[Cite as *Daley v. Fryer*, 2015-Ohio-930.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

CHARLES DALEY, ET AL.,

PLAINTIFFS-APPELLANTS, **CASE NO. 1-14-48**

v.

EILEEN FRYER, ET AL., **O P I N I O N**

DEFENDANTS-APPELLEES.

Appeal from Allen County Common Pleas Court
Trial Court No. CV2014 0144

Judgment Affirmed

Date of Decision: March 16, 2015

APPEARANCES:

Gordon D. Evans, II and Curtis M. Fifner **for Appellants**

Robert B. Fitzgerald **for Appellee Fryer**

Stephen F. Korhn **for Appellee Y & B Drug, Inc.**

ROGERS, P.J.

{¶1} Plaintiffs-Appellants, Charles ("Charles") and Shirley ("Shirley") Daley (collectively "the Daleys"), appeal the judgment of the Court of Common Pleas of Allen County, granting summary judgment in favor of Defendants-Appellees, Eileen Fryer ("Fryer"), and Y&B Drug, Inc., dba Canal Pharmacy, dba Canal Health Mart Pharmacy, and Health Mart Systems ("Canal Pharmacy"). On appeal, the Daleys argue that the trial court erred by: (1) finding that Charles slipped and fell on a natural accumulation of snow and ice; (2) determining that Canal Pharmacy did not breach or owe a duty of care to Charles; and (3) determining that Fryer did not breach or owe a duty of care to Charles. For the reasons that follow, we affirm the trial court's decision.

{¶2} On March 6, 2014, the Daleys filed a complaint against Fryer and Canal Pharmacy seeking recovery for damages stemming from injuries Charles suffered when he slipped and fell on the sidewalk abutting Canal Pharmacy. As a result of his injuries, Charles is now paralyzed from the chest down. The Daleys' complaint asserted four claims: (1) premises liability: negligence; (2) respondeat superior; (3) negligent maintenance; and (4) loss of consortium. (Docket No. 1, p. 5-9).

{¶3} On April 7, 2014, Canal Pharmacy filed an answer wherein it denied the allegations set forth in the Daleys' complaint and asserted numerous

affirmative defenses. In addition to answering the Daleys' complaint, Canal Pharmacy filed a cross-claim against Fryer.[1] (Docket No. 6, p. 12).

{¶4} On April 23, 2014, Fryer filed her answer to the Daleys' complaint. In her answer, Fryer denied the Daleys' allegations and asserted numerous affirmative defenses.

{¶5} On May 9, 2014, Canal Pharmacy filed a motion for summary judgment. Canal Pharmacy argued that Charles fell on a public sidewalk, owned by the Village of Spencerville. Since the law of premises liability only applies to property owned or occupied by the tortfeasor, Canal Pharmacy claimed it was entitled to summary judgment. Canal Pharmacy also argued that it did not breach a duty to Charles because the sidewalk contained a natural accumulation of snow and ice.

{¶6} On June 10, 2014, Fryer filed her motion for summary judgment as to the Daleys' claims. In her motion for summary judgment, Fryer argued that she had no duty to protect a business invitee from the dangers resulting from the natural accumulation of snow and ice. Specifically, she argued that such accumulation is obvious and apparent, and as such, an invitee is reasonably expected to discover and protect against such dangers. Fryer also contended that she was not negligent in her management of the sidewalk. Next, Fryer argued that

[1] Since summary judgment was granted in favor of Fryer and Canal Pharmacy, Canal Pharmacy's cross-claim is of no importance to this appeal and will not be discussed.

she cannot be liable for Charles' injuries because she had no possessory interest in the sidewalk. Fryer presented the affidavit of Brad Core, a licensed surveyor, who concluded that the sidewalk in question is not located on the property that is owned by Fryer. Instead, the Village Administrator of Spencerville testified at his deposition that the Village of Spencerville owns the sidewalk. Lastly, Fryer argued that she had no prior knowledge of a leaking gutter or down spout, which would cause an unnatural accumulation of ice, nor was she actively negligent in permitting the ice to accumulate on the sidewalk.

{¶7} On September 30, 2014, the Daleys filed memorandum contra to Canal Pharmacy's motion for summary judgment and memorandum contra to Fryer's motion for summary judgment. In their memoranda, the Daleys argued that both defendants were negligent per se, breached contractual duties in their lease, and were actively negligent in causing the unnatural accumulation of ice and snow. The Daleys argued that the ice on the sidewalk was unnatural because it was caused by a "defective gutter system." However, they did not explain how the gutter was defective.

{¶8} The Daleys attached two affidavits to the memoranda contra to defendants' motions for summary judgment. One was of Lee Martin, who provides analysis and reports on matters involving professional design services, construction defects, and premises safety. Martin stated that the icy patch on the

sidewalk was caused by a defective roof drainage system and a building defect. (Docket No. 30, Exhibit A, p. 6). Martin also stated that ice dams form when snow-covered roofs are exposed to solar radiation or when snow melts from building warming. (*Id.*). When melted water comes over the top of an ice dam in a gutter, the water drips off or runs down the outside of the downspout and can potentially freeze on the sidewalk below. (*Id.*). As more snow and ice melted on the roof, more water flowed to the ice-clogged gutter, forming icicles as it ran over the lip of the gutter and refroze on the sidewalk. (*Id.*).

{¶9} The Daleys also attached an affidavit of Timothy Dickson, a licensed professional engineer. Dickson stated that the fall could have been prevented by installing electric heat cables in the gutters and the downspouts. (Docket No. 30, Exhibit B, p. 2).

{¶10} On October 1, 2014, the trial court issued its judgment entry granting Fryer's and Canal Pharmacy's motions for summary judgment. In its judgment entry, the trial court found that it was undisputed that Charles slipped and fell on a public sidewalk, and thus, the defendants owed no duty to Charles to keep the sidewalks free of ice and snow. The trial court also found that the ice on the sidewalk was a result of a natural accumulation and was not man-made. Specifically, the trial court stated that the Daleys presented no evidence of any defect on the defendants' premises that caused an unnatural accumulation of ice.

Instead, the court found that the "law of nature and gravity caused the pooling and subsequent freezing of the water in the gutter, which apparently led to the ice accumulation on the sidewalk" and that nothing about this process was unnatural. (Docket No. 32, p. 8). Lastly, the trial court found that neither defendant had any knowledge of the ice dam in the gutter or the accumulation of ice on the sidewalk, which would demonstrate that defendants were actively negligent in either creating or permitting the ice to exist on the sidewalk.

{¶11} The Daleys timely appealed this judgment, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ERRED BY DETERMINING THAT APPELLANT CHARLES SLIPPED AND FELL ON A NATURAL ACCUMULATION OF SNOW AND ICE.

Assignment of Error No. II

THE TRIAL COURT ERRED BY DETERMINING THAT APPELLEE CANAL DID NOT BREACH OR OWE A DUTY OF CARE TO APPELLANT CHARLES TO REMOVE ANY NATURAL OR UNNATURAL ACCUMULATION OF SNOW AND ICE.

Assignment of Error No. III

THE TRIAL COURT ERRED BY DETERMINING THAT APPELLEE FRYER DID NOT BREACH OR OWE A DUTY OF CARE TO APPELLANT CHARLES TO PREVENT THE UNNATURAL ACCUMULATION OF ICE.

{¶12} Due to the nature of the assignments of error, we elect to address the second and third assignments of error together.

Assignment of Error No. I

{¶13} In their first assignment of error, the Daleys argue that the trial court erred in determining that Charles slipped and fell on a natural accumulation of snow and ice. Specifically, the Daleys argue that the accumulation of snow and ice was unnatural because there was a "defective roof drainage system" on the Canal Pharmacy building, which created a genuine issue of material fact as to whether the ice the caused Charles to slip was unnatural. We disagree.

{¶14} An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.*, 131 Ohio App.3d 172, 175 (8th Dist.1999). Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., Inc.*, 148 Ohio App.3d 596, 2002-Ohio-3932, ¶ 25 (3d Dist.), citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 222 (1994). Summary judgment is appropriate when, looking at the evidence as a whole: (1) there is no genuine issue as to any material fact, and (2) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). In conducting this analysis the court must determine "that reasonable minds can

come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, [the nonmoving] party being entitled to have the evidence or stipulation construed most strongly in the [nonmoving] party's favor." *Id*. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. City of Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

{¶15} The party moving for summary judgment has the initial burden of producing some evidence which demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). In doing so, the moving party is not required to produce any affirmative evidence, but must identify those portions of the record which affirmatively support his argument. *Id*. at 292. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; he may not rest on the mere allegations or denials of his pleadings. *Id*.; Civ.R. 56(E).

{¶16} Bearing these standards in mind, we turn our attention to the Daleys' negligence claim. To establish a cause of action for negligence, a plaintiff must show the existence of a duty, breach of that duty, and an injury proximately caused by the breach. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680 (1998). To defeat a properly supported motion for summary judgment in a negligence action, the plaintiff must first demonstrate a duty owed

to him by the defendant. *Kaeppner v. Leading Mgt., Inc.*, 10th Dist. Franklin No. 05AP-1324, 2006-Ohio-3588, ¶ 9. The plaintiff must then present evidence from which reasonable minds could conclude that the defendant breached that duty and that the breach was the proximate cause of the plaintiff's injuries. *Id.*

{¶17} First, we note that on appeal, the Daleys do not challenge the trial court's finding that Charles' fall occurred on a public sidewalk. "[T]he general rule governing natural accumulations of snow and ice on public sidewalks is that the owner owes no such duty and is not subject to civil liability even where an ordinance requires the owner or occupier to keep abutting sidewalks free from snow and ice." *Lopatkovich v. City of Tiffin*, 28 Ohio St.3d 204, 206 (1986). Thus, snow removal ordinances do "not raise a duty on owners and occupiers to the public at large, and such statutes should not, as a matter of public policy, be used to impose potential liability on owners and occupiers who have abutting public sidewalks." *Id.* at p. 207. However, when an abutting owner or occupier is actively negligent in permitting or creating an unnatural accumulation of snow and ice, he or she could be subject to liability. *Id.*

{¶18} The Daleys contend that there is a genuine issue of material fact as to whether the ice that caused Charles to fall was natural or unnatural. We disagree as a reasonable trier of fact, viewing the evidence in the light most favorable to the

Daleys, could not conclude that the accumulation of ice upon which Charles fell was unnatural.

{¶19} "[A] natural accumulation of ice and snow is one which accumulates as a result of an act of nature, whereas an unnatural accumulation is one that results from an act of a person." *Coletta v. Univ. of Akron*, 49 Ohio App.3d 35, 37 (10th Dist.1988). " 'Unnatural' accumulation must refer to causes and factors other than the inclement weather conditions of low temperatures, strong winds and drifting snow, i.e., to causes other than the meteorological forces of nature. By definition, then, the 'unnatural' is the man-made, the man-caused * * *." *Porter v. Miller*, 13 Ohio App.3d 93, 95 (6th Dist.1983).

{¶20} Cases where courts have found genuine issues of material fact regarding whether an accumulation of ice and snow was natural or unnatural generally involve records containing evidence of an unnatural cause or source of the accumulation. *See Sherwood v. Mentor Corners Ltd. Partnership*, 11th Dist. Lake No. 2006-L-020, 2006-Ohio-6865, ¶ 18 (valley between gable and edge of roof); *Nawal v. Clearview Inn, Inc.*, 8th Dist. Cuyahoga No. 65796, 1994 WL 407998 *4 (Aug. 4, 1994) (improperly maintained downspouts and gutters); *Tyrrell v. Invest. Assocs., Inc.*, 16 Ohio App.3d 47, 49 (8th Dist.1984) (defect in canopy extending over sidewalk). Courts have also denied summary judgment where there is evidence that an accumulation of ice results from some source other

than precipitation or meteorological conditions. *See Notman v. AM/PM, Inc.*, 11th Dist. Trumbull No. 2002-T-0144, 2004-Ohio-344 (ice resulted from water from carwash hoses).

{¶21} Here, the evidence reveals that the weather was cold and snowy on the days leading up to Charles' accident. Charles admitted that he was aware there was snow on the ground and possibly ice on the sidewalks. Being fully aware of the condition of the sidewalks, Charles decided to walk, instead of drive, to Canal Pharmacy. It is undisputed that the ice dam, which the Daleys claim caused the icy spot on the sidewalk to form, was created by natural weather conditions. In their brief, the Daleys admit, "The weather conditions the week prior to the incident caused an unnatural ice dam to build up in the gutters * * *." (Boldface deleted.) (Appellant's Br., p. 3). The Daleys apparently admit that the ice dam was caused by the weather, but still maintain that it was "unnatural." Martin, the Daleys' expert witness, also admitted that the "[c]onditions in the days prior to the Daley slip and fall were favorable for the development of ice dams * * *." (Docket No. 30, Exhibit A, p. 3).

{¶22} There is no evidence that the construction of the gutters resulted in an unnatural accumulation of ice. While one of the Daleys' experts stated in his affidavit that "[t]here was an icy patch on the sidewalk from a defective roof drainage system on the pharmacy building that caused an ice dam in the gutter and

created a dangerous icy condition on the sidewalk below[,]" he does not explain how the drainage system was defective. (*Id.* at p. 7). For example, Martin does not aver that the gutters were incorrectly installed, improperly maintained, or were leaking.[2] Nor does he claim that the formation of the ice dam was aggravated by a man-made condition such as ventilation from the building. While Dickson stated in his affidavit that the ice dam could have been prevented by having heating rods in the gutters, he does not provide any evidence that failing to install the heating elements made the gutters defective.

{¶23} Even if there was some sort of "unnatural" accumulation of ice and snow on the sidewalk, the Daleys have failed to present any evidence that Fryer or Canal Pharmacy was negligent in permitting and creating such accumulation. The Daleys presented no evidence that Fryer or Canal Pharmacy had notice that there was an ice dam on their roof, that they somehow knew their drainage system was "defective," or that they improperly heated or ventilated the building. All of Canal Pharmacy's employees testified at their depositions that they did not know of any building defects and did not know of any problems with the roofs or gutters. *See* (Klausing Depo., p. 32-33); (Noah Burkholder Depo., p. 32, 46); (Reynolds Depo., p. 31, 35-36); (Kathy Burkholder Depo., 77, 83-84). Nor do the Daleys point to any evidence in the record that shows Fryer or Canal Pharmacy had knowledge of

[2] Indeed, Douglas Sorrell, another expert witness for the Daleys, testified at his deposition that when he inspected the building there were no problems with the gutter and that the roof was in good condition. (Sorrell Depo., p. 29, 31).

the icy spot where Charles fell. Indeed, all the employees testified that they were unaware of any complaints from customers that the sidewalk was icy on January 13, 2011. *See* (Matson Depo., p. 24); (Klausing Depo., p. 35, 37); (Noah Burkholder Depo., p. 40); (Reynolds Depo., p. 17); (Kathy Burkholder Depo., p. 78, 82). Thus, there is no evidence indicating that Fryer or Canal Pharmacy had knowledge that their roof and drainage system was "defective" or that their gutter had a tendency to form icy patches on the sidewalk below. Without any evidence showing that Fryer or Canal Pharmacy had knowledge of the alleged unnatural accumulation, we cannot find that they were actively negligent in creating or permitting the ice to exist. *See Sleeper v. Casto Mgt. Servs.*, 10th Dist. Franklin No. 12AP-566, 2013-Ohio-3336, ¶ 39.

{¶24} In light of the foregoing, we find that the trial court did not err in finding that Charles slipped on a natural accumulation of snow and ice. Accordingly, we overrule the Daleys' first assignment of error.

Assignments of Error No. II & III

{¶25} In their second and third assignments of error, the Daleys argue that both Canal Pharmacy and Fryer breached their contractual duties to keep the sidewalks clear of ice and snow and failed at implementing an effective waterproofing and weather protection system for the roof and exterior walls of the building. We disagree.

{¶26} To support their arguments, the Daleys cite to *Oswald v. Jeraj*, 146 Ohio St. 676 (1946), for the proposition that "a duty to remove natural accumulations of snow and ice may be voluntarily assumed by contract, either express or implied by a course of conduct." (Appellant's Br., p. 6), citing *Oswald* at 679. When such a reading of *Oswald* is followed,

> a landlord who benevolently undertakes to clear natural accumulations of snow and ice to the best of his ability exposes himself to potential lawsuits by tenants who slip and fall on any patches of snow or ice that may remain. By contrast, a landlord who sits idly by and refrains from clearing natural accumulations of snow and ice to avoid assuming a duty can remain insulated from liability. Such an interpretation discourages landlords from voluntarily assisting their tenants in wintry conditions.

Sanfilippo v. Village Green Mgt. Co., 12th Dist. Clermont No. CA2010-04-027, 2010-Ohio-4211, ¶ 20.

{¶27} Instead, many courts have chosen not to follow such an interpretation of *Oswald* and some have even questioned its validity. *See Thatcher v. Lauffer Ravines, L.L.C.*, 10th Dist. Franklin No. 11AP-851, 2012-Ohio-6193, ¶ 40 (stating that it has previously called into question an implied assumption of duty based on a previous course of conduct); *Hosler v. Shah*, 6th Dist. Lucas No. L-12-1066, 2012-Ohio-5553, ¶ 14 ("With respect to [the] assertion that there may be created an implied duty of a landlord to remove accumulations of ice and snow, it does not appear that this holding has survived *Brinkman* [*v. Ross*, 68 Ohio St.3d 82 (1993)]."); *Brooks v. Lee*, 12th Dist. Butler CA95-05-091, 1995 WL 708227, *1

(Dec. 4, 1995) ("After reviewing the reasoning behind more recent supreme court decisions, we question the continued validity of *Oswald*."); *Yanda v. Consolidated Mgt., Inc.*, 8th Dist. Cuyahoga No. 57268, 1990 WL 118703, *2 (Aug. 16, 1990) ("We choose not to discourage the diligence of landlords who exercise ordinary care in undertaking to clear their properties of ice and snow in a reasonable manner.").

{¶28} However, we do not need to determine whether *Oswald* is still good law or whether it has been abrogated by subsequent cases of the Supreme Court of Ohio. This is because *Oswald*'s holding was only applicable to cases that involve a landlord-tenant situation. "Each paragraph of the syllabus of the *Oswald* case is either limited to an action by the tenant against the landlord or to the duty owed by the landlord to the tenant." *Sidle v. Humphrey*, 13 Ohio St.2d 45, 49 (1968). It follows that *Oswald* does not apply to an action by a third party against the tenant or to the duty owed by the landlord to some third party. Thus, the Daleys' reliance on *Oswald* and other cases that apply *Oswald* is misplaced.

{¶29} The Daleys also cite to the contractual language of the lease between Fryer and Canal Pharmacy to support their argument that Fryer and Canal Pharmacy breached a duty to keep the sidewalks clear of ice and snow. The Daleys claim that Charles is a third-party beneficiary because Kathleen

Burkholder, Canal Pharmacy's vice president, testified at her deposition that she shovels the sidewalks for her customers. *See* (Kathy Burkholder Depo., p. 56-57).

{¶30} To enforce a contract, a party must be an intended beneficiary and not a mere incidental beneficiary. *Bierl v. BGZ Assocs. II, L.L.C.*, 3d Dist. Marion No. 9-12-42, 2013-Ohio-648, ¶ 46, *aff'd* 138 Ohio St.3d 357, 2014-Ohio-1172, citing *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St.3d 36 (1988). In *Hill*, the Supreme Court of Ohio adopted the Second Restatement's definitions of intended and incidental beneficiaries. The definitions are as follows:

> (1) * * * [A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

2 Restatement of the Law 2d, Contracts, Section 302 (1981).

{¶31} The Court also adopted the "intent to benefit" test to delineate between intended and incidental beneficiaries. The test is as follows:

> "[I]f the promise * * * intends that a third party should benefit from the contract, then the third party is an 'intended beneficiary' who has enforceable rights under the contract. If the promise has no intent to benefit a third party, then any third party beneficiary to the contract

> is merely an 'incidental beneficiary,' who has no enforceable rights under the contract."

Hill at 40, quoting *Norfolk & W. Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir.1980). The *Hill* test remains viable in Ohio courts. *E.g., Huff v. FirstEnergy Corp.*, 130 Ohio St.3d 196, 2011-Ohio-5083, ¶ 10-11 (applying *Hill* test).

{¶32} The Supreme Court has provided the following guidance for the application of the *Hill* test:

> Courts generally presume that a contract's intent resides in the language the parties choose to use in the agreement. * * * "Only when the language of a contract is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of a contract with a special meaning will extrinsic evidence be considered in an effort to give effect to the parties' intentions." [*Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638 (1992).] Ohio law thus requires that for a third party to be an intended beneficiary under the contract, there must be evidence that the contract was intended to directly benefit that third party. Generally, the parties' intention to benefit a third party will be found in the language of the agreement.

Huff at ¶ 12.

{¶33} Further, courts have noted that for a person to claim intended third party beneficiary status, the contracting parties must have entered into the contract for the primary purpose of that person. *E.g., Caruso v. Natl. City Mtge. Co.*, 187 Ohio App.3d 329, 2010-Ohio-1878, ¶ 23 (1st Dist.). Nevertheless, there is no requirement that the contract explicitly identify the third party beneficiary. *First Fed. Bank v. Angelini*, 3d Dist. Crawford No. 3-07-04, 2007-Ohio-6153, ¶ 11.

{¶34} The Daleys presented no evidence that Fryer and Canal Pharmacy entered into their lease agreement to primarily or directly benefit Charles. The lease's purpose was to govern the contractual relationship between Fryer and Canal Pharmacy for the use of the leased premises. Both Fryer and Canal Pharmacy received the primary benefits of the lease. Namely, Fryer received rental payments and Canal Pharmacy's agreement to abide by its duties listed in the lease while Canal Pharmacy received the right to occupy the first floor of the building and Fryer's agreement to abide by her duties listed in the lease. Meanwhile, Charles merely received the incidental benefit of being able to walk on sidewalks free of snow and ice when visiting Canal Pharmacy.

{¶35} In sum, we find that the majority of the cases the Daleys cite are inapplicable to the facts of this case. We also find that Charles was an incidental beneficiary of Canal Pharmacy's lease agreement with Fryer. As such, the trial court did not err in finding that neither Canal Pharmacy nor Fryer owed a duty to Charles under the lease and the trial court was correct in granting summary judgment in favor of Fryer and Canal Pharmacy.

{¶36} Accordingly, we overrule the Daleys' second and third assignments of error.

{¶37} Having found no error prejudicial to the Daleys in the particulars assigned and argued, we affirm the trial court's judgment.

Judgment Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr