known lack of lighting, i.e., the tenant does not claim a lack of knowledge. *Compare Carter v. Forestview Terrace, L.L.C.*, 8th Dist. No. 103165, 2016-Ohio-5229, ¶ 28 (tenant claimed to be unaware contractor would be shutting off electric). Besides charging a plaintiff with knowledge of a condition, *Raflo* and *Leighton* dealt with contributory negligence. We therefore discuss these cases under the second assignment of error, which deals with contributory negligence.

negligence per se obviates the open and obvious doctrine. *See Mann*, 138 Ohio St.3d 175 at ¶ 24, 33; *Robinson*, 112 Ohio St.3d 17 at ¶ 25 (the open and obvious doctrine does not dissolve the statutory duty to repair).

{¶34} To the extent the trial court's decision does not make this distinction, Appellant's argument would have merit: the open and obvious doctrine cannot be used to negate a negligence per se claim. We must proceed to address whether there was a genuine issue of material fact as to the tenant's negligence per se claim.

{¶35} Negligence per se is not equivalent to strict liability or liability per se. *Mann*, 138 Ohio St.3d 175 at ¶ 27. For instance, negligence per se is "different from strict liability, in that a negligence-per-se violation will not preclude defenses and excuses, unless the statute clearly contemplates such a result. * * * Most statutes are construed to require that the actor take reasonable diligence and care to comply, and if after such diligence and care the actor is unable to comply, the violation will ordinarily be excused." *Robinson*, 112 Ohio St.3d 17 at ¶ 23. "A plaintiff tenant would also have to show that 'the landlord received notice of the defective condition of the rental premises, that the landlord knew of the defect, or that the tenant had made reasonable, but unsuccessful, attempts to notify the landlord'." *Mann*, 138 Ohio St.3d 175 at ¶ 12, quoting *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 26, 427 N.E.2d 774 (1981). *See also Sikora v. Wenzel*, 88 Ohio St.3d 493, 497, 727 N.E.2d 1277 (2000) (lack of notice is among the legal excuses available to a landlord).

{¶36} Demonstration of the defendant's violation of a statute providing for negligence per se satisfies the plaintiff's obligation to show duty and breach. *Lang*, 122 Ohio St.3d 120 at ¶ 15. The plaintiff must then show an injury was proximately caused by the violation. *Mann*, 138 Ohio St.3d 175 at ¶ 12. But even before all of this, a violation of the statute must be established. The tenant's complaint alleged a violation of R.C. 5321.04(A)(1), (2), (3), and (4), which provide:

> (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 condition;
>
> (3) Keep all common areas of the premises in a safe and sanitary condition;
>
> (4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by the landlord; * * *

Compare R.C. 5321.04(A)(6) ("Supply running water, reasonable amounts of hot water, and reasonable heat at all times, except where * * *").

{¶37} The Supreme Court has specified that a landlord's violation of the statutory duty in division (A)(1), (A)(2), or (A)(3) is negligence per se. *See, e.g., Mann*, 138 Ohio St.3d 175 at ¶ 32-33 (a landlord's violation of division (A)(3) is negligence per se as it is no less specific than division (A)(1) and (A)(2), the violation of which were previously ruled to result in negligence per se); *Sikora*, 88 Ohio St.3d at 498 (a landlord's violation of division (A)(1) or (A)(2) is negligence per se); *Shroades*, 68 Ohio St.2d at 25 (a landlord's violation of division (A)(2) is negligence per se). Division (A)(4) provides at least as much specificity as (A)(1), (2), or (3), and thus, its violation would similarly result in negligence per se. *See, e.g., McKenzie v. FSF Beacon Hill Assoc., LLC.*, 10th Dist. No. 05AP1194, 2006-Ohio-6894, ¶ 11; *Trammell v. McDonald*, 3d Dist. No. 4-04-15, 2004-Ohio-4805, ¶ 12.

{¶38} The tenant contends reasonable minds could differ on whether the landlord violated a statutory duty by failing to provide battery-operated emergency lighting (or alternate residency). The landlord argues there was no breach of a statutory duty and thus no negligence per se, in which case the open and obvious doctrine persists. There is no question there was no light in the common area over the stairs at the time of the fall, and no temporary light was provided. For our purposes, there is no dispute the landlord had notice of the power outage; the tenant testified at deposition she reported the power outage to the landlord's agent the day before the fall. The question is whether the landlord had a statutory duty to provide

battery-operated lighting at the stairs in the common area during the second night of a power outage caused by actions of a third-party.

{¶39} Concerning division (A)(1), the tenant failed to cite this court or the trial court to any "applicable building, housing, health, and safety codes that materially affect health and safety" in order to raise an issue under division (A)(1). There is thus no evidence this statutory provision was violated here.

{¶40} As to division (A)(4), this court concludes there is no evidence the landlord failed to "[m]aintain in a "good and safe working order and condition" the "electrical * * * fixtures * * * supplied * * * by the landlord" over the stairs. Rather, the electrical fixtures were in good and safe working order and condition, but there was no power in the building due to a third-party's act regarding the power lines.

{¶41} Regarding the first portion of division (A)(2), there is no evidence the landlord could have repaired the power outage and no evidence the light fixture or step needed to be repaired. Regarding the second portion of division (A)(2), this court concludes a lack of light in the common area stairs during an external power outage does not render the premises unfit or uninhabitable. The premises remained fit and habitable.

{¶42} This leaves the question of whether the failure to provide temporary lighting for the staircase constitutes a failure to keep this common area of the premises in a safe condition under division (A)(3) of R.C. 5321.04. The stairs lead to the tenant's basement apartment. It was said to be "pitch black" at the staircase so the tenant could not see her hand in front of her face.

{¶43} In *Mann*, the Tenth District found (A)(3) could be used for a negligence per se claim in a case where: the tenant's guest fell upon reaching the bottom of the staircase at night; the lights in the hallway were inoperable; and the landlord had been informed of this condition. *See Mann v. Northgate Investors, L.L.C.*, 10th Dist. No. 11AP-684, 2012-Ohio-2871, 973 N.E.2d 772. The Supreme Court affirmed, agreeing the landlord owed the same statutory duty to a guest as owed to a tenant and the open and obvious doctrine could not be applied to this (A)(3) claim as it involved negligence per se. *Mann*, 138 Ohio St.3d 175. From this, the tenant suggests a reasonable person can find the total darkness over stairs required to be

traversed in order to enter the tenant's apartment rendered the common area unsafe for purposes of R.C. 5321.04(A)(3), and thus, a reasonable person could find the statutory duty to keep the common area safe was technically violated. Due to the *Mann* case, it would appear a dark internal staircase can violate the duty to keep the common area safe. (Whether a defense or excuse existed is a different question.)

{¶44} As for continued references to the tenant's knowledge of the condition, this would not transform an unlighted staircase from unsafe to safe or meet a statutory duty imposed on a landlord. If knowledge of a peril can be used to show a danger is open and obvious but the open and obvious doctrine cannot be used to eliminate duty in a negligence per se case, then the tenant's prior complaint to the landlord cannot satisfy the landlord's statutory duty to keep the common area safe.

{¶45} Two landlord-tenant cases dealing with proximate cause may illustrate the irrelevance of the tenant's knowledge to a case where negligence per se is used to satisfy duty and breach. In one case, the plaintiff-tenant sold appliances to people who broke two stairs leading to her apartment while moving the appliances. The plaintiff knew of the issue and the landlord's agent was notified. A few weeks later, a third step collapsed and the plaintiff fell through the opening. The Court found the suit involved negligence per se and proceeded to uphold the jury's decision finding unbroken causation as it was foreseeable the tenant would use the stairs. *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 26, 427 N.E.2d 774 (1981). In another case, the tenant placed a board over a hole in concrete steps and told his landlord the front steps were unsafe. Although the tenant also had a back and side entrance, he used the front steps and was injured when the outer portion of the steps collapsed, resulting in negligence per se due to a violation of a statutory duty under R.C. 5321.04. The Supreme Court agreed it was a jury question whether the causal connection was intact, i.e., whether the landlord should have reasonably foreseen the tenant would use the stairs. *Anderson v. Ceccardi*, 6 Ohio St.3d 110, 115, 451 N.E.2d 780 (1983), syllabus at ¶ 2. (The remainder of the holding is outlined in the next section on contributory negligence.)

{¶46} In these cases, the tenant clearly knew of an unsafe condition (as the tenant complained about the condition to the landlord). The courts did not find the

landlord's statutory duty to be met (on some knowledge or warning theory); instead, the courts moved to the next element and found factual questions as to proximate cause. *See Anderson*, 6 Ohio St.3d 110; *Shroades*, 68 Ohio St.2d 20. *See also Mann*, 138 Ohio St.3d 175 at ¶ 2 ("Despite the darkness," the tenant's guest "decided to proceed down" two sets of stairs). A tenant's decision to proceed down stairs in the complete darkness after gaining knowledge of a condition (which puts the property in noncompliance with a statutory duty to keep common areas safe) does not eliminate the landlord's statutory duty. These facts are more relevant to the defense of contributory negligence, which is discussed in the final section.

{¶47} Similarly, the fact that the landlord did not cause the darkness would not be dispositive of the question of whether the common area was safe. (For instance, if someone broke the light with a bat, the landlord's duty would not be absolved.) According to the tenant's position, this does not eliminate a duty to ensure the common area is safe. In other words, the common area does not lose its quality of unsafeness merely because the reason for the darkness is a power outage; the cause of the darkness does not alter the nature of the common area.

{¶48} We recognize *Mann* did not involve an external power outage. We also recognize how negligence per se is different from strict liability as the landlord is entitled to utilize legal excuses. *Robinson*, 112 Ohio St.3d 17 at ¶ 23; *Sikora*, 88 Ohio St.3d at 497. The landlord is required to "take reasonable diligence and care to comply" with the statutory duty to keep the common area safe. *See id.* However, "if after such diligence and care the actor is unable to comply, the violation will ordinarily be excused." *Id.* An excuse may prevail if no reasonable mind could find the landlord failed to use reasonable diligence and care to comply with the statute on the second night of the power outage, with recognition the tenant was warned of the condition. For instance, one could argue the provision and maintenance of temporary lighting in the common area was too extraordinary to be considered "reasonable diligence and care" by a reasonable person where there is a common expectation the power will be restored soon.

{¶49} Still, the landlord did not raise this doctrine of excuse. The landlord did raise a defense. Just as a negligence per se claim does not preclude the defendant's

presentation of a legal excuse, it also does not preclude the defendant's presentation of defenses. *Robinson*, 112 Ohio St.3d 17 at ¶ 23. This leads to the trial court's alternative holding in support of summary judgment: contributory negligence. Our resolution of this assignment of error is not dispositive due to our holding on the doctrine below.

CONTRIBUTORY NEGLIGENCE

{¶50} The tenant's second assignment of error provides:

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING MASSEY'S MOTION FOR SUMMARY JUDGMENT WHERE CONTRIBUTORY NEGLIGENCE MUST BE DETERMINED BY THE JURY."

{¶51} The trial court found the tenant was contributorily negligent when she intentionally stepped into total darkness and concluded this negligence was an absolute bar to her recovery. The court cited *Jeswald*, where the Ohio Supreme Court held: " 'Darkness' is always a warning of danger, and for one's own protection it may not be disregarded. Its disregard may preclude the recovery of damages for personal injuries. * * * plaintiff herself, in the described circumstances, was chargeable with negligence which was a direct contributing cause of her misfortune." *Jeswald v. Hutt*, 15 Ohio St.2d 224, 227-228, 239 N.E.2d 37 (1968).

{¶52} The trial court referred to the "step-in-the-dark" rule, citing *Posin* for the general holding: "one who, from a lighted area, intentionally steps into total darkness, without knowledge, information, or investigation as to what the darkness may conceal, is guilty of contributory negligence as a matter of law." *See Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 276, 344 N.E.2d 334 (1976). The *Posin* Court found a factual question for a jury remained on the question of contributory negligence, instructing courts to consider whether there was conflicting evidence as to the intentional nature of the step into the dark, the lighting conditions and degree of darkness, the nature and appearance of the premises, or other circumstances tending to disprove a voluntary, deliberate step into known darkness. *See id.* The trial court found summary judgment was proper under this rule because there was no conflicting evidence on these topics.

{¶53} The tenant asserts that the trial court's decision is contrary to the more recent statutory scheme for cases involving contributory negligence; she states R.C. 2315.33 and R.C. 2315.34 show the issue is one of comparative negligence that should generally be left for a jury. *See Trowbridge v. Franciscan Univ. of Steubenville*, 7th Dist. No. 12 JE 33, 2013-Ohio-5770, ¶ 17 (comparative negligence is "usually" a question for a jury). The tenant also notes the defense of "assumption of risk" is not a complete bar to recovery as it has been merged with contributory negligence. Pursuant to the comparative negligence statute,

> The contributory fault of a person does not bar the person as plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action. The court shall diminish any compensatory damages recoverable by the plaintiff by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff as determined pursuant to section 2315.34 of the Revised Code.

R.C. 2315.33. The section cited within this statute then provides:

> If contributory fault is asserted and established as an affirmative defense to a tort claim, the court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories * * *

R.C. 2315.34 (and the answers to interrogatories shall specify: the total compensatory damages that would have been recoverable but for the plaintiff's conduct; the portion representing economic loss; the portion representing noneconomic loss; and the percentage of tortious conduct attributable to all persons as per R.C. 2307.23). Pursuant to R.C. 2307.23(A), the court in a non-jury action or the jury shall specify in interrogatories: (1) the percentage of tortious conduct which

proximately caused the injury that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this action; and (2) the percentage of tortious conduct which proximately caused the injury that is attributable to each person from whom the plaintiff does not seek recovery in this action. The sum of the percentages of tortious conduct shall equal one hundred per cent. R.C. 2307.23(B).

{¶54} Under Ohio common law, contributory negligence was a complete defense which totally barred the plaintiff's recovery. *Wilfong v. Batdorf*, 6 Ohio St.3d 100, 103, 451 N.E.2d 1185 (1983), overruled on other grounds by *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 108, 522 N.E.2d 489 (1988). "No matter what the degree of plaintiff's negligence, however slight, a plaintiff who was contributorily negligent could not recover damages." *Wilfong*, 6 Ohio St.3d at 103.

{¶55} This defense was changed by the enactment of Ohio's Comparative Negligence Act, effective June 20, 1980, calling for apportionment of fault. *See* Former R.C. 2315.19. *See also Wilfong*, 6 Ohio St.3d at 103-104 (and modifying the "unjust" common law to coincide with the comparative negligence statute). In the 1983 *Anderson* case, involving the landlord's negligence per se for failing to keep steps in repair, the Supreme Court reevaluated the defense of implied assumption of risk in light of the comparative negligence statute. *Anderson*, 6 Ohio St.3d at 113, citing R.C. 2315.19 (the prior comparative negligence statute).

{¶56} Previously, assumption of risk and contributory negligence were separate (but overlapping) defenses, and both resulted in a complete bar to recovery. *Id.* at 112-113. Upon the enactment of the comparative negligence statute, however, the defense of assumption of risk merged with the defense of contributory negligence. *Id.* "The conduct previously considered as assumption of risk by the plaintiff shall be considered by the trier of the fact under the phrase 'contributory negligence of the person bringing the action' under R.C. 2315.19, and the negligence of all parties shall be apportioned by the court or jury pursuant to that statute." *Id.* at 112-113.

{¶57} In the *Raflo* and *Leighton* cases mentioned earlier, the Supreme Court found summary judgment was warranted where the plaintiff had recently and

successfully traversed the allegedly defective step to enter but blamed the step on the fall incurred upon exit. These cases involved the application of the contributory negligence defense. *See, e.g., Raflo v. Losantiville Country Club,* 34 Ohio St.2d 1, 4, 295 N.E.2d 202 (1973) (affirming summary judgment motion granted "on the ground that appellant was, as a matter of law, guilty of contributory negligence proximately causing her injuries"); *Leighton v. Hower Corp.*, 149 Ohio St. 72, 74, 82-83, 77 N.E.2d 600 (1948) (upon the defendant's argument that the "injury was caused by plaintiff's contributory negligence," the Court held "evidence does reflect upon the question of plaintiff's sole negligence" and the plaintiff's statement "that she was temporarily oblivious of a step which a few minutes before she had used shows a want of due care on her part"). *See also Perry v. Eastgreen Realty Co.*, 53 Ohio St.2d 51, 54, 372 N.E.2d 335 (1978) (*Raflo* held "that 'the surrounding circumstances' of the injuries incurred therein were insufficient 'to raise a jury question' as to whether the plaintiff had been contributorily negligent.").

{¶58} These cases predated Ohio's adoption of comparative negligence. Similarly, the law of contributory negligence is not the same as it was at the time of *Jeswald* and *Posin* (the other cases relied upon by the trial court). The concept that a step into darkness can result in contributory negligence no longer automatically precludes recovery.

{¶59} Nevertheless, as the landlord points out, the advent of comparative negligence does not necessarily preclude summary judgment on the defense of contributory negligence (or assumption of risk). The tenant voluntarily encountered a completely dark staircase without a flashlight (or other illuminating device) during a power outage which she knew about before she left her apartment. If reasonable minds could only conclude the tenant's negligence was more than 50%, then summary judgment can be granted for the landlord. The tenant acknowledges summary judgment can be granted where the plaintiff's "negligence was so extreme that no reasonable person could conclude that [the plaintiff] was entitled to recover," citing *Knopp v. Dayton Machine Tool, Co.*, 7th Dist. No. 03 CO 60, 2004-Ohio-6817, ¶ 23. The tenant believes her negligence was not extreme as she lived at the bottom

of the stairs; she suggests reasonable minds could reach different conclusions as to whether her own negligence exceeded 50%.

{¶60} The Supreme Court has ruled that issues of comparative negligence are for the jury to resolve unless the evidence is "so compelling" that reasonable minds can only conclude that the plaintiff's negligence is greater than the combined negligence of other actors. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 646, 597 N.E.2d 504 (1992). In *Knopp*, we acknowledged it is "a rare circumstance under which a trial court can take away a jury's duty to apportion fault." *Knopp*, 7th Dist. No. 03 CO 60 at ¶ 39. Still, we then found such a rare circumstance due to a dangerous act engaged in by the plaintiff. *Id.* Even where the open and obvious doctrine does not apply to eliminate duty, the open and obvious character of a danger can be used in the analysis regarding contributory negligence and assumption of risk. *Simmers*, 64 Ohio St.3d at 646-647 (ruling an independent contractor cannot use the open and obvious doctrine a landowner can use and then finding a genuine issue of material fact as to contributory negligence or assumption of risk where the contractor created an unguarded hole in an abandoned railroad bridge).

{¶61} In the case before us: the landlord did not cause the external power outage; the landlord could not fix the external power outage; there was no issue with a warning by the landlord; the tenant knew of the power outage, which first began on the prior day; she called the landlord to report the power outage; the steps were not in need of repair; there is no evidence the steps were unusual in height or depth; the tenant knew the steps were there and was familiar with the steps; the staircase was not lengthy (four or five steps); there was nothing wrong with the light fixture; a railing was provided; the tenant previously traversed the steps in the dark during this power outage; the landlord could reasonably expect the power to be restored soon when considering whether to configure a temporary lighting system; the landlord could reasonably expect this tenant to use portable illumination if traversing the common area stairs at night; the tenant left her apartment during the power outage and returned hours later; the tenant voluntarily began her descent down the stairs in complete darkness at 10:00 p.m.; and the tenant used no flashlight or other illumination (such as a cell phone).

{¶62} Viewed in the light most favorable to the tenant as the non-movant, reasonable minds can only conclude her negligence was greater than 50%. This assignment of error is overruled. For the foregoing reasons, the trial court's judgment is affirmed as the landlord was entitled to summary judgment.

Donofrio, J., concurs.

DeGenaro, J., concurs.