[Cite as *Butler v. Wyndtree Housing Ltd. Partnership*, 2012-Ohio-49.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

JAMES E. BUTLER, Administrator of Estate of Aubrey M. Butler, et al.,	:	
	:	CASE NO. CA2011-03-056
Plaintiffs-Appellants,	:	O P I N I O N
		1/9/2012
- vs -	:	
	:	
WYNDTREE HOUSING LIMITTED. PARTNERSHIP, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-08-3617

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PIPER, J.

{¶1} James E. Butler, administrator of the estates of Alexander J.E. Butler, Aubrey M. Butler, and Braden W. Butler, appeals from a decision of the Butler County Court of Common Pleas, granting summary judgment in favor of defendant-appellee, United Apartment Group, Inc. (UAG). We affirm the decision of the trial court.

I. Statement of Facts

{¶2} Appellant represents the estates of three deceased children, who died in a fire on November 24, 2007, while residing with their mother, Emily Butler (Mother), in an apartment located at the Trails of West Chester, 4397 Leeds Point Court in Butler County, Ohio.

{¶3} On September 15, 2006, Mother entered a year-long lease with the Trails owner, Wyndtree Housing Limited Partnership, as represented by the management company, Flaherty & Collins (F&C). Pursuant to the lease agreement, F&C acted as landlord for the Trails. The same day, Mother moved into Apartment 263 with her children.

{¶4} On June 15, 2007, the Trails was placed in foreclosure, at which time F&C was appointed receiver. However, on September 14, 2007, the common pleas court appointed defendant-appellee, UAG, as the successor receiver. On October 1, 2007, Mother signed a subsequent lease agreement, this time with the "Trails of West Chester," which was simply the name of the apartment complex and not a legal entity. However, UAG's on-site property manager, Regina Galloway, signed the lease as the other party to the agreement.

{¶5} Roughly one month into the new lease, the fire occurred, killing all three children. During the fire, two smoke alarms located in the children's bedrooms sounded an alarm, but the alarms in the hallway, living room, and Mother's bedroom did not work at all. Upon inspection after the fire, it was apparent the three nonfunctioning smoke alarms were

not connected to the apartment's 120V AC electric power and the batteries were installed backwards. It is undisputed that if all five smoke alarms had been properly connected, the alarms would have sounded in unison after the first alarm detected smoke.

{¶6} Investigators concluded that the fire originated in the living room and identified several potential ignition sources, including a cigarette, lamp, extension cord, outlets, and a candle. Mother admitted that on the night of the fire, she left a four-wick candle burning near the living room sofa before she went to bed. Mother also admitted to smoking a cigarette in her bathroom that evening, but denied smoking in the living room. Mother admitted she smoked cigarettes in the bathroom on various occasions, but testified she never heard the smoke alarms sound as a result of the smoke.

{¶7} After the fire, appellant filed a wrongful death action against defendants Wyndtree, F&C, and UAG, asserting claims of negligence and negligence per se. Appellant argued defendants knew or should have known about the faulty smoke alarms prior to the fire. Appellant further asserted that defendants' failure to test, inspect, and maintain the smoke alarms violated local building ordinances and fire safety codes.

{¶8} On November 15, 2010, defendants moved for summary judgment. The trial court granted UAG's motion in full and simultaneously granted in part and denied in part summary judgment as to Wyndtree and F&C. With respect to UAG, the trial court found that as a landlord and a receiver, UAG owed various statutory and common law duties to Mother and her children. However, the court found UAG was not liable because there was no evidence suggesting UAG knew or should have known the smoke alarms were inoperable prior to the fire.

{¶9} Appellant now appeals from the trial court's decision granting summary judgment to UAG, raising one assignment of error for review. In addition, UAG cross-appeals from the same decision, raising one cross-assignment of error.

{¶10} Assignment of Error No. 1:

{¶11} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN GRANTING UAG'S MOTION FOR SUMMARY JUDGMENT."

{¶12} In his single assignment of error, appellant argues the trial court erred in granting summary judgment in favor of UAG. This court's review of a trial court's ruling on a summary judgment motion is de novo. *Caplinger v. Korrzan Restaurant Mgt., Inc*., Butler App. No. CA2011-06-099, 2011-Ohio-6020, ¶10. Civ.R. 56 sets forth the summary judgment standard and requires that: (1) there be no genuine issues of material fact to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. Id.

{¶13} On summary judgment, the moving party has the burden of demonstrating that there is no genuine issue of material fact. See *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Once the moving party's burden has been satisfied, the burden shifts to the nonmoving party, as set forth in Civ.R. 56(E). *Caplinger* at ¶11. The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." Id., quoting *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389. Not all arguable facts are material. A dispute of fact can be considered "material" only if it affects the outcome of the litigation. See *Myers v. Jamar Ents.* (Dec. 10, 2001), Clermont App. No. CA2001-06-056, 2001 WL 1567352, at *4. Similarly, not all disputes of fact create a genuine issue. Instead, a dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. Id.

{¶14} A tenant seeking to establish a claim of negligence against a landlord may do so under Ohio's Landlord-Tenant Act or common law premises liability. *Packman v. Barton*,

Madison App. No. CA2009-03-009, 2009-Ohio-5282, ¶11, citing *Ryder v. McGlone's Rentals*, Crawford App. No. 3-09-02, 2009-Ohio-2820, ¶15.

{¶15} Generally, in order to avoid summary judgment in a negligence action, the plaintiff must establish that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. *Rigdon v. Great Miami Valley YMCA*, Butler App. No. CA2006-06-155, 2007-Ohio-1648, ¶11; *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184. (Citations omitted.) The plaintiff's failure to prove any of these elements would be fatal to his negligence claim. *Whiting v. Ohio Dept. of Mental Health* (2001), 141 Ohio App.3d 198, 202.

II. Ohio's Landlord-Tenant Act: Statutory Negligence

{¶16} In regard to his statutory negligence claim, appellant argues summary judgment was improper because genuine issues of material fact remained as to whether UAG breached its statutory duties by failing to test, inspect, and maintain the smoke alarms in Mother's apartment. This argument lacks merit.

{¶17} 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. See *Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St.2d 20. In *Shroades,* the Supreme Court of Ohio held that a landlord is liable for injuries sustained on leased premises that are proximately caused by the landlord's failure to fulfill the duties imposed by R.C. 5321.04(A), which provides, in pertinent part:

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

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

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

{¶21} "* * *

{¶22} "(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 him[.]"

{¶23} A landlord's violation of the duties imposed by Ohio's Landlord-Tenant Act constitutes negligence per se. *Allstate Ins. Co. v. Henry*, Butler App. No. CA2006-07-168, 2007-Ohio-2556, ¶9, citing *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406, syllabus. With negligence per se, proof of a landlord's violation of the statute dispenses with the plaintiff's burden to establish the existence of a duty and the breach of that duty. *Henry* at ¶10; *Chambers*, 82 Ohio St.3d at 565.

{¶24} However, negligence per se does not equate to liability per se, as it does not dispense with the plaintiff's obligation to prove the landlord's breach was the proximate cause of the injury complained of, nor does it obviate the plaintiff's obligation to prove the landlord received actual or constructive notice of the condition causing the statutory violation. *Barton*, 2009-Ohio-5282 at ¶15, citing *Turner v. Teimeyer* (Feb. 12, 1996), Clermont App. No. CA95-08-053, 1996 WL 56040, at *3; *Henry*, 2007-Ohio-2556 at ¶11. In turn, landlords will be excused from liability where they "neither knew nor should have known of the factual circumstances that caused the violation." *Mounts v. Ravotti*, Mahoning App. No. 07 MA 182, 2008-Ohio-5045, ¶30, quoting *Sikora*, 88 Ohio St.3d at 498.

{¶25} In entering summary judgment in favor of UAG, the trial court determined that as a "landlord," UAG was required to comply with R.C. 5321.04. However, the court did not find that UAG owed a specific duty to test, inspect, and maintain Mother's smoke alarms. Instead, the court addressed the notice requirement, and excused UAG from liability upon

finding there was no evidence that UAG knew or should have known of the factual circumstances that caused the statutory violation. See *Sikora* at 498.

{¶26} On appeal, appellant argues UAG had an affirmative duty under R.C. 5321.04 to test, inspect, and maintain Mother's smoke alarms. Appellant further argues UAG's admission that it did not do so constitutes a per se violation of R.C. 5321.04(A). However, even if said duty exists, appellant forgets that absent notice of the alleged violation, there can be no liability for negligence per se.

{¶27} First, with respect to UAG's alleged duty, we find appellant failed to present clear evidence of a legislative enactment or safety code requiring UAG to test, inspect, and maintain the smoke alarms, or what those processes might specifically entail. While appellant cited several controlling portions of the 2000 National Fire Alarm Code and the 2000 International Fire Code, these sections defer to the alarm manufacturer's manual for specific maintenance and inspection instructions. However, appellant did not provide the manufacturer's manual corresponding to Mother's smoke alarms. Thus, UAG's specific maintenance and inspection duties under these codes are speculative at best. Cf. *Ornella v. Robertson* (1968), 14 Ohio St.2d 144, 149 ("where duties are undefined, or defined only in abstract or general terms, * * * the phrase 'negligence per se' has no application").

{¶28} Further, while appellant's expert concluded UAG owed a duty to perform a "life safety" inspection on the smoke alarms, he could not point to a specific code requiring it. In fact, appellant's expert testified as follows:

{¶29} "[UAG]: Can you give me the basis for your opinion that there should have been some sort of life safety inspection when a court-appointed receiver came in in September of '07 in this case?

{¶30} "[Expert]: I did not say that there should be or that there was a legal requirement of a receiver to do a life safety inspection. I'll say it again, that based on that I

would expect the inspections that you conduct when you're taking over a property would involve life safety. * * * The inspections that have been conducted on this specific apartment complex have involved looking at smoke alarms and life safety so my expectation when you're taking over a property is that that is one of the * * * premier items that you're going to be interested in."

{¶31} While appellant's suggestion of UAG's alleged duty is marginal, we consider, for discussion purposes, that R.C. 5321.04(A) requires landlords to address material issues of health and safety, particularly with respect to the "good and safe working order and condition of all electrical * * * fixtures and appliances[.]" See R.C. 5321.04(A)(1), (4). However, even if we assume, arguendo, that UAG had a statutory duty to test, inspect, and maintain the smoke alarms, absent evidence showing UAG knew or should have known of the defect causing the violation, it must be excused from liability. R.C. 5321.04(A). See *Sikora*, 88 Ohio St.3d at 497-498.

A. Notice

{¶32} Appellant first argues UAG had "actual knowledge" that Mother's apartment lacked operable smoke alarms upon inspecting management files it obtained from its predecessor, F&C.

{¶33} First, appellant argues F&C's files called "Move In/Move Out Inspection" forms put UAG on notice that there were problems with Mother's smoke alarms. According to appellant, the Move In/Move Out form for Mother's apartment appeared "suspect," and therefore should have alerted UAG that F&C failed to test the smoke alarms when Mother moved in, and that the alarms were defective at that time.

{¶34} During her deposition, Regina Galloway, F&C's property manager,[1] explained

1. Galloway acted as property manager for F&C, and subsequently, UAG.

that before moving in, tenants would walk through their apartment, at which time the tenant was to inspect the apartment and notify leasing personnel of any problems. After the walk-through, tenants would sign a Move In/Move Out form, documenting any problems discovered. Each Move In/Move Out form contained a "comments" column beside seven demarked sections: "Kitchen," "Living-Dining," "Bathroom," "Bedrooms," "Exterior," "Smoke Detector & Battery Working (initials)," and "Other."

{¶35} In this case, Mother walked through Apartment 263 on September 15, 2006 and signed a Move In/Move Out form the same day. With the exception of the smoke detector section, each column for Apartment 263 was marked "ok[.]" Appellant argues the blank smoke detector section indicates F&C did not inspect the smoke alarms when Mother moved in. Appellant further contends that in obtaining the form from F&C, UAG gained "direct knowledge that there were problems with the smoke detectors in [Mother's] apartment when she first moved in." We disagree.

{¶36} First, we note the Move In/Move Out forms do not create a duty under R.C. 5321.04. The forms are not a legislative dictate, thus, application of negligence per se for a failure to comply with the forms is not appropriate. See, e.g., *Jung v. Davies*, Montgomery App. No. 09-CV-5867, 2011-Ohio-1134, ¶31-33.

{¶37} Even so, a review of the record reveals Mother's Move In/Move Out form would not have put UAG on notice of the allegedly undiscovered defect. First, Galloway testified the forms were neither intended nor relied upon as proof of inspection by management. According to Galloway, leasing personnel would not necessarily inspect the smoke alarms during a walk-through because it was the common and required practice of maintenance to do so after a previous tenant moved out. Further, the form for Apartment 263 makes no mention of any complaint lodged by Mother concerning the smoke alarms or any other problems.

{¶38} Without more, we cannot say the condition of Mother's Move In/Move Out form put UAG on notice that F&C failed to inspect Mother's smoke alarms, or that the alarms were defective upon move-in. Thus, the Move In/Move Out forms do not create a disputed issue of material fact regarding UAG's notice of the defect.

{¶39} Appellant next argues F&C's files called "Occupied Unit Inspection" forms put UAG on notice of "systemic problems with smoke detectors throughout the apartment building[.]" During her deposition, Galloway explained that F&C completed the Occupied Unit Inspection forms in anticipation of an inspection by the Ohio Housing Finance Agency (OHFA). The OHFA finances low-income housing projects maintained in accordance with certain health and safety guidelines, partly through tax benefits. Pertinent to this appeal, OHFA guidelines require residential property owners to "pay close attention to * * * inoperable or missing smoke detectors" and correct smoke detector violations.

{¶40} Galloway explained that prior to the OHFA inspection, F&C maintenance personnel checked "everything" in the apartments, including the smoke alarms. After each inspection, maintenance completed an Occupied Unit Inspection form documenting the apartment's condition.

{¶41} Appellant argues that inconsistencies in the inspection forms should have put UAG on notice "that there were problems with the smoke detectors throughout the apartment building when it inherited the files from F&C." Appellant also argues that suspicious circumstances surrounding the inspection of Apartment 263 raises a question of fact as to whether Mother's smoke alarms were actually tested during that time. Upon review, we find that whether the pre-OHFA inspections occurred and, if so, what they revealed, does not create a genuine issue of material fact as to UAG's notice of the defect in Mother's smoke alarms.

{¶42} First, appellant presents no evidence that landlords are required to inspect the

premises for OHFA violations to comply with their duties under R.C. 5321.04. In fact, "R.C. 5321.04 sets forth no affirmative duty on the landlord to inspect the premises and no such duty was recognized by the Ohio Supreme Court in *Shroades* or *Sikora*." *Boyd v. Hariani*, Summit App. No. 22500, 2005-Ohio-4536, ¶32. Instead, both cases, and more importantly *Sikora*, focused "specifically on whether the landlord had actual or constructive notice of the defect[.]" Id. See, also, *Avila v. Gerdenich Realty Co*., Lucas App. No. L-07-1098, 2007-Ohio-6356, ¶10.

{¶43} Moreover, a review of the record indicates the Occupied Unit Inspection forms would not have put UAG on notice of the alleged defect in Mother's apartment. First, appellant produced no evidence that F&C was cited for noncompliance with OHFA guidelines. Secondly, the mere fact that *other* apartments had smoke alarm issues during the pre-OHFA inspections would not automatically put UAG on notice of problems with Mother's smoke alarms. In fact, the form for Apartment 263 indicates the smoke alarms made a passing grade. See *Hariani*, 2005-Ohio-4536; *Burnworth v. Harper* (1996), 109 Ohio App.3d 401, 406-407 ("general knowledge of the possibility of a defect does not rise to the level of either actual or constructive notice"). Lastly, even if management did not actually inspect Mother's apartment, as appellant suspects, this does not create an issue of fact as to notice of the defect, where the inspections were performed strictly to ensure continued OHFA financing, not safety code compliance.

{¶44} Thus, we cannot say F&C's files create a genuine issue of material fact as to whether UAG had notice of problems with Mother's smoke alarms.

{¶45} Appellant next argues there is an issue of fact as to whether UAG had notice of the defect through its agent, Regina Galloway, who it hired to continue as property manager in September 2007. Appellant argues Galloway acquired knowledge of problems with Mother's smoke alarms during her employment with F&C, and that this knowledge should be

imputed to UAG as her subsequent employer under common law agency principles.

{¶46} A general principle of agency is that a "principal is chargeable with and bound by the knowledge of or notice to his agency received by the agent in due course of his employment, with reference to matters to which his authority extends[.]" *Royal Appliance Mfg. Co., Inc. v. Fernengel* (Aug. 27, 1987), Cuyahoga App. No. 51268, 1987 WL 16189, at *5, quoting *State ex rel. Nicodemus v. Indus. Comm.* (1983), 5 Ohio St.3d 58, 60. (Citation omitted.) An employee's conduct is considered to be within the course of his employment when it "can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered or a natural, direct, and logical result of it." *Tucker v. Barrett*, Warren App. No. CA2010-09-090, 2011-Ohio-2854, ¶14, quoting *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 278.

{¶47} More specifically, Restatement of the Law 2d, Agency (1957), Section 228, sets forth three factors to consider when determining if an employee's conduct falls within the scope of his employment. *Barrett* at ¶15. Only when: (1) the conduct is the kind the employee is employed to perform; (2) occurs substantially within authorized time and space limits; and (3) is actuated, at least partly, to serve the employer, will the employee's conduct be considered within the scope of his employment. *Posin* at 278.

{¶48} Appellant claims the knowledge Galloway received during her tenure as F&C's property manager should be imputed to UAG. Specifically, appellant argues Galloway oversaw F&C's inspections in 2007, and because UAG inherited F&C's files and hired Galloway to continue as property manager, the knowledge she received should be imputed to UAG.

{¶49} Upon review, we decline to impute any knowledge Galloway may have acquired while working for F&C to UAG. We reach this conclusion in light of several facts. First, Galloway did not oversee the Move In/Move Out and pre-OHFA inspections during the

authorized time and space of her employment with UAG. Instead, both inspections occurred under F&C's authorization, well before UAG became receiver. See *Posin*, 45 Ohio St.2d at 278; *Alvarez v. Natl. City Bank*, Summit App. No. 24292, 2008-Ohio-444, ¶12; *Davenport v. E.H.J. Skyworker Servs., Inc*. (Jan. 23, 1985), Delaware App. Case No. CA 84-25, 1985 WL 7153, at *1 ("Ohio * * * follows the rule that knowledge acquired by a corporate officer or other agent prior to the inception of his agency is not to be imputed to the corporation").

{¶50} Moreover, there is no evidence that Galloway acted for UAG's benefit during these inspections. See *Phelan v. Middle States Oil Corp*. (C.A.2, 1954), 210 F.2d 360, 365-366. Instead, the Move In/Move Out inspections were performed for the benefit of the *tenant*, who was responsible for inspecting doors, locks, refrigerators, drawers, etc., and notifying leasing personnel of any problems before move-in. Additionally, as previously discussed, F&C performed the pre-OHFA inspections strictly for immediate tax benefits.

{¶51} Where Galloway did not oversee the inspections under UAG's authorization and did not do so for UAG's benefit, any knowledge Galloway attained with F&C is not chargeable to UAG. See *Barrettt*, 2011-Ohio-2854 at ¶14. Accordingly, we find there is no disputed material fact as to whether UAG had notice of the defect through Galloway.

{¶52} Next, appellant argues UAG knew or should have known about the defective smoke alarms as a result of an inspection it performed in September 2007, roughly two months before the fire. Appellant argues that even a simple "visual inspection" at that time would have notified UAG of the problem.

{¶53} As with the prior inspections, there is no evidence that an entity in UAG's position had a legislative duty to perform the September 2007 inspection. R.C. 5321.04. See *Hariani*, 2005-Ohio-4536 at ¶32. Moreover, there is no evidence that UAG knew or should have known about the defective smoke alarms as a result of this inspection. UAG's Senior Vice President, Beth Sickler, averred that the purpose of the inspection was for

"capital-budgetary" purposes, versus assessing "life safety" issues. Sickler stated that "[w]hen an apartment unit is currently occupied upon UAG's receivership, UAG presumes appliances and smoke detectors in the apartment are fully functional unless informed otherwise."

{¶54} Where UAG was not otherwise informed of Mother's smoke alarm issues as of September 2007, we do not take issue with this presumption. Thus, we find the September 2007 inspection does not create a genuine issue of material fact as to UAG's notice of the defect.

{¶55} Finally, appellant argues UAG's lease agreement is evidence that UAG knew or should have known that there "could be problems with the smoke detectors in [Mother's] apartment." On October 1, 2007, Mother signed a lease with UAG, as represented by Galloway, that states, in pertinent part:

{¶56} "Smoke Detectors. We'll furnish smoke detectors as required by statute, and we'll test them and provide working batteries when you first take possession. After that, you must pay for and replace batteries as needed[.]"

{¶57} Appellant argues that if UAG had inspected the smoke alarms as required by the lease, it "would have discovered that they were not working, and the Butler children would likely be alive today." According to appellant, the subsequent lease resulted in an entirely new "possession" that triggered UAG's contractual duty to inspect the alarms. Conversely, UAG argues it had no contractual duty to inspect the alarms because Mother already possessed the apartment when she signed the lease. We agree with UAG.

{¶58} When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. *Sunoco, Inc. (R&M) v. Toledo Edison Co*., 129 Ohio St.3d 397, 2011-Ohio-2720, ¶37. We will examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract. Id. When the language of a

written contract is clear, a court may look no further than the writing itself to find the intent of the parties. Id.

{¶59} Here, the language of the lease undoubtedly creates a contractual duty to test the smoke alarms when a tenant "first" takes possession, yet the lease does not define "first." However, "common, undefined words appearing in a contract will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the agreement." *Sunoco* at ¶38.

{¶60} Accordingly, we must look to the ordinary meaning of the word "first." While there are several dictionary definitions of "first," the most relevant are: "beginning, outset," and "preceding all others, earliest in time[.]" Webster's Third New International Dictionary (1993) 856-857. Pursuant to these definitions, it is clear Mother did not "first" take possession of the apartment simply because she signed a new lease. Instead, for the purposes of the lease, it appears "first" possession occurred during Mother's "earliest" occupancy in September 2006. See *Cooper v. Roose* (1949), 151 Ohio St. 316, 323.

{¶61} This interpretation comports with the intent of the parties, as evidenced by Beth Sickler's affidavit, which stated "[w]hen an apartment unit is *currently occupied* upon UAG's receivership, UAG presumes appliances and smoke detectors within the apartment are fully functional unless informed otherwise." (Emphasis added.) Mother testified that when she signed UAG's lease, she had been living in Apartment 263 on a continual basis since September 2006. Thus, there is no question that Mother's apartment was "currently occupied" within the minds of both parties. Moreover, Mother did not testify, nor did appellant present other evidence, that Mother expected a new inspection to follow a simple change in management, rather than, say, a change of apartment.

{¶62} Under these circumstances, we cannot say that applying the ordinary meaning of the word "first" results in manifest absurdity. Accordingly, where "first" possession

occurred long before UAG entered the lease agreement, we find UAG had no contractual duty to test Mother's smoke alarms. Thus, we find the lease agreement does not create a genuine issue of material fact as to notice of safety concerns.

{¶63} Because the record is devoid of any evidence indicating UAG knew or should have known about the defective smoke alarms prior to the fire, we find appellant cannot establish liability against UAG for any potential violation of R.C. 5321.04. Thus, the trial court did not err by granting UAG summary judgment in regard to appellant's statutory negligence claim.

III. Common Law Negligence

{¶64} Having addressed UAG's statutory duties, we next look to UAG's common law duties. Appellant argues UAG was negligent at common law for failing to test, inspect, and maintain Mother's smoke alarms. We disagree.

{¶65} As previously discussed, negligence claims require a showing of: (1) a duty owed; (2) a breach of that duty; and (3) an injury proximately caused by the breach. *Barton*, 2009-Ohio-5282 at ¶32. "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." Id., quoting *Adelman v. Timman* (1997), 117 Ohio App.3d 544, 549. The determination of whether a duty exists is a question of law for the court to decide, and is therefore a suitable basis for summary judgment. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318; *Galinari v. Koop*, Clermont App. No. CA2006-10-086, 2007-Ohio-4540, ¶10, 13.

{¶66} In granting summary judgment to UAG, the trial court found that as a court-appointed receiver, UAG had a duty to exercise ordinary care. However, the court found there was no evidence that UAG breached its duty, thus UAG was relieved from liability. *INF Ent., Inc. v. Donnellon* (1999), 133 Ohio App.3d 787, 789.

{¶67} As an initial matter, we do not deny that as a receiver, and even as a landlord,

UAG owed Mother a common law duty to exercise 'ordinary care.' See id.; *Davies v. Kelley* (1925), 112 Ohio St. 122, paragraph one of the syllabus (under common law, a landlord owes a tenant the duty of ordinary care to keep portions of a leased premises that remain under the control of the landlord in a reasonably safe condition). However, in order to address appellant's argument, we must find whether UAG's duty of ordinary care included the specific duty to test, inspect, and maintain Mother's smoke alarms.

{¶68} The threshold question of the existence of a duty depends upon the foreseeability of the injury. *French v. New Paris*, Preble App. No. CA2010-05-008, 2011-Ohio-1309, ¶19. An injury is foreseeable if the defendant "knew or should have known that his act was likely to result in harm to someone." *Midwestern Indemn. Co. v. Wiser* (2001), 144 Ohio App.3d 354, 358.

{¶69} Upon review, we find UAG did not owe a common law duty to test, inspect, and maintain Mother's smoke alarms, due to a lack of foreseeability. In other words, even with the facts construed most favorably to appellant, there is still no evidence that UAG knew or should have known about the defective smoke alarms or the potential injury associated therewith.

{¶70} As previously discussed in depth, appellant failed to present evidence that UAG knew or should have known the smoke alarms were defective. Absent a reason to know of the defect, we cannot say there is a genuine issue of material fact as to whether UAG knew or should have known that its inattention to the smoke alarms was likely to result in injury to Mother and her children.

{¶71} Because the injury was not foreseeable, we find UAG did not owe a duty to test, inspect, or maintain Mother's smoke detectors at common law.[2] See *Avila* at ¶10 ("[a]

2. Because the record lacks evidence as to foreseeability, any distinction between UAG's common law duties as a "receiver" or "landlord" is inconsequential.

landlord has no common law or statutory duty to do that of which he has no knowledge, no possession and no control"). *New Paris*, 2011-Ohio-1309 at ¶42. Because appellant failed to prove the "duty" element, his negligence claim must fail. See *Whiting*, 141 Ohio App.3d at 202. We recognize that the trial court, in reaching the same result as we do, found UAG owed a duty, but that there was no evidence of a breach; however, it is well settled that a lower court can be correct for the wrong reasons. Thus, we find the trial court did not err in granting UAG summary judgment on appellant's common law negligence claim. See, e.g., *Thomas v. Res. Network*, Lorain App. No. 10CA009886, 2011-Ohio-5857, ¶29 ("[a]n appellate court shall affirm a trial court's judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial").

{¶72} Appellant's sole assignment of error is overruled.

{¶73} UAG's Cross-Assignment of Error No. 1:

{¶74} "UAG WAS NOT THE LANDLORD AT THE TRAILS AND OWED THE DECEDENTS NO LEGAL DUTY UNDER R.C. § 5321.04."

{¶75} In its single cross-assignment of error, UAG argues the trial court erroneously found it was "landlord" of the Trails pursuant to R.C. 5321.01, which states, in pertinent part:

{¶76} "(B) 'Landlord' means the owner, lessor, or sublessor of residential premises, the agent of the owner, lessor, or sublessor, or any person authorized by the owner, lessor, or sublessor to manage the premises or to receive rent from a tenant under a rental agreement."

{¶77} UAG argues that as a court-appointed receiver, it did not meet any of the aforementioned criteria. Specifically, UAG argues it was not an "owner, lessor, or sublessor," because it had neither title to the Trails nor the right to possession. It also argues it was not an "agent" of the owner, lessor, or sublessor, because it was strictly an agent of the court.

Lastly, UAG argues it was not "authorized" by the owner, lessor, or sublessor to receive rent, because a receiver in a foreclosure action derives its authority to act strictly from the court.

{¶78} We note that this case presents a unique situation, where UAG does not cite, nor can we find, case law specifically addressing the statutory duties a court-appointed receiver might owe a tenant upon entering a lease agreement. However, upon review, we find UAG cannot hide behind the veil of its receivership to avoid duties stemming from a lease agreement signed by its property manager, namely, Regina Galloway. When Galloway signed the lease in her capacity as UAG's property manager, UAG became a "lessor," bound to abide by its newfound contractual duties, and consequently, statutory duties, as well. R.C. 5321.01(B); R.C. 5321.04.

{¶79} In so holding, we reiterate that while UAG is subject to the obligations imposed by R.C. 5321.04, it is also entitled to its protections. In other words, prior to facing liability for negligence per se, a plaintiff must still prove that UAG's breach was the proximate cause of the injury, and that UAG received actual or constructive notice of the condition causing the statutory violation. See *Barton*, 2009-Ohio-5282 at ¶15.

{¶80} UAG's sole cross-assignment of error is overruled.

{¶81} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.