[Cite as *Thatcher v. Lauffer Ravines, L.L.C.*, 2012-Ohio-6193.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Cecelia Thatcher,	:	
Plaintiff-Appellant,	:	
		No. 11AP-851
v.	:	(C.P.C. No. 10CVC-10-14608)
Lauffer Ravines, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 28, 2012

Plymale & Dingus, LLC, and *Ronald E. Plymale*, for appellant.

Caborn & Butauski Co., LPA, and *David A. Caborn*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Cecelia Thatcher, appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Lauffer Ravines, LLC, and Evergreen Realty, Inc.

{¶ 2} This is a premises liability case. Appellant resided in the Lauffer Ravines apartment complex and suffered injuries when she slipped and fell on an icy sidewalk, suffering compound fractures of her tibia and fibula. Lauffer Ravines, LLC owns the property, and Evergreen Realty manages the complex.

{¶ 3} Appellant's complaint states that she was injured on December 25, 2008 (later filings correct the date to January 25, 2009) while walking on a concrete sidewalk leading from a parking lot toward the building where her apartment was located. The complaint alleges that her injuries were the proximate result of appellees' negligent

design, maintenance, and repair of grounds, landscaping, and downspout drainage systems. Appellant's claim is that these factors created an unnatural accumulation of ice that was concealed by fresh snow.

{¶ 4} The trial court granted appellees' motion for summary judgment, finding that, under Ohio law, any snow or ice present on the sidewalk represented a natural accumulation for which the property owner and manager were not liable. The trial court further found that the hazardous condition was open and obvious and, therefore, could not give rise to liability. Finally, the court held that any analysis of the claim under Ohio's Landlord-Tenant Act, R.C. 5321.04, would yield the same result.

{¶ 5} Appellant has timely appealed and brings the following assignments of error:

> 1. The trial court erred in granting Appellees' Motion for Summary Judgment because reasonable minds could conclude the ice and snow that Appellant encountered was an unnatural accumulation and therefore not open and obvious.
>
> 2. The trial court erred in granting Appellees' Motion for Summary Judgment because the Appellees were required to exercise ordinary care to render the sidewalk reasonably safe for use by the Appellant.
>
> 3. The trial court erred in granting Appellees' Motion for Summary Judgment because Appellees breached a statutory duty owed to Appellant under The Landlord Tenant Act.
>
> 4. The trial court erred in granting Appellees' Motion for Summary Judgment because the Appellant's expert testimony was based on reliable scientific, technical, or other specialized information.

{¶ 6} We initially note that this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case.

Dresher v. Burt, 75 Ohio St.3d 280, 293 (1996). Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party lacks evidence to support one or more element of each stated claim. *Id*.

{¶ 7} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994); *Bard v. Soc. Natl. Bank, nka KeyBank, N.A.*, 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶ 8} Appellant's first assignment of error raises basic issues of common-law premises liability in ice and snow cases and asserts that the trial court improperly discounted the evidence that would maintain a genuine issue of material fact in the case and preclude summary judgment. Appellant's fourth assignment of error is subsumed under the first because it addresses the trial court's treatment of the expert testimony presented on behalf of appellant in opposition to summary judgment on the common-law negligence claim. We will accordingly discuss these two assignments of error together.

{¶ 9} Appellant asserts that appellees breached a duty of ordinary care in this case by negligently causing or allowing an unnatural or improper accumulation of ice and snow on the sidewalk, failing to remove this hazard, and failing to warn residents of it. The fundamental legal principles guiding Ohio law in this area will also underpin our analysis of the arguments presented in the balance of the appeal.

{¶ 10} In order to establish actionable negligence in general, a plaintiff must show the existence of a duty, a breach of that duty, and injury proximately resulting therefrom. *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). In cases specifically involving common-law premises liability, a property owner or occupier owes different duties of care to different classes of persons on the premises. Ohio law applies the typical common-law classifications of business invitee, licensee, and trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315 (1996); *Carlson v. Ohio Dept. of Transp.*, 10th Dist. No. 11AP-175, 2011-Ohio-5973.

{¶ 11} Although the Ohio Supreme Court has never explicitly defined the status of residential tenants in an apartment complex, most premises-liability cases have assumed without discussion that residential tenants are invitees for these purposes, as are their guests. *See, e.g., Bae v. Dragoo and Assoc., Inc.*, 156 Ohio App.3d 103, 2004-Ohio-544 (10th Dist.); *Tucker v. Kanzios*, 9th Dist. No. 08CA009429, 2009-Ohio-2788; *Briskey v. Gary Crim Rentals*, 7th Dist. No. 04 MA 7, 2004-Ohio-6508, ¶ 2. Property owners owe invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition, including an obligation to warn invitees of latent or hidden dangers so as to avoid unnecessarily and unreasonably exposing invitees to risk of harm. *Perry v. Eastgreen Realty Co.*, 53 Ohio St.2d 51, 52 (1978). The property owner is not, however, an insurer of the invitee's safety for all purposes and against all hazards. *Id.*

{¶ 12} Even if the facts otherwise might establish a breach of the duty owed to invitees, Ohio law places an additional burden on the plaintiff in a premises liability case. The "open-and-obvious" doctrine further limits the owner's duty to warn an invitee of those dangers on the premises that are either known to the invitee or so obvious and apparent to the invitee that he or she may reasonably be expected to discover them and guard against them. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 21; *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968). The rationale for this doctrine is that, because the open-and-obvious nature of the hazard itself serves as a warning, the property owner may reasonably expect persons lawfully on the premises to discover the hazard and take appropriate measures to protect themselves. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644 (1992). The open-and-obvious doctrine relates to the threshold question of whether the defendant had a duty towards the plaintiff. *Ray v. Wal-Mart Stores, Inc.*, 4th Dist. No. 08CA41, 2009-Ohio-4542, ¶ 21, citing *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St. 3d 79, 2003-Ohio-2573, ¶ 13.

{¶ 13} Open-and-obvious dangers are those that are not hidden, concealed from view, or undiscoverable upon ordinary inspection. *Lydic v. Lowe's Cos., Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶ 10. A person need not actually observe the dangerous condition for it to be "open and obvious" under the law; the determinative issue is whether the condition is, under an objective standard, observable. *Id.* Even in instances where the plaintiff did not actually notice the condition until after it had caused injury, we

have concluded that no duty was breached if the plaintiff could have observed the dangerous condition with reasonable attention to his or her surroundings. *Id.* In other words, the open-and-obvious doctrine focuses on the nature of the hazard itself, not on any party's particular conduct or subjective assessment of the hazard. *Ray* at ¶ 21.

{¶ 14} Procedurally, it is well-settled that "[c]ertain clearly ascertainable hazards or defects may be deemed open and obvious as a matter of law for purposes of granting summary judgment." *McConnell v. Margello,* 10th Dist. No. 06AP-1235, 2007-Ohio-4860, ¶ 11. As such, "[t]his court has uniformly recognized that the existence and obviousness of an alleged danger requires a review of the underlying facts." *Id.,* citing *Schmitt v. Duke Realty, LP,* 10th Dist. No. 04AP-251, 2005-Ohio-4245, ¶ 10. "However, unless the record reveals a genuine issue of material fact as to whether the danger was free from obstruction and readily appreciable by an ordinary person, it is appropriate to find that the hazard is open and obvious as a matter of law." *McConnell* at ¶ 11, citing *Freiburger v. Four Seasons Golf Ctr., L.L.C.,* 10th Dist. No. 06AP-765, 2007-Ohio-2871, ¶ 11.

{¶ 15} Applying the above rules regarding duty and breach specifically to cases arising from injuries caused by accumulations of ice and snow, Ohio law provides that an owner or occupier generally owes no duty to remove natural accumulations of snow or warn users of the dangers associated with such accumulations. *Brinkman v. Ross*, 68 Ohio St.3d 82, 83-84 (1993). The rationale is that individuals are assumed to appreciate the inherent risks associated with ice and snow arising during typical Ohio winters and protect themselves against such dangers. *Id.* at 84, citing *Debie v. Cochran Pharmacy-Berwick, Inc.*, 11 Ohio St.2d 38 (1967). This is sometimes referred to as the "no-duty winter rule." *See, e.g., Luft v. Ravemor, Inc.*, 10th Dist. No. 11AP-16, 2011-Ohio-6765, citing *Brinkman* at 83-84.

{¶ 16} Ohio does recognize two exceptions to this absence of duty in ice and snow cases. The first addresses an "unnatural" accumulation of ice and snow, and the second addresses an "improper" accumulation. *See generally Luft* at ¶ 14.

{¶ 17} An "unnatural" accumulation is one created by causes and factors other than natural meteorological forces. Natural meteorological forces include inclement weather conditions, low temperatures, drifting snow, strong winds, and freeze cycles.

Unnatural accumulations therefore are caused by the intervention of human action doing something that would cause ice and snow to accumulate in unexpected places and ways. *Porter v. Miller*, 13 Ohio App.3d 93 (6th Dist.1983). Under the unnatural-accumulation exception, an owner or occupier may be liable if he "is actively negligent in permitting or creating" such unnatural accumulations of ice and snow. *Bowen v. Columbus Airport Ltd. Partnership*, 10th Dist. No. 07AP-108, 2008-Ohio-763, ¶ 13; *see also Miller v. Tractor Supply Co.*, 6th Dist. No. H-11-001, 2011-Ohio-5906.

{¶ 18} An "improper" accumulation occurs when a natural accumulation conceals a hazardous condition that is substantially more dangerous than conditions normally associated with ice and snow. Under the improper-accumulation exception, the owner or occupier may be liable if he has actual or constructive knowledge of the concealed hazardous condition. *Luft* at ¶ 16. *Miller v. Tractor Supply* at ¶ 12, 13, citing *Mikula v. Tailors*, 24 Ohio St.2d 48, 57 (1970), and *Crossman v. Smith Clinic*, 3d Dist. No. 9-10-10, 2010-Ohio-3552, ¶ 15. This exception is not raised in the present case.

{¶ 19} In arguing the existence and effect of an unnatural accumulation on the case before us, the parties present differing analyses on the interaction of the unnatural-accumulation exception and the open-and-obvious rule. Indeed, Ohio courts have split on the question of whether the open-and-obvious rule applies to unnatural accumulations. On the one hand, the no-duty winter rule was originally presented as a broad extension of the open-and-obvious rule, establishing, in effect, that it would be legally untenable for any plaintiff to claim ignorance of customary winter hazards. Under this reasoning, unnatural accumulations are discussed as exceptions not just to the no-duty winter rule but to the open-and-obvious rule itself. *See, e.g., McLean v. McHugh*, 5th Dist. No. CT2011-007, 2011-Ohio-2478; *Jackson v. J-F Ents., Inc.*, 6th Dist. No. L-10-1285, 2011-Ohio-1543; *Bailey v. River Properties*, 8th Dist. No. 86968, 2006-Ohio-3846. Such cases would conclude that the proven existence of an unnatural accumulation forecloses any need for further discussion of whether it was open and obvious and mandates the conclusion that it was not.

{¶ 20} The greater number of cases, however, consider that, even if a plaintiff establishes that an unnatural accumulation existed, to show liability on the part of the landlord, the plaintiff bears the additional burden of showing that the condition was not

open and obvious. *Mounts v. Ravotti*, 7th Dist. No. 07 MA 182, 2008-Ohio-5045; *Prexta v. BW-3 Akron, Inc.*, 9th Dist. No. 23314, 2006-Ohio-6969; *Bevins v. Arledge*, 4th Dist. No. 03CA19, 2003-Ohio-7297; *Murphy v. McDonald's Restaurants of Ohio, Inc.*, 2d Dist. No. 2010 CA 4, 2010-Ohio-4761.

{¶ 21} This court has recognized the ambiguous authority on this issue but has yet to definitively pass on the question. In *Cummin v. Image Mart, Inc.*, 10th Dist. No. 03AP-1284, 2004-Ohio-2840, and *Kaeppner v. Leading Mgt., Inc.*, 10th Dist. No. 05AP-1324, 2006-Ohio-3588, we found that resolution of the cases turned on facts that obviated the need to decide whether a separate analysis under the open-and-obvious rule was required. The present case presents a similar analytical posture, and our disposition of the question of whether there remained a genuine issue of material fact regarding the existence of an unnatural accumulation will preclude any need to go further on the question of whether it was open and obvious.

{¶ 22} Appellant in the present case asserts that the snow and ice upon which she slipped was an unnatural accumulation. She asserts that the ice accumulated on the sidewalk due to defects in the roof drainage system and landscaping that resulted from the negligent design, construction, and maintenance of the apartment complex. She further asserts that the ice was not an open-and-obvious condition because: (1) it was concealed under new snow at the time of her fall; and (2) she had no notice that a hazardous condition was concealed under the fresh snow because neither ice nor snow were present when appellant last used the sidewalk.

{¶ 23} In opposition to summary judgment, appellant presented her affidavit and deposition testimony. In these, she states that she lived in the Lauffer Ravines complex for more than three years prior to the accident. On January 24, 2009, the day before her injury, she observed that the sidewalk leading from her apartment to the parking area was free of ice and snow. The next day appellant drove to visit her mother. She ended the visit and left for home when she heard on the radio that the weather forecast called for snow. She observed intermittent snowfalls while driving home. When she returned to the apartment complex, appellant approached her apartment door on the sidewalk and slipped on a patch of ice covered by newly fallen snow. Appellant observed that there was a hole in the ice as if someone had cracked a sheet of ice and left the fragments without

removing them. Appellant suffered an open fracture of her ankle and, with some difficulty, was able to drag herself to her apartment, where she waited the arrival of paramedics.

{¶ 24} Appellant's affidavit included her prior observation that there was a drainage problem at the corner of the building where she fell due to the building being sited at the base of a ravine, and there was water carrying soil down the side of the ravine. Appellant also noticed that drainage of water from the roof through the gutters and downspouts was obstructed by broken downspout drains, causing the backed-up drainage water from the roof to spurt out from the downspouts in the area where mud from the hillside collected. This mud accumulation prevented the misdirected roof drainage from running off from the sidewalk and allowed water to pool and freeze there. Appellant averred that she had repeatedly complained to the management company about these conditions. Maintenance employees had attempted to remedy some of the problems by digging a shallow trench along the sidewalk to divert water from the hillside, but this trench soon was choked with newly deposited mud and failed to serve its purpose.

{¶ 25} The affidavit of Khoudir Admi, appellant's former roommate, corroborated her statements regarding the condition of the premises and prior complaints to Evergreen.

{¶ 26} Appellant also presented deposition testimony from two maintenance workers employed by Evergreen. John Barr testified that he had been called to the location to repair holes in the downspouts and soil erosion from the hillside. Michael McClish similarly testified that he had been dispatched by his employer to repair holes in the downspouts that were projecting water onto the sidewalk area.

{¶ 27} In addition to this personal deposition testimony, appellant retained an expert to survey the site of the accident. James Riley, an experienced professional architect, evaluated the building site and sidewalks and gave his professional opinion by means of an affidavit and subsequent deposition testimony. Mr. Riley opined regarding the state of the drainage system and causes for ice accumulation. Mr. Riley testified in his deposition that, pursuant to his observations, he found that the area next to the building consisted of a steep hillside, incompletely covered in vegetation, causing substantial storm-water runoff that would carry soil and debris over a retaining wall and toward the

corner of the building. These deposits of washed-down soil and debris caused a blockage of surface-water drainage around the sidewalk.

{¶ 28} Riley also observed several problems with the gutter, downspouts, and drain systems on the property. He calculated that the downspouts were too few, too small, and poorly distributed in relation to the size of the roof, but that this defect would only become apparent in heavy downpours. Because the reported conditions surrounding appellant's fall did not involve such heavy precipitation, he opined that the inadequate downspout design capacity was not a contributing factor.

{¶ 29} In contrast, Riley opined that the condition of the underground drains intended to carry off water flowing from the gutters through the downspouts presented serious problems. He found that the underground drainage pipes were located too close to the surface and had become severed and damaged at several locations and useless for properly carrying away water from the roof. In addition, these drains were not deep enough and subject to freezing, which would further impair any remaining water-carrying capacity. This blockage from damage, collapse, and freezing would cause drainage from the roof to find other outlets and flow over surface areas, including the sidewalk.

{¶ 30} Riley stated that, under such conditions, it was not necessary for heavy precipitation to fall in order to see undesirable water flow onto the sidewalk, nor for ambient above-freezing temperatures to generate new snowmelt. Even on sub-freezing days without new precipitation, existing snow on the roof of the building would melt due both to loss of building interior heat and sun exposure, resulting in water flow to the gutters, downspouts, and thus onto the sidewalk because of the clogged drains.

{¶ 31} Riley's professional conclusion was that ice accumulation on the sidewalk would be caused by water from the roof from snowmelt, collecting in the gutters as intended but then leaking from the downspout at various points because the underground drains designed to carry away this water were inoperable. In combination with the soil, water, and debris deposits running down the hillside, this would create ponding water on the sidewalk.

{¶ 32} As noted by the trial court, however, these conclusions were presented with some lack of finality. In an affidavit, signed prior to the taking of the deposition, Riley stated that it was "more probable than not" that this is what occurred. (Riley Affidavit, at

3.) However, in his later deposition, he characterized his theory as "suspicion," "speculation," "just a guess" (Riley Depo., at 32-33).

> Q. Now, for the purpose of offering opinions, are you assuming that there was a layer of ice underneath the newly fallen snow at the time Ms. Thatcher fell?
>
> A. That's my understanding.
>
> Q. Okay. How did the ice get under the snow?
>
> A. You know, that's what this is all about.
>
> Q. And that's my question. How did the ice get under the snow?
>
> A. My *suspicion* is there was overflow from the downspout.
>
> Q. Okay. Does that represent speculation on your part?
>
> A. Yes.
>
> Q. And it could also be probable that when the snow landed on the sidewalk itself initially it could have frozen?
> A. We don't know what – we don't have any record from the weather bureau of whether there was snow – sun. You can have sun shining on the sidewalk that's actually below freezing that would warm up the sidewalk.
>
> Q. Sure.
>
> A. And so, you know, that I have no – I have no information about.
>
> Q. Okay. So we could only speculate whether, for example, it was partly sunny or full sun but still snowing?
>
> A. Right.
>
> Q. Okay. So we at the end of the day we can probably only speculate as to what would have caused that ice to be under the snow?
>
> A. It's just a *guess*.

(Emphasis added.)

{¶ 33} In his errata sheet to the deposition he corrected, without explanation, the term "suspicion" to "supposition" and the term "guess" to "educated conclusion."

{¶ 34} In support of summary judgment, appellees presented deposition testimony, affidavits, and documentary evidence. Ronald Porshinsky, manager of Evergreen Realty, testified that Evergreen had managed the property since 2003. The condition of the ravine hillside retaining wall and building layout had not been altered after he assumed management. Porshinsky confirmed that, due to the grade of the ravine, earth would erode over the retaining wall onto the sidewalk, despite past efforts to introduce vegetation to control the erosion. Evergreen would dispatch maintenance personnel to clear and salt the sidewalks around the building on an as-needed basis. Evergreen's management office would note complaints from tenants regarding condition of the buildings and maintained records with regard to service calls and subsequent repairs. According to Porshinsky's records, there is no indication that appellant had ever contacted Evergreen to report an issue with ice building up on the sidewalk of her building or problems with the downspout drains in the adjacent area.

{¶ 35} Porshinksy's personal recollection, which was prompted by and tied to his recollection of appellant's injury, was that, on January 25, 2009, it was very cold in the area and snowing, following a period of cold but relatively dry weather. He subsequently reviewed daily summaries of weather data for Columbus as compiled by the National Weather Service, documenting that only on January 23, 2009 did the temperature rise above freezing and that there was no precipitation on that day.

{¶ 36} The trial court granted summary judgment in part because it noted that Riley's testimony was "too speculative" (Sept. 6, 2011 Decision at 12). The court relied upon *Holbrook v. Kingsgate Condo Assn.*, 12th Dist. No. CA2009-07-193, 2010-Ohio-850, for the proposition that an expert must opine that there is a greater than 50 percent likelihood that the condition observed caused the unnatural accumulation leading to injury. As such, the court found that the expert's opinion demonstrated too great a level of uncertainty and could not create a genuine issue of material fact on the question of unnatural accumulation of ice and snow. The trial court then concluded that the dangerous condition was open and obvious, which precluded liability.

{¶ 37} We agree that the expert's opinion could not create a genuine issue of material fact. Although in his affidavit appellant's expert Riley opined that it was "more probable than not" that snowmelt from the roof combined with faulty downspouts and drains caused the ice, he later equivocated in his deposition. His deposition testimony that his theory was a "guess," "speculation," and "suspicion" does not create a genuine issue of material fact. Nor does appellant's subsequent effort to correct these terms without explanation via the errata sheet. "The admissibility of expert testimony that an event is the proximate cause of injury is contingent upon the expression of an opinion by an expert with respect to the causative event in terms of probability. An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue. Inasmuch as the expression of probability is a condition precedent to the admissibility of expert opinion regarding causation, it relates to the competence of the evidence and not its weight. Consequently, expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability." (Internal citations omitted.) *Stinson v. England*, 69 Ohio St.3d 451 (1944), at paragraph one of the syllabus. Appellant's expert's deposition testimony did not meet this criteria.

{¶ 38} We accordingly find that appellant failed to present sufficient evidence in opposition to summary judgment to preserve the question of whether appellees' negligent maintenance of the roof drainage system created an unnatural accumulation on the day in question. The trial court properly granted summary judgment for appellees on the common-law negligence claim, and appellant's first and fourth assignments of error are overruled.

{¶ 39} Appellant's second assignment of error asserts that, in addition to the standard duty of care owed to a residential tenant by a landlord, appellees assumed an enhanced duty of care by virtue of their past practice of sending maintenance personnel to clear the common areas after heavy snowfalls. Appellant urges this court to follow *Bauer v. Baker Rental Co.*, 10th Dist. No. 79AP-789 (Mar. 6, 1980), and to find that there was a genuine issue of material fact as to whether appellees impliedly agreed by a course of conduct to assume the duty of clearing snow and ice.

{¶ 40} Assuming, without finding, that such an implied agreement existed, we note that this court has previously called into question such an implied assumption of duty. In

Tom v. Catholic Diocese of Columbus, 10th Dist. No. 06AP-193, 2006-Ohio-4715, this court, in finding that a landlord's prior efforts to remove snow did not give rise to a continuing duty to do so, commented that: "Indeed, if plaintiffs' position were adopted, a premises owner who 'does absolutely nothing to clear ice and snow from his properties, and allows such elements to accumulate as they will, will be entirely immune from liability as a consequence of his inaction.' " *Id.* at ¶14, citing *Community Ins. Co. v. McDonald's Restaurants of* Ohio, 2d Dist. No. 17051 (Dec. 11, 1998), quoting *Yanda v. Consolidated Mgmt., Inc.*, 8th Dist. No. 57268 (Aug. 16, 1990). "By contrast, a premises owner 'who does what he can to combat the dangerous conditions frequently recurring in our climate will be opening himself up to potential lawsuits from those who slip and fall on the inevitable patches of ice and snow eluding the plow, shovel and salt.' " *Tom* at ¶14, quoting *Yanda*. *See also Pacey v. Penn Garden Apts.*, 2d Dist. No. 17370 (Feb. 19, 1999) (noting " 'this court has recently sought to distance itself from the principle contained in *Hammond* [*v. Moon*, 8 Ohio App.3d 66 (10th Dist.1982)] and its progeny, on the grounds that imposing a duty on landlords to remove ice and snow through an "implied course of conduct" theory would discourage landlords from ever attempting to remove ice and snow from the common areas of their premises as a courtesy to their tenants, and would, therefore, make those areas less safe' ").

{¶ 41} Also, we find that appellant did not introduce evidence to establish that appellees had through past conduct created an implied duty that would have applied on the day in question. While both appellant and Porshinsky testified that management would clear and salt the common areas in response to weather, the weather conditions described by appellant, combined with the narrow time interval between any additional snowfall and the accident, do not sufficiently support the inference that appellees failed to conform to past practice. The record lacks evidence to establish that appellees customarily would respond consistently and immediately to any new weather event within an interval that would have reduced the hazard to appellant.

{¶ 42} For all these reasons, we find that appellant has not demonstrated that appellees breached a duty of care created by contract or implication, and appellant's second assignment of error is overruled.

{¶ 43} Appellant's third assignment of error asserts that the trial court improperly granted summary judgment on appellant's claim under the Ohio Landlord-Tenant Act, R.C. Chapter 5321. There is some dispute in the present case whether the complaint properly states the statutory action under the Act, since such a claim is not spelled out in the complaint by explicit reference to the appropriate statutory sections; whereas, in her memorandum contra appellees' motion for summary judgment, appellant asserts violations of R.C. 5321.04(A)(1), (2), and (3), as well as Sections 4525.08 and 4525.11(b) of the Columbus Housing Code.

{¶ 44} Pursuant to Civ.R. 8(A), a complaint shall contain: "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. Such Ohio rule encompasses what is known as notice pleading." *Snell v. Seidler*, 7th Dist. No. 04 MO 15, 2005-Ohio-6785 (42 U.S.C. 1983 claim sufficiently set forth without reference to statute). More specifically, in a case similar to the case at bar, the court held that a complaint pleading common-law negligence in a premises liability action could also go forward on a Landlord-Tenant Act claim if the allegations in the complaint provided fair notice to the defendants that the action could proceed on this theory. *Mounts v. Ravotti*, 7th Dist. No. 07 MA 182, 2008-Ohio-5045, ¶ 25-26 ("[T]he labels used in a particular cause of action do not control the nature of that action. * * * [T]he pleading clearly asserts that [the defendant] had a duty to maintain [the premises].").

{¶ 45} Appellant argues that, in her complaint, she set forth statutory claims for violation of R.C. 5321.04(A)(1), (2), and (3), which read as follows:

> (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; * * * [.]

Appellant argues as well that she set forth statutory claims for violations of Sections 4524.08 and 4525.11(b) of the Columbus Housing Code, which read as follows:

> **4525.08 - Rain carriers.**
>
> The owner of any dwelling shall be responsible for the installation and maintenance of adequate rain carriers where the absence thereof creates a structural or a health hazard.
>
> **4525.11 – Exterior of premises**
>
> * * *
>
> (b) All driveways, fire escapes, porches, sidewalks, exterior stairways, yards and entire premises shall be reasonably clean and free from filth, garbage, noxious weeds, refuse or other debris, free from hazardous objects or conditions such as excavations, holes and dead or dying trees so as to afford safe passage and use; and in good repair.

{¶ 46} In contrast to a common-law claim for premises liability, the open-and-obvious doctrine does not apply in a statutory action predicated on a breach of the duty to repair. *Robinson v. Bates*, 112 Ohio St.3d 17, 25, 2006-Ohio-6362, citing *Schoefield v. Beulah Rd.*, 10th Dist. No. 98AP-1475 (Aug. 26, 1999) ("The 'open and obvious' doctrine does not dissolve the statutory duty to repair."). *See also Mann v. Northgate Investors*, 10th Dist. No. 11AP-684, 2012-Ohio-2871, ¶ 11, citing *Robinson* and *Ryder v. McGlone's Rentals,* 3d Dist. No. 3-09-02, 2009-Ohio-2820, ¶ 17 ("If a landlord breaches a duty under R.C. 5321.04, the 'open and obvious' doctrine will not protect the landlord from liability. If, however, no statutory breach occurred, the open-and-obvious doctrine remains a bar to a common law negligence claim."). Therefore, it is necessary for us to determine if the statutory claims survive our resolution of the other assignments of error.

{¶ 47} In moving for summary judgment, appellees asserted that "[a]ll of the allegations in [appellant's] complaint are couched in terms of common law negligence." (Motion at 2.) Nevertheless, as noted above, appellees also included the affidavit of Ronald Porshinsky, who was responsible for the maintenance and upkeep of appellees' property. Porshinsky averred that neither appellant nor any one else had ever notified appellees of the conditions of ice, downspout problems and the drainage system problems. (Porshinsky affidavit, at ¶ 6, attached to Motion for Summary Judgment.)

{¶ 48} The Supreme Court of Ohio has held that a landlord's notice of the condition causing a statutory violation is a prerequisite to liability. *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20 (1981); *Sikora v. Wenzel*, 88 Ohio St.3d 493 (2000). Appellees addressed the element of notice with the evidence provided in support of the motion for summary judgment. Accordingly, as appellees anticipated and addressed the element of notice, we cannot say that the complaint was deficient in providing fair notice to appellees that the action could proceed on the theory of statutory violations. See *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Quaranta*, 7th Dist. No. 01 CA 60 (Mar. 18, 2002), ¶ 41-42, and *Collier v. Libations Lounge, L.L.C.*, 8th Dist. No. 97504, 2012-Ohio-2390, ¶ 24. We also note that the trial court appears to have been on notice of the statutory claims since the decision also grants judgment in favor of appellees on R.C. 5321.04(A)(3). (Decision at 14.)

{¶ 49} With regard to R.C. 5321.04(A)(3), the Supreme Court of Ohio in *LaCourse v. Fleitz*, 28 Ohio St.3d 209 (1986), syllabus, specifically stated that the Landlord-Tenant Act does not impose an additional duty on landlords to keep common areas of leased premises clear of natural accumulations of ice and snow. *See also Schoefield*, citing *LaCourse*, at syllabus: "The Supreme Court has extended the open and obvious danger doctrine to the landlord/tenant situation in the context of the removal of ice and snow. * * * R.C. 5321.04(A)(3) does not impose a duty on landlords to keep common areas of leased premises clear of natural accumulations of ice and snow. * * * [T]he dangers from such are ordinarily so obvious and apparent that a landlord may reasonably expect that a tenant will act to protect himself or herself against such dangers." Thus, as appellant did not show a genuine issue of material fact that the ice was a natural accumulation, the trial court did not err in granting summary judgment in favor of appellees on R.C. 5321.04(A)(3).

{¶ 50} With regard to R.C. 5321.04(A)(1) and (2) and the Columbus Housing Code provisions, we note that the trial court did not specifically address these allegations. Nevertheless, appellant very clearly raised these allegations in her memorandum contra appellees' motion for summary judgment. (Memorandum Contra at ¶ 2.) With this in mind, as well as our finding noted above that the trial court appears to have been on notice of the statutory allegations, we find the trial court implicitly granted summary

judgment in favor of appellees on these remaining statutory allegations when it granted judgment in favor of appellees on R.C. 5321.04(A)(3).

{¶ 51} Because we find that appellant presented evidence that the landlord was on notice of the condition allegedly resulting in the statutory violation, she raised a genuine issue of material fact as to whether appellees violated R.C. 5321.04(A)(1) and (2) and Columbus Housing Code Sections 4525.08 and 4525.11(b). Appellant's own affidavit, the affidavit of Khoudir Admi, the deposition of Michael McClish, the deposition of Pamela K. Lewis, and the deposition of John Barr, all create a genuine issue of material fact. Accordingly, we find the trial court erred in granting summary judgment in favor of appellees on R.C. 5321.04(A)(1) and (2) and the Columbus Housing Code Sections 4525.08 and 4525.11(b).

{¶ 52} For these reasons, we overrule appellant's third assignment of error in part and sustain in part.

{¶ 53} In summary, appellant's first, second, and fourth assignments of error are overruled, and her third assignment of error is overruled in part and sustained in part. Therefore, the judgment of the Franklin County Court of Common Pleas granting summary judgment for appellees is affirmed in part and reversed in part, and this case is remanded to that court to conduct proceedings consistent with this decision.

Judgment affirmed in part, reversed in part, and cause remanded.

BRYANT and CONNOR, JJ., concur.

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