[Cite as *Burress v. Associated Land Group*, 2009-Ohio-2450.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

JAMES BURRESS, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2008-10-096
	:	O P I N I O N
- vs -		5/26/2009
	:	
ASSOCIATED LAND GROUP, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007-CVC-00705

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POWELL, J.

{¶1} Plaintiffs-appellants, Tammy Burress, James Burress, and James Burress, Jr., appeal from the Clermont County Court of Common Pleas decision granting summary judgment in favor of defendants-appellees, Associated Land Group, Inc. ("ALG") and

Cincinnati Lawnmaster, LLC ("Lawnmaster").[1] We affirm the trial court's decision.

{¶2} ALG is the owner and operator of Mallard Glen Apartments, an apartment complex located in Amelia, Ohio. At all times relevant, James and Tammy Burress, along with their infant son James, Jr., were tenants of the Mallard Glen Apartments.

{¶3} On December 6, 2002, a day in which it had snowed heavily, Mrs. Burress left her apartment with her son, James, Jr., to go to the store. While the pair was gone, a Lawnmaster employee plowed the Mallard Glen Apartment parking lot, which created two "snow banks."[2] Mrs. Burress, upon her return, and while carrying her son, slipped and fell when she stepped over one of the plowed snow banks as she made her way towards her apartment building. As a result of the fall, James, Jr., her son, was injured.

{¶4} Over four years later, on April 23, 2007, appellants filed suit against ALG and Lawnmaster, alleging they negligently plowed the parking lot. ALG and Lawnmaster moved for summary judgment, which the trial court granted. Appellants now appeal, raising one assignment of error.

{¶5} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF [ALG AND LAWNMASTER]."

{¶6} Appellants, in their sole assignment of error, argue the trial court erred by granting summary judgment in favor of ALG and Lawnmaster. We disagree.

I. Summary Judgment

{¶7} An appellate court's review of a summary judgment decision is de novo. *Uhl v. Thomas*, Butler App. No. CA2008-06-131, 2009-Ohio-196, ¶7, citing *Grafton v. Ohio Edison*

1. Pursuant to Loc.R. 6(A), we have sua sponte removed this appeal from the accelerated calendar.

2. During her deposition, Mrs. Burress testified the "snow banks," which were allegedly created by Lawnmaster's plowing, were approximately one foot high, and that "[t]here wasn't no [sic.] wideness to it." The trial court referred to them as "snow ridges." We will refer to them as "snow banks" because appellant does.

Co., 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran,* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383. An appellate court must review a trial court's decision to grant or deny summary judgment independently, without any deference to the trial court's judgment. *Bravard*, citing *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 295.

{¶8} A court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment bears the burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. The nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. Id. at 293. A material fact is one which would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505. In deciding whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.*, Butler App. No. CA2001-10-249, 2002-Ohio-3730, ¶10.

{¶9} Negligence claims, such as the case here, require a showing of a duty owed; a breach of that duty; and an injury proximately caused by the breach. *Wallace v. Ohio Dept. of Commerce,* 96 Ohio St.3d 266, 2002-Ohio-4210, ¶22. "The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability."

Adelman v. Timman (1997), 117 Ohio App.3d 544, 549. Determination of whether a duty exists is a question of law for the court to decide. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

II. Associated Land Group, Inc.

{¶10} Initially, appellants, in regard to their claim against ALG, essentially argue the trial court incorrectly applied the open and obvious doctrine, and therefore, erred by granting summary judgment in favor of ALG. This argument lacks merit.

{¶11} At the outset, it should be noted that the trial court classified appellants as invitees. While it is undisputed that appellants were, in fact, tenants of the Mallard Glen Apartments, an apartment complex owned an operated by ALG, neither party took exception to the trial court's invitee classification on appeal. Nevertheless, whether appellants are viewed as invitees, or merely tenants, ALG's duty towards them is substantially the same.[3] See *Carrozza v. Olympia Mgt., Ltd.* (Sept. 2, 1997), Butler App. Nos. CA96-11-228, CA96-11-234, at 7-8; see, also, *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 210-211.

{¶12} The general rule in Ohio is that landlords are not liable for failing to clear naturally accumulated ice and snow from common areas on leased property because "[t]he dangers from natural accumulations of ice and snow are ordinarily so obvious and apparent that a landlord may reasonably expect that a tenant * * * will act to protect himself against them." *Barner v. Continent Apt. Homes*, Franklin App. No. 04AP-774, 2005-Ohio-2133, ¶16, quoting *DeAmiches v. Popczun* (1973), 35 Ohio St.2d 180, paragraph one of the syllabus. A landlord does have a duty, however, "to refrain from creating or allowing the creation of an unnatural accumulation of ice or snow, if that accumulation results in a condition that is

3. It should also be noted, appellants did not argue to the trial court, or to this court, that they were entitled to any recovery under R.C. 5321.04, also known as the Landlord-Tenant Act, which requires a landlord to, among other things, "keep all common areas of the premises in a safe and sanitary condition; * * *."

substantially more dangerous than would have resulted naturally." *Saunders v. Greenwood Colony*, Union App. No. 14-2000-40, 2001-Ohio-2099, 2001 WL 196498 at *3, citing *Myers v. Forest City Ent., Inc.* (1993), 92 Ohio App.3d 351, 353-354; *Mitchell v. Parkridge Apts., Ltd.*, Cuyahoga App. No. 81046, 2002-Ohio-5357, ¶13.

{¶13} An unnatural accumulation of snow and ice refers to "causes and factors other than the inclement weather conditions of low temperature, strong winds and drifting snow." *Walters*, 2002-Ohio-3730 at ¶15. In other words, an unnatural accumulation is "man-made," and created by a person doing something that would cause ice and snow to accumulate in an unexpected place or way. Id., quoting *Porter v. Miller* (1983) 13 Ohio App.3d 93, 95; *Lawrence v. Jiffy Print, Inc.*, Trumball App. No. 2004-T-0065, 2005-Ohio-4043, ¶14.

{¶14} However, even when a plaintiff's resulting slip and fall was due to unnatural accumulations of snow and ice, numerous appellate districts have found the open and obvious doctrine applicable, thus absolving the duty of care on the part of the landowner. *Mounts v. Ravotti*, Mahoning App. No. 07 MA 182, 2008-Ohio-5045, ¶53; see, e.g., *Whitehouse v. Customer is Everything!, Ltd.,* Lake App. No. 2007-L-069, 2007-Ohio-6936, ¶72; *Prexta v. BW-3, Akron, Inc.,* Summit App. No. 23314, 2006-Ohio-6969, ¶13; *Scholz v. Revco Discount Drug Ctr., Inc.,* Montgomery App. No. 20825, 2005-Ohio-5916, ¶17-19; *Couture v. Oak Hill Rentals, Ltd.*, Ottawa App. No. OT-03-048, 2004-Ohio-5237, ¶16; *Bevins v. Arledge,* Pickaway App. No. 03CA19, 2003-Ohio-7297, ¶18-20. The open and obvious doctrine, which is based on a common-law duty to warn invitees of latent or hidden dangers, applies to common law premises liability even when it involves claims against a landlord. *Mounts* at ¶50, citing *Robinson v. Bates,* 112 Ohio St.3d 17, 2006-Ohio-6362, ¶25. As a result, "[w]here a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus. Therefore, if the danger resulting from the plowed snow bank

found in the parking lot was open and obvious, ALG, the landlord, owed no duty of care to appellants, the tenants. *Mounts* at ¶16.

{¶15} After reviewing the record, the evidence presented indicates the plowed snow bank was open and obvious. It is undisputed that Mrs. Burress knew she was parking next to a snow bank in the apartment's parking lot, she saw the snow bank as she approached the sidewalk, and that the snow bank was in no way hidden from her view. In fact, Mrs. Burress testified that she drove over the foot high snow bank when she pulled into her parking spot, and that the snow looked "slushy." As a result, because the plowed snow bank was an open and obvious accumulation of snow and ice, ALG owed no duty of care to appellants.

{¶16} Appellants, nonetheless, argue the open and obvious doctrine should not apply due to "attendant circumstances." In support of their argument, appellants claim Mrs. Burress was "obviously distracted" by the falling snow, and because she was "carrying her infant son." However, while attendant circumstances, or "distractions that contribute to an injury by diverting the attention of the injured party and reduc[ing] the degree of care an ordinary person would exercise at the time," are an exception to the open and obvious doctrine, appellants' claim is in direct contrast to Mrs. Burress' deposition testimony, in which she stated that, among other things, she was "totally aware" of the snow, and that her attention was not diverted in anyway. *Wainscott v. Americare Communities Anderson Dev., L.L.C.*, Butler App. No. CA2006-12-308, 2007-Ohio-4735, ¶12, citing *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 194.

{¶17} Appellants also claim that the plowed snow bank blocked "the only ingress/egress for the property." However, such an assertion is unsupported by the record. During her deposition, Mrs. Burress stated, in pertinent part:

{¶18} "Somebody told me, why didn't you just walk all this way? I'm like, what? That is just too much for me, you all, with a kid. Come on."

{¶19} In turn, while appellants claim there was "only the one way" into their apartment building, the record clearly indicates that was simply not the case.

{¶20} The trial court, in its decision granting summary judgment in favor of ALG, found it "did not owe [appellants] a duty with respect to the snow ridge in the parking lot." We agree with the trial courts decision. After snow is removed from the surface of the parking lot, it must be disposed of and placed somewhere. *Dunbar v. Denny's Restaurant*, Cuyahoga App. No. 86385, 2006-Ohio-1248, ¶13, citing *Zamano v. Joseph D. Hammerschmidt, Inc.,* Huron App. No. H-02-031, 2003-Ohio-1618; *Hoenigman v. McDonald's Corp.* (Jan. 11, 1990), Cuyahoga App. No. 56010, 1990 WL 1334 at *3. As this court has observed previously, "[w]e choose not to discourage the diligence of landlords to exercise ordinary care in undertaking to clear their properties of ice and snow in a reasonable manner." *Brooks v. Lee* (Dec. 4, 1995), Butler App. No. CA95-05-091, at 4, citing *Yanda v. Consolidated Management, Inc.* (Aug. 16, 1990), Cuyahoga App. No. 47268. Accordingly, because the trial court did not err in granting summary judgment to ALG, appellants' first argument is overruled.

III. Cincinnati Lawnmaster, LLC

{¶21} Next, appellants, in regard to their claims against Lawnmaster, argue it "cleared the snow negligently and made the already snowy conditions substantially more dangerous by unnecessarily creating a slippery obstacle * * *" in front of their apartment building. We disagree.

{¶22} To claim liability based upon negligent plowing in a commercial lot, an appellant must prove that negligent plowing created or aggravated a hazardous condition. *Rampersaud v. Madison Dev. Co*. (June 24, 1998), Lorain App. No. 97CA006768, 1998 WL 332956 at *2; *Dunbar* at ¶13, citing *Smith v. Fraternal Order of Eagles* (1987), 39 Ohio App.3d 97, 98. In turn, to establish a claim that snow and ice was cleared negligently, a

plaintiff must present evidence that "the risk of injury was substantially increased" from the risk normally associated with those conditions that create accumulations of snow and ice in the winter. *Dunbar* at ¶13.

{¶23} Appellants have failed to provide any competent evidence indicating Lawnmaster's plowing made the parking lot substantially more dangerous than it would have been in its natural state. The only support for appellants' claim that the parking lot was, in fact, substantially more dangerous was in the form of an unsupported, conclusory statement made in Mrs. Burress' affidavit. Her affidavit, which was attached to appellants' memorandum in opposition, simply stated, "[t]he snow bank was substantially more dangerous that [sic] the rest of the ice and snow I had to walk across." Such statements are not competent evidence of a triable issue of fact in a summary judgment proceeding. See, e.g., *Rampersaud*, 1998 WL 332956 at *3.

{¶24} In addition, Mrs. Burress' affidavit contradicts her former deposition testimony. "An affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment." See *Irwin v. Rite Aid Corp.*, Trumball App. No. 2008-T-0095, 2009-Ohio-1137, ¶21, quoting *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, at paragraph three of the syllabus. During her deposition, Mrs. Burress testified that she was "good" when she stepped over the first snow bank, that she could "step over it okay," and that the second snow bank, which she now classifies in her affidavit as "substantially more dangerous," was "about the same." In addition, Mrs. Burress never testified that she walked on the snow bank, something which, as noted above, she claimed in her affidavit. Instead, Mrs. Burress testified that she stepped *over* the foot high snow bank before she slipped and fell, and that she never stepped *into* the snow bank. Appellants did not provide the trial court, or this court, with any explanation for these

contradictory statements.

{¶25} The trial court, in its decision granting summary judgment in favor of Lawnmaster, determined appellants provided "no evidence that [Lawnmaster's] plowing of the parking lot creating the one foot ridge substantially increased the risk normally associated with snow fall." We agree with the trial court's conclusion. As a result, because appellants failed to demonstrate the condition of the parking lot where Mrs. Burress fell was substantially more dangerous than it would have been in its natural state, we find the trial court did not err in granting summary judgment in favor of Lawnmaster. Therefore, appellants' second argument is overruled.

{¶26} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.

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