[Cite as *Stenger v. Timmons*, 2012-Ohio-6163.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles Stenger,	:	
Plaintiff-Appellant,	:	No. 12AP-306 (C.P.C. No. 09CV-1442)
v.	:	(ACCELERATED CALENDAR)
Thomas Timmons et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 27, 2012

Jeffrey H. Verwholt, for appellant.

James E. Featherstone, for appellees.

APPEAL from the Franklin County Court of Common Pleas

PER CURIAM.

{¶ 1} Plaintiff-appellant, Charles Stenger, appeals from a judgment of the Franklin County Court of Common Pleas concluding, on remand, that violation of the Codified Ordinances of the city of Grove City, Ohio ("Grove City Code") Section 521.04 is not negligence per se. Although plaintiff does not delineate a specific assignment of error, his brief generally asserts the common pleas court erred in so concluding. Because the trial court properly concluded negligence per se does not apply to a violation of Grove City Code Section 521.04, we affirm.

I. Facts and Procedural History

{¶ 2} Plaintiff's action was appealed once prior to the present appeal, and the pertinent facts and procedure are set forth in this court's decision resulting from the first

appeal. *See Stenger v. Timmons*, 10th Dist. No. 10AP-528, 2011-Ohio-1257 ("*Stenger I*"). At approximately 3:30 a.m. on April 11, 2007, plaintiff was returning to his vehicle after delivering newspapers to defendant-appellee, Thomas Timmons, and defendant's neighbor. *Id*. at ¶ 2. As plaintiff approached his vehicle, he noticed a tree in front of defendant's residence had been cut down, and he then tripped and fell over on branches from the same tree that extended onto the sidewalk in front of defendant's home, resulting in injury to plaintiff. Although a street lamp was in the area where plaintiff fell, it had been inoperable for some time. *Id*.

{¶ 3} Plaintiff filed a negligence action against defendant on January 30, 2009, contending defendant was negligent in failing to remove the tree limbs from the sidewalk area in front of his residence. Defendant ultimately responded with a motion for summary judgment, asserting that any hazard the tree branches posed in extending onto the sidewalk was open and obvious. The trial court agreed with defendant's contentions and on March 15, 2010 granted defendant's summary judgment motion, finding the hazard to be open and obvious and further concluding the darkness in the area should have acted as a warning of danger. *Id*. at ¶ 3. After the trial court journalized its decision, plaintiff appealed and presented subjects of discussion, the third of which contended the trial court erred in granting summary judgment because defendant's violation of Grove City Code Section 521.04 is negligence per se to which the open and obvious doctrine does not apply.

{¶ 4} Although *Stenger I* agreed with plaintiff that the open and obvious doctrine does not apply to a statute the violation of which is negligence per se, it observed "neither the parties nor the trial court addressed this issue in the proper legal context." *Id*. at ¶ 11. Accordingly, *Stenger I* determined the matter should be returned to the trial court to consider whether defendant's "actions constituted negligence per se." *Id*. at ¶26. If so, *Stenger I* advised "the open and obvious doctrine does not apply to absolve [defendant] of his duty toward [plaintiff]," meaning "the trial court may not render summary judgment on the basis of the open and obvious doctrine." *Id*. By contrast, *Stenger I* stated, "[i]f the trial court finds [defendant's] actions did not constitute negligence per se, the open and obvious doctrine may be applied to the present case, and the trial court may again render summary judgment on that basis." *Id*.

{¶ 5} On remand, the trial court considered the applicable law and determined a violation of Grove City Code Section 521.04 does not constitute negligence per se. Plaintiff once again appeals, contending the trial court erred in so concluding.

II. Assignment of Error - Negligence Per Se

{¶ 6} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997). Because determining whether violation of Grove City Code Section 521.04 is negligence per se involves a question of law, we review the trial court's decision de novo.

{¶ 7} In *Stenger I*, this court set forth the requirements for violation of an ordinance or statute to constitute negligence per se: "(1) there is a legislative enactment that imposes a specific duty upon the defendant for the safety and protection of a person in plaintiff's position; (2) the defendant failed to observe the enactment; and (3) that failure proximately caused his or her injury." *Id.* at ¶ 15. In applying that standard, *Stenger I* pointed out that a jury finds negligence based on the facts, conditions, and circumstances the evidence discloses; by contrast, "a cause of action asserting negligence per se is ' "a violation of a specific requirement of law or ordinance, the only fact for determination by the jury being the commission or omission of the specific act inhibited or required." ' " *Id.* at ¶ 14, quoting *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998), quoting *Swoboda v. Brown*, 129 Ohio St. 512, 522 (1935).

{¶ 8} As a result, where " ' "a positive and definite standard of care has been established by legislative enactment whereby a jury may determine whether there has been a violation thereof by finding a single issue of fact, a violation is negligence *per se*." ' " *Id.* at ¶ 14, quoting *Chambers* at 565, quoting *Swoboda* at 522. If, however, "a jury must determine the negligence or lack of negligence of a party charged with the violation

of a statute from consideration and evaluation of multiple facts and circumstances and by applying the standard of care of a reasonable person, negligence per se is inapplicable." *Stenger I* at ¶ 14. Alternatively, "if the legislative enactment expresses a rule of conduct to secure the safety or welfare of the public in general or abstract terms, the doctrine of negligence per se has no application, and liability turns on whether the defendant exercised the care of a reasonably prudent person under similar circumstances." *Id.*

{¶ 9} Grove City Code Section 521.04(a) states that "[n]o person shall place or knowingly drop upon any part of a sidewalk, playground or other public place any tacks, bottles, wire, glass, nails or other articles which may damage property of another or injure any person or animal traveling along or upon such sidewalk or playground." Grove City Code Section 521.04(c) provides that "[n]o person shall place, deposit or maintain any merchandise, goods, material or equipment upon any sidewalk so as to obstruct pedestrian traffic thereon except for such reasonable time as may be actually necessary for the delivery or pickup of such articles. In no case shall the obstruction remain on such sidewalk for more than one hour." Under the test articulated in *Stenger I*, violation of Grove City Code Section 521.04 is not negligence per se.

{¶ 10} In *Gonzalez v. Henceroth Ent., Inc.*, 135 Ohio App.3d 646, 651 (9th Dist.1999), the court examined Vermilion Codified Ordinance 1020.06 which stated that " '[n]o person shall leave unprotected or unguarded or without proper lighting any hole, excavation, pile of dirt, trucks, equipment or other material in any of the streets.' " In determining the ordinance did not impose negligence per se, the court noted the ordinance, in plain language, required an answer to two separate questions of fact: initially, whether material was left in the street and, if so, whether it was unprotected, unguarded, or not properly lit. Because it failed to impose a fixed and absolute duty that was the same under all circumstances, the court concluded it was a general-duty ordinance and its violation was not negligence per se.

{¶ 11} Similarly here, Grove City Code Section 521.04(a) would require the jury to answer at least two questions: (1) whether defendant placed or knowingly dropped something on the sidewalk in front of his home, and (2) whether the tree branches constituted the prohibited "articles which may damage property of another or injure any person." Moreover, even if the first issue may be deemed specific, the second issue is

general, its elements are ambiguous, and it requires a subjective determination of whether the tree branches constitute an item prohibited under the ordinance. As in *Gonzalez*, the ordinance does not impose negligence per se on its violation.

{¶ 12} Subsection (c) of Grove City Code Section 521.04 similarly does not meet the test for negligence per se. It not only requires the trier of fact to determine whether the sidewalk was obstructed, but also requires a subjective analysis of what constitutes a reasonable time. *See Becker v. Shaull*, 62 Ohio St.3d 480, 482 (1992) (observing that the statute which provided no person shall wrongfully obstruct any ditch, drain, or water course along, upon, or across a public highway, required not only a determination that the ditch was obstructed, but a further determination of whether such obstruction was wrongfully caused, giving rise to the question of whether defendants acted with due care, a subjective analysis). Accordingly violation of Grove City Code Section 521.04(c) is not negligence per se.

{¶ 13} Plaintiff nonetheless contends *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 8th Dist. No. 69523 (Nov. 27, 1996), supports its negligence per se contentions about Grove City Code Section 521.04. In *Texler*, Solon Municipal Code 660.10 contained language identical to Grove City Code Section 521.04(a) and (c). In a trial arising from the plaintiff's falling over a bucket the defendant used to prop open the door of its dry cleaning business, the jury found the defendant negligent per se and awarded the plaintiff 100 percent of the requested damages. On appeal, the parties did not address negligence per se as an assigned error. Instead, the court focused on the comparative negligence issue and concluded the plaintiff's negligence in *Texler* as a matter of law outweighed any negligence of the defendant. The court of appeals therefore reversed the judgment of the trial court. In explaining its decision, the court stated that "[a]ny other conclusion suggests that a plaintiff with knowledge of an obvious danger can simply ignore the danger and proceed without caution. Such a position is contrary to law." *Texler*.

{¶ 14} As to the negligence per se issue, the court noted that its "foregoing analysis is not rendered inapposite because appellant's conduct *may* have constituted negligence *per se*." (Emphasis added.) *Id.* The court pointed out that negligence per se is not liability

per se, so not only must a plaintiff's negligence be weighed against the defendant's negligence but proximate cause also must be demonstrated.

{¶ 15} On appeal to the Supreme Court of Ohio, that court addressed only proximate cause in terms of comparative negligence. *Stenger I* at ¶ 25. It did not determine whether violation of the ordinance at issue in *Texler* constituted negligence per se. *Texler* thus does not undermine the analysis resulting in a conclusion that violation of Grove City Code Section 521.04 is not negligence per se. Defendant's contention that the trial court erred in so concluding is overruled.

III. Disposition

{¶ 16} Having concluded the trial court did not err in determining violation of Grove City Code Section 521.04 is not negligence per se, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, KLATT and FRENCH, JJ., concur.