[Cite as *Mullins v. Grosz,* 2010-Ohio-3844.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles Mullins,	:	
Plaintiff-Appellant,	:	
		No. 10AP-23
v.	:	(C.P.C. No. 08CVC10-14683)
Mark Grosz et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 17, 2010

Malek & Malek, and *James Malek*, for appellant.

Alan E. Mazur, for appellee Mark Grosz.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Charles Mullins ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendant-appellee, Mark Grosz ("appellee"). For the following reasons, we affirm the trial court's judgment.

{¶2} On October 14, 2008, appellant filed a complaint seeking damages for injuries he sustained after falling off the porch of a home he rented from appellee. In his two-count complaint, appellant alleged causes of action for common-law negligence and negligence per se, pursuant to R.C. 5321.04, arising from appellee's failure to install a handrail or gating in the front porch area.

{¶3} On December 31, 2008, appellant moved for an order granting default judgment against appellee. By decision filed January 23, 2009, the trial court granted appellant's motion as to liability and set the matter for a damages hearing before a magistrate. By agreed entry filed May 7, 2009, the default judgment was set aside and the case was returned to the active docket.

{¶4} Appellee filed a motion for summary judgment on October 13, 2009, supported by the deposition testimony of appellant. Appellant testified that he and his wife moved into the property in 1997. Appellant identified several photographs (Defendant's Exhibits A-H), which depict the house and the surrounding area. Those photographs show that the house is situated at the top of a rather steep hill. Entrance to the front of the house is via a large concrete front porch. Approximately 20 concrete steps lead from the street up the hill to a short expanse of concrete walkway, followed by a single concrete step leading to the front porch. To the right of the concrete steps that lead to the street is a metal handrail. The handrail stops where the walkway begins. To the right of the walkway are several concrete steps built into the adjacent hill that leads down to the driveway. There is no handrail or gating on the porch, the single step or the walkway.

{¶5} Sometime between 2000 and 2002, appellant, with appellee's permission, replaced the concrete steps leading from the walkway to the street in exchange for a reduction in rent. Appellant did not replace the existing handrail and did not install railing or gating along the walkway or step leading to the porch. Appellant testified that he did not even discuss the possibility of doing so with appellee. (Deposition, 17-20.)

{¶6} On the afternoon of October 16, 2006, appellant was removing several objects from the front porch. In so doing, he stood facing the front door with his back to the step, approximately one foot from the edge of the porch. He picked up an object (either rolled roofing or a large box) which required the use of both hands. When he turned to his left to step off the porch, he lost his balance when his left foot was "halfway" on the edge of the porch. (Deposition, 38.) After losing his balance, he fell off the porch and tumbled about halfway down the adjacent hill toward the driveway. Appellant testified that he lost consciousness after he lost his balance and does not remember anything more about the fall. As a result of the fall, appellant sustained a broken ankle that required surgical intervention and subsequent physical therapy.

{¶7} Appellant testified that from the time he moved into the house in 1997, he routinely entered and exited via the steps and walkway leading to the front porch. Appellant estimated that he entered or exited the house in this manner approximately six times a day since 1997 and had never fallen off the front porch or step area in front of the house.

{¶8} Appellant further testified that he always considered the area to be dangerous because there was no handrail or gate to prevent a person from falling down the adjacent hill. However, he conceded that he had never asked appellee to install a

railing in the porch/step/walkway area. Nonetheless, appellant maintained that he believed that a railing installed to the right of the single step and walkway would have prevented him from falling down the hill and breaking his ankle.

{¶9} In his summary judgment motion, appellee first maintained that he owed appellant no duty to install a handrail or gating in the front porch/step/walkway area under either common-law negligence principles or under the duties imposed by R.C. 5321.04. Appellee further asserted that he owed no duty to appellant because appellant had equal, if not superior, knowledge of the lack of a handrail or gating in the area and the proximity of the hill in relation to the porch. Appellee also argued that the absence of a handrail or gating and the proximity of the hill were open and obvious conditions for which appellee had no duty to warn appellant.

{¶10} Appellee also averred that appellant failed to produce evidence establishing a genuine issue of material fact as to proximate cause. Appellee maintained that appellant submitted no evidence establishing a causal connection between the lack of a handrail or gating and his falling off the front porch. In particular, appellee noted appellant's deposition testimony that the precarious placement of his foot on the edge of the porch caused him to lose his balance and fall. Appellee argued that the absence of a handrail or gating had nothing to do with the cause of the accident and that it was purely speculative as to whether a handrail or gating would have prevented appellant from falling down the hill or lessened the severity of his injuries.

{¶11} Appellant filed a memorandum contra on November 12, 2009, supported by the deposition testimony of appellee and appellant's affidavit testimony. Appellee testified that he purchased the house in 1981 and lived there from 1981 to 1985. Appellee

averred that the house had three separate entrances, one at the back, one on the side, and one in the front, and that he normally utilized the front entrance because it was the most practical way to enter or exit.

{¶12} Appellee confirmed that the handrail adjacent to the steps leading to the street does not extend all the way to the front porch. Appellee averred that the handrail stops where the walkway leading to the front porch begins, and estimated that distance to be approximately five or six feet. Appellee acknowledged that the walkway and the single step leading to the front porch had been unguarded since he purchased the property in 1981. (Deposition, 20.)

{¶13} Appellee agreed that the entire front of the property, due to the steepness of the hill, has always been "dangerous" to children (Deposition, 32, 44) and that one must be "extremely careful" when walking in that area. (Deposition, 32.) However, appellee testified that he had never been cited for violation of any city housing code pertaining to the front porch area, and no one other than appellant had ever claimed injury from falling down the hill.

{¶14} Appellee acknowledged that it was foreseeable that a person slipping on the front porch step could roll down the adjacent hill, and that extending the handrail along the walkway and step leading up to the front porch was feasible and might potentially make the property safer. He stated, however, that he never had any problem when he lived in the house and, as such, had never considered extending the handrail.

{¶15} In his affidavit, appellant averred, in pertinent part, that: the only practical way to get to the house is up the front steps to the front door (¶3); one must climb 20 cement steps and cross a six-foot section of walkway to get to the front porch (¶4);

immediately next to the six-foot section of walkway is a severe drop off (¶5); since 2003, the six-foot section of walkway has not been level and "leans toward the severe drop off" (¶6); appellee had been to the house at least once between 2004 and October 16, 2006 and thus would have easily observed the condition of the walkway (¶7); the six-foot walkway is not protected by any hand railing, fencing or other guarding to prevent someone from falling down the severe drop off into the ravine (¶8); on October 16, 2006, appellant lost his balance as he was turning left on the front porch, causing him to fall down the unguarded severe drop off (¶9); and had there been a railing or other guarding along the side of the six-foot walkway he would not have sustained any injuries (¶11).

{¶16} In his memorandum contra, appellant argued that appellee violated R.C. 5321.04(A)(2), and was thus negligent per se, by failing to install a handrail in the front porch/step/walkway area. Appellant argued that appellee's failure to install a handrail violated his statutory duty to do whatever is necessary to put and keep the premises in a fit and habitable condition. Appellant further maintained that the open and obvious doctrine does not negate appellee's statutory duty to appellant. Finally, appellant contended that the evidence established a genuine issue of material fact as to proximate cause. Appellant argued that the most likely inference to be drawn from the evidence was that his injuries did not occur as a result of losing his balance on the porch, but, rather, from falling down the adjacent hill via the unguarded porch/step/walkway area.

{¶17} In his reply to appellant's memorandum contra, appellee argued that he owed no duty to install a railing in the porch/step/walkway area in order to protect appellant from the natural topography of the adjacent hill. Appellee contended that the absence of a railing was not a defect that rendered the premises unfit or uninhabitable as

contemplated by R.C. 5321.04(A)(2). Appellee further argued that appellant's affidavit and deposition testimony contending that he would not have sustained any injuries had there been a railing or other guarding in the porch/step/walkway area constituted inadmissible lay opinion testimony and was otherwise based upon mere speculation. Appellee argued that appellant submitted no evidence pertaining to the many factors necessarily involved in determining whether a railing would have prevented appellant's fall and subsequent injury, such as the type and dimensions of the railing, the distance of the railing from the porch/step/walkway area, the size and weight of the object appellant was carrying when he fell, appellant's height and weight, and the distance of the fall. Appellee also argued that the open and obvious doctrine precluded recovery under R.C. 5321.04.

{¶18} By decision and entry filed December 15, 2009, the trial court granted appellee's motion for summary judgment, finding that appellant failed to provide sufficient evidence to establish that appellee breached any statutory duty owed to him under either R.C. 5321.04(A)(1) or (2) and, therefore, could not as a matter of law be held liable for appellant's injuries.

{¶19} Appellant timely appeals, advancing a single assignment of error:

> The trial court erred, on December 14, 2009, to the prejudice of Plaintiff-Appellant in granting Defendants-Appellees Motion for Summary Judgment.

{¶20} Appellant's single assignment of error asserts that the trial court erred in granting summary judgment in favor of appellee. An appellate court reviews a trial court's grant of summary judgment independently and without deference to the trial court's determination. *Sadinsky v. EBCO Mfg. Co.* (1999), 134 Ohio App.3d 54, 58. An

appellate court applies the same standard as the trial court in reviewing a trial court's disposition of a summary judgment motion. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107. Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶21} Before summary judgment may be granted under Civ.R. 56(C), the trial court must determine that: "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 1994-Ohio-172, citing *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327.

{¶22} To recover on a negligence claim, a plaintiff must establish that: (1) the defendant had a duty to protect the plaintiff from injury; (2) the defendant breached that duty; and (3) the defendant's breach proximately caused the plaintiff's injury. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184. (Citations omitted.) "Typically, a duty may be established by common law, legislative enactment, or by the particular facts and circumstances of the case." Id., citing *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, paragraph one of the syllabus.

{¶23} At common law, a landlord was charged with a general duty to exercise reasonable care to keep the premises retained in his control for the common use of his tenants in a reasonably safe condition. *Shroades v. Rental Homes, Inc.* (1981), 68 Ohio

St.2d 20. In 1974, the Ohio General Assembly enacted R.C. 5321.01 et seq., the Landlord and Tenant Act, in an attempt to clarify and broaden tenants' rights as derived from common law. Id. In *Shroades,* the Supreme Court of Ohio held that a landlord is liable for injuries sustained on the leased premises which are proximately caused by the landlord's failure to fulfill the duties imposed by R.C. 5321.04(A), which provides, in relevant part:

> 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.

{¶24} A landlord's violation of the duties in R.C. 5321.04(A) constitutes negligence per se. *Shroades* at 25. "Application of negligence *per se* in a tort action means that the plaintiff has conclusively established that the defendant breached the duty that he or she owed to the plaintiff. It is not a finding of liability *per se* because the plaintiff will also have to prove proximate cause and damages." *Chambers* at 565. (Emphasis sic.) Thus, the tenant must establish that the landlord's violation of the statutory duties proximately caused the tenant's injuries.

{¶25} Appellant claims that appellee's failure to install a handrail or gating in the porch/step/walkway area constitutes negligence per se because such failure violates the duties imposed upon appellee under both R.C. 5321.04(A)(1) and (2).

{¶26} In entering summary judgment, the trial court addressed the statutorily imposed duties outlined in R.C. 5321.04(A)(1) and (2). Appellant first contends the trial court erred in entering summary judgment with respect to R.C. 5321.04(A)(1), which, as noted above, requires a landlord to "[c]omply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety." The trial court based its denial of appellant's claims under this section on appellant's "fail[ure] to provide evidence indicating that the defendant has violated a specific safety or housing code provision."

{¶27} In *Taylor v. Alexander* (July 11, 1986), 11th Dist. No. 3550, the plaintiff, while visiting the tenant's apartment, lost his footing and fell down while descending the stairway leading from the tenant's apartment to the door. The plaintiff filed suit alleging that the defendant landlord had a duty to install a handrail in the stairway, pursuant to R.C. 5321.04(A)(1), and her failure to do so constituted negligence per se. In addressing whether the landlord owed the plaintiff a duty under R.C. 5321.04(A)(1), the court stated:

> [T]he foregoing statutory section would not apply to the present facts because appellant has not cited any applicable building, housing, health, or safety code that requires such a handrail within the interior of this apartment. In the absence of any evidence or submission demonstrating a violation of any other building, housing, health, or safety code, appellant's reliance on R.C. 5321.04(A)(1) is misplaced.

{¶28} This court adopted the *Taylor* court's reasoning in *McDaniels v. Petrosky* (Feb. 5, 1998), 10th Dist. No. 97APE08-1027. In *McDaniels,* the tenants requested that the landlords remove a tree stump from the rental property. The landlords did not remove the tree stump, and the tenants' child subsequently tripped on it and injured himself. The tenants alleged violations of R.C. 5321.04(A)(1), (2), and (3). Considering R.C.

5321.04(A)(1), we noted that the tenants had pointed to no applicable building, housing, health and/or safety code requiring the landlord to remove a tree stump. Citing the reasoning in *Taylor,* this court held that summary judgment was appropriate.

{¶29} In the instant case, appellant, in his response to appellee's motion for summary judgment, failed to assert any argument or provide any evidence that appellee breached any applicable building, housing, health or safety code. Only now, in his brief before this court, does appellant contend that appellee's failure to install a handrail constitutes a violation of Columbus Municipal Housing Code Section 4525.03. It is well-settled that arguments not raised in the trial court should not be considered for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175, 177. Moreover, consistent with the reasoning in *Taylor* and *McDaniels,* we conclude that the trial court did not err in determining that appellant's claim under R.C. 5321.04(A)(1) failed as a matter of law.

{¶30} Appellant also maintains that the trial court erred in entering summary judgment with respect to R.C. 5321.04(A)(2), which, as previously noted, requires a landlord to "[m]ake all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." The trial court noted initially that, under R.C. 5321.04(A)(2), a plaintiff must first establish that a defective condition exists on the premises which renders the premises unfit or uninhabitable. In concluding that appellant had failed to establish the existence of such a defective condition, the trial court reasoned:

> The plaintiff contends that the property was defective because it failed to provide any type of protection to prevent someone from falling down the adjacent hill. However, the plaintiff

> occupied the premises for nine (9) years prior to accident without the presence of a hand railing, guard, or gate. * * * Furthermore, the plaintiff has failed to provide sufficient evidence indicating that the property is unfit or uninhabitable due to the lack of a railing. In fact, the property did not contain a railing at the time it was leased, and no agreement has been presented to this Court that the defendant agreed to install one. Moreover, the plaintiff admits he never requested that the defendant install a railing in the front area of the property. (Mullins deposition, p. 92). As such, this Court finds that the plaintiff has failed to provide evidence sufficient to demonstrate that there was a defect in the property such that the defendant can be held liable under R.C. 5321.04(A)(2).

(Dec. 15, 2009 Decision and Entry, 6.) (Emphasis sic, footnote omitted.)

{¶31} Appellant claims that the porch/step/walkway area of the premises was in a defective condition because the area had no handrail or gating to prevent a person from falling off the porch down the adjacent steep hill.

{¶32} In *Taylor,* the court addressed whether a landlord has a duty to install a handrail on a stairway pursuant to R.C. 5321.04(A)(2). As noted previously, the plaintiff in *Taylor*, a visitor in the tenant's apartment, lost his footing and fell down while descending the stairway leading from the tenant's apartment to the door. The tenant submitted affidavit testimony averring that prior to the plaintiff's injury, she had asked the landlord to install a handrail because she had children who used the staircase. In support of his argument that liability should be imposed, pursuant to R.C. 5321.04(A)(2), the plaintiff relied upon two Supreme Court of Ohio decisions, *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, and *Shroades.* The *Taylor* court distinguished those cases on grounds that the violations of R.C. 5321.04(A)(2) asserted therein were conditioned upon the landlords' failure to repair portions of the rental premises which had become unsafe and fallen into a state of disrepair. The court noted that "[n]either *Anderson* nor *Shroades,* supra, stand for

the proposition that a landlord has an affirmative obligation to improve the rental premises by the addition of safety measures not present when the premises are initially leased." Id. In addition, the court emphasized that "the common law warranty of habitability deals with situations where the premises contain defective wiring, heat or water shortages, vermin infestations, etc." The court further averred that "[i]t cannot seriously be contended that the lack of a handrail, in and of itself, renders the premises substantially or wholly uninhabitable."

{¶33} In *Aldridge v. Englewood Village, Ltd.* (July 22, 1987), 2d Dist. No. 10251, the tenant, when exiting her apartment, caught her toe on a threshold allegedly three-quarters of an inch too high. The tenant alleged that the threshold constituted a defect for purposes of R.C. 5321.04(A)(2). The court disagreed, stating:

> [I]n order to label this threshold a "defect" within R.C. 5321.04(A), such defect must render the premises unfit and uninhabitable. Fitness and habitability entails such defects as lack of water or heat, faulty wiring, or vermin infestation. *Taylor v. Alexander* (July 11, 198[6]), Trumbull App. No. 3550, unreported. The court found in *Taylor* that a defective handrail, or even the total absence of one, did not cause the premises to be unfit or uninhabitable. The same reasoning would apply to a threshold allegedly three-quarters of an inch too high. Even if we assume the threshold to have been improperly constructed, there is no "affirmative obligation to improve the rental premises by the addition of safety measures not present when the premises are initially leased." *Taylor, supra.*
>
> The meaning and interpretation of the statutory phrase "fit and habitable" will not be liberally construed to include that which does not clearly fall within the import of the statute. *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209. Having not shown a defect rendering the premises unfit and uninhabitable, liability may not be predicated under R.C. 5321.04(A)(2).

{¶34} Applying *Taylor* and *Aldridge,* we cannot find that the lack of a handrail or gating in the porch/step/walkway area of the premises constitutes a defective condition rendering the premises unfit and uninhabitable. Appellant admitted that he lived in the house for nine years prior to his accident without incident and had never asked appellee to install a handrail in the porch/step/walkway area. Further, despite appellee's concession that installing a handrail was feasible and might potentially make the property safer, he had no affirmative duty to improve the rental premises by installing a handrail when one was not present at the time appellant leased the premises. Accordingly, the trial court did not err in determining that appellee was not liable under R.C. 5321.04(A)(2).

{¶35} Appellant urges this court to apply the decision in *Crawford v. Wolfe*, 4th Dist. No. 01CA2811, 2002-Ohio-6163. We decline appellant's invitation, however, as the facts of *Crawford* are distinguishable. In *Crawford*, the house the tenants rented from the landlord was in need of repair. The sole usable access to the home had steps without a handrail. Although the landlords agreed to install a handrail both before, and shortly after, the tenants moved in, the landlords failed to follow through on their agreement. On an icy day, one of the tenants slipped and fell, breaking her wrist and spraining her ankle. The court determined that "the maintenance of the sole means of ingress to a rented residence certainly invokes the requirement that the landlord 'do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition.' " Id., citing R.C. 5321.04(A)(2).

{¶36} Here, there was more than one usable access to the home. Further, in the nine years appellant lived in the house preceding the accident, appellant never requested nor did appellee ever agree to install a handrail in the porch/step/walkway area. In

addition, in *Crawford*, it was undisputed that the steps were defective without a handrail, as the tenants demonstrated that applicable housing and safety codes required a handrail on the steps. As noted above, appellant failed to assert in his motion for summary judgment that any applicable housing and safety codes required a handrail in the porch/step/walkway area.

{¶37} For the foregoing reasons, we conclude that summary judgment was appropriate in this matter, as appellee was entitled to judgment as a matter of law.[1] Accordingly, appellant's sole assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, P.J., and McGRATH, J., concur.

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[1] As previously noted, appellant's complaint alleges causes of action for both common-law negligence and negligence per se under R.C. 5321.04. The trial court's December 15, 2009 decision and judgment entry unquestionably constitutes a final appealable order, as it dismisses appellant's complaint in its entirety. Although appellant's captioned assignment of error asserts a general challenge to the trial court's grant of summary judgment, appellant's argument in the body of his brief singularly focuses upon his statutory claims, which were the only claims considered by the trial court. Because appellant has not asserted any argument regarding his common-law negligence claims, he has waived any argument related thereto pursuant to App.R. 16(A)(7). *State v. Quick*, 8th Dist. No. 91120, 2009-Ohio-2124, ¶14 ("[t]his argument relates solely to theft of Hill's equity in the house, so we deem any argument relating to theft in the context of the Novastar loan application to be waived under App.R. 16(A)(7)").