**[Cite as *Cika-Heschmeyer v. Young*, 2019-Ohio-502.]**

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

AUNDREA CIKA-HESCHMEYER,

Plaintiff-Appellant,

v.

WILBUR YOUNG,

Defendant-Appellee.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 18 MA 0048**

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Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2017 CV 686

**BEFORE:**
Carol Ann Robb, Gene Donofrio, Kathleen Bartlett, Judges.

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**JUDGMENT:**
Affirmed.

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*Atty. Jeffrey A. Kurz*, 42 N. Phelps Street, Youngstown, Ohio, 44503 for Plaintiff-Appellant and

*Atty. Adam E. Carr*, Atty. *Eric K. Grinnell*, 5824 Akron-Cleveland Rd., Ste. A, Hudson, Ohio 44236, for Defendant-Appellee.

Dated: January 22, 2019

**Robb, P.J.**

**{¶1}** Plaintiff-Appellant Aundrea Heschmeyer appeals the decision of Mahoning County Common Pleas Court granting summary judgment for Defendant-Appellee Wilbur Young. The issue in this appeal is whether the staircase lacking a handrail was open and obvious. For the reasons expressed below, the trial court's order granting summary judgment for Appellee is affirmed.

Statement of Facts and Case

**{¶2}** Appellee listed his residence at 1886 Fifth Avenue, Youngstown, Ohio for sale in the fall of 2015. Appellant first visited the house in late 2015 and viewed the house a second time on January 22, 2016. There was snow on the ground that day and Appellant, her husband, and the real estate agent, Elayne Bozick, had to walk through the snow to enter the house. Bozick Depo. 10-12. Once inside all three wiped their shoes on a throw rug. Bozick Depo. 13. The real estate agent and Appellant's husband proceeded to go down the steps to the basement. Bozick Depo. 15.

**{¶3}** This basement stairwell is wider than a normal stairwell and the hand rail had been removed. Bozick Depo. 22. There are approximately five or six steps then a landing and then another set of steps. Bozick Depo. 16. The real estate agent and Appellant's husband successfully traversed the first set of steps. Bozick Depo. 15; Aundrea Heschmeyer Depo. 25. Appellant proceeded after them, but on the first step her feet slipped out from under her and she fell down the first set of steps. Aundrea Heschmeyer Depo. 2; 275. The fall caused broken ribs, a collapsed lung, concussion, and contusions.

**{¶4}** As a result of the fall and injuries, Appellant filed a complaint sounding in negligence against Appellee. 3/17/17 Complaint. Appellee filed an answer and following discovery, filed a motion for summary judgment. 6/16/17 Answer; 1/26/18 Defendant's Motion for Summary Judgment. Appellee acknowledged there was no handrail; it had been removed for painting and work on the stairwell. He argued the danger was open and obvious and there was no duty to warn of the steps because they were open and obvious. 1/26/18 Defendant Motion for Summary Judgment. He also

cited to the Ohio Administrative Code indicating that structures built before 1970, which this house was, are not required to have handrails in stairwells. 1/26/18 Defendant Motion for Summary Judgment.

**{¶5}** Appellant filed a motion in opposition to summary judgment. 3/28/18 Opposition Motion. Appellant acknowledged she was a business invitee. However, she claimed the grandfathered status of no handrails was removed when the property was used by Appellee as a foster home for kids. 3/28/18 Opposition Motion. This use required Appellee to strictly comply with the building codes and as such, the stairwell required a handrail. 3/28/18 Opposition Motion. Appellant claimed the lack of a handrail is evidence of negligence. 3/28/18 Opposition Motion.

**{¶6}** Appellee filed a reply arguing the staircase is an open, obvious and patent danger and therefore, he is entitled to summary judgment. 4/9/18 Reply.

**{¶7}** The trial court granted the motion for summary judgment. 4/12/18 J.E. It concluded there was no genuine issue of material fact and Appellee was entitled to judgment as a matter of law. 4/12/18 J.E. The trial court found the open and obvious doctrine was applicable and Appellee had no duty to warn Appellant. 4/12/18 J.E.

**{¶8}** Appellant timely appeals raising five assignments of error.

Assignments of Error One Through Four

**{¶9}** Appellant addresses the first four assignments of error together. These assignments provide:

"Did the trial court err when it granted summary judgment against Plaintiff when the evidence and testimony demonstrated genuine issues of material fact that a reasonable trier of fact could find in Plaintiff's favor?

"Did the trial court err when it applied the Open and Obvious Doctrine despite evidence and testimony that multiple conditions were hidden, concealed from view, or undiscoverable upon ordinary inspection?

"Did the trial court err when it applied the Open and Obvious Doctrine to dangers, at least some of which were dynamic in nature due to active negligent acts by the premises owner?

"Did the trial court err when it applied the Open and Obvious Doctrine despite evidence and testimony that the existence of surrounding attendant

circumstances distracted Appellant from exercising the degree of care an ordinary person would have exercised to avoid the dangers?"

**{¶10}** In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we are governed by Civ.R. 56(C), the same test the trial court uses in determining whether summary judgment was proper. *Id*. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law.

**{¶11}** The trial court determined, as a matter of law, the condition of the premises was open and obvious and thus, Appellant was not liable for negligence. 4/12/18 J.E. Appellant argues that decision is incorrect because the staircase was wider than normal, had no handrail, and the steps were freshly painted and glossy. She claims there was a duty to warn about this condition.

**{¶12}** To establish a cause of action for negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998). The parties agree Appellant is a business invitee since Appellee was selling his house and Appellant came to the house to determine if she wished to purchase the house. A business owner owes a business invitee a duty of ordinary care in maintaining the premises in a reasonably safe condition so that invitees are not subjected to unreasonable dangers. *Paschal v. Rite Aid Pharmacy Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). A property owner, however, is under no duty to protect business invitees from dangers that "are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them." *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph one of the syllabus.

**{¶13}** "The rationale underlying the open and obvious doctrine is "'the 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 v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶ 5, quoting *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992). "When applicable * * *, the open-and-obvious doctrine * * * acts as a complete bar to any negligence claims." *Armstrong*.

**{¶14}** The open and obvious doctrine has been applied to situations where the person not only would reasonably be expected to discover a hazard, but where the person had actual knowledge of the particular hazard or condition. *Mounts v. Ravotti*, 7th Dist. No. 07MA182, 2008–Ohio–5045, ¶ 51 (where tenant was aware of water on steps prior to fall and he had slipped numerous times in the past, condition was open and obvious); *Stewart v. AMF Bowling Ctrs., Inc.*, 3d Dist. No. 5–10–16, 2010–Ohio–5671, ¶ 16–17 (where plaintiff was aware of a step-down leading to bowling lanes, had previously been to the bowling center and was aware of its set-up, hazard was open and obvious); *see also Hayes v. Murtha*, 10th Dist. No. 96APE04–512, 1996 WL 589268 (Oct. 10, 1996) (summary judgment properly awarded where plaintiff knew "that the sidewalks were uneven and over-grown with shrubbery and that the weather conditions overnight had caused the sidewalks to be ice-covered."). Furthermore, the failure to avoid a known peril is not excused by the fact that one forgot about it or ignored it. *St. Germain v. Newell*, 3d Dist. No. 9-15-14, 2015-Ohio-3713, ¶ 25 (Injured party was aware railing on steps was loose.), citing *Raflo v. Losantiville Country Club*, 34 Ohio St.2d 1, 3 (1973).

**{¶15}** Here there was testimony from the real estate agent that Appellant had gone up and down these steps the first time they viewed the house. Bozick Depo. 8-9. She did not recall if the handrail was up the first time; however, she indicated the condition was the same the first and second time they viewed the house. Bozick Depo. 19. Bozick specifically indicated she had noticed that the steps had been recently painted the first time they visited the house. Bozick Depo. 19. Appellant testified she did not recall whether they used the stairs and went downstairs during the first visit. Aundrea Heschmeyer Depo. 15.

**{¶16}** This testimony, even when viewed in the light most favorable to Appellant, indicates Appellant should have been aware of the width of the staircase and the fact

that it was freshly painted. Thus, the width of the stairwell and the fresh paint can be considered open and obvious partially because there is uncontroverted testimony she had previously traversed the steps in that condition.

**{¶17}** However, the testimony does not establish whether there was a handrail during the first visit. Case law indicates that the lack of handrail is an open and obvious condition. The Ninth Appellate District has stated when the lack of a handrail is clearly visible to the observer and can be seen simply by glancing at the stairwell, the lack of a handrail is open and obvious as a matter of law. *Ault v. Provenza*, 9th Dist. No. 95CA006210, 1996 WL 255889 (May 15, 1996) (summary judgment). Similarly, the Third Appellate District has held that the lack of a guardrail in a hayloft in a barn was an open and obvious condition given the deposition testimony and evidence. *Primavera v. Guthery*, 3d Dist. No. 9-96-11, 1996 WL 355042 (June 24, 1996) (summary judgment). The court even went as far as to say the injured party's awareness of each specific hazard present in the barn was not necessary for it to conclude as a matter of law that the overall hazardous condition of the barn was an open and obvious danger. *Id*. Moreover, this court has even concluded that the lack of a railing on a second floor balcony of a home under construction was open and obvious. *Salanki v. Doug Freshwater Contracting, Inc.*, 7th Dist. No. 06-JE-39, 2007-Ohio-6703, ¶ 75, 79 (summary judgment).

**{¶18}** Here given the testimony and evidence the lack of a handrail is open and obvious. Furthermore, this reasoning equally applies to the width of the staircase and the fact that it was newly painted. The evidence indicates these conditions were open and obvious even if Appellant had not traversed the steps on her prior visit. Accordingly, these four assignments of error are meritless.

Fifth Assignment of Error

"Did the trial court err when it granted Appellee's Motion for Summary Judgment despite Appellee's violations of Ohio Adm.Code 4101:1-10 and Ohio Adm.Code 4101:8-3-01 §311.1.1 as they related to the stairwell at issue in this case?"

**{¶19}** This assignment of error addresses the alleged failure to comply with the Ohio Administrative Code requirements for buildings/dwelling to have handrails in stairwells. Rules regarding the use of railings in stairwells are in the Ohio Administrative

Code under the Ohio Building Code. The Ohio Building Code contains the Ohio Residential Code. The residential code specifically governs the erection, construction, repair, alteration, and maintenance of residential buildings in Ohio.

**{¶20}** Appellant cites this court to a section of the Ohio Residential Code, Ohio Adm.Code 4101:8-3 § 311.7.7. Section 311 is titled Means of Egress. Subsection 7 governs stairways and subsection 7.7 governs handrails. That section states a handrail must be provided on at least one side of each continuous run of treads or flight with four or more risers. Ohio Adm.Code 4101:8-3 §311.7.7. The subsection on handrails also dictates the height, continuity, grasping and exterior wood/plastic composite of handrails. Ohio Adm.Code 4101:8-3 §311.7.7.1-4. Appellant contends Appellee failed to comply with subsection 7.7 and thus, he was negligent.

**{¶21}** Appellee cites this court to a portion of the Ohio Adm.Code Ohio Building Code that he contends indicates the residence does not need to have handrails because of a grandfather clause. The grandfather clause is in the Ohio Building Code, not the Residential Code and it states that existing stairways in an existing structure shall not be required to comply with the requirements of a new stairway as "outlined in Sections 1011, 1014, and 1015." Ohio Adm.Code 4101:1-34 §3408.3 (Section 3408 is titled Change of Occupancy.) Section 1011 dictates the requirements for Stairways and subsection 11 of that section governs handrails stating they need to be on each side of a stairway. However, one exception is listed for dwelling units; dwelling units only need a handrail on one side of a stairway. Section 1014 governs handrail requirements such as graspability, height, fitting, and other requirements. Section 1015 governs guards. Appellee argues section 3408.3 indicates he was not negligent.

**{¶22}** Appellant counters the grandfather clause arguing Appellee was required to comply with the handrail requirement when he used the home as a foster home. Appellant asserts that although the home is no longer used as a foster home, Appellee cannot remove the handrail and claim the grandfather clause now applies.

**{¶23}** The Ohio Supreme Court has explained, a violation of an administrative rule does not constitute negligence per se. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 20; *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 568, 697 N.E.2d 198 (1998). It may, however, be admissible as evidence of

negligence. *Lang*. Because a violation of the code does not amount to negligence per se, the open and obvious doctrine is applicable and can be used as a defense to violations of the Ohio Administrative Code. *Id*. at ¶ 24 (addressing violations of the Ohio Basic Building Code).

**{¶24}** As discussed in the first four assignments of error, the lack of a handrail was open and obvious as a matter of law. Therefore, any alleged violation of the Ohio Administrative Code does not alter that determination. This assignment of error is meritless.

## Conclusion

**{¶25}** All assignments of error are meritless. The trial court's grant of summary judgment for Appellee is affirmed.

Donofrio, J., concurs.

Bartlett, J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**