[Cite as *Mason v. Allstate Ins. Co.*, 2009-Ohio-6204.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT MASON, ET AL. LAVELL MASON Plaintiff-Appellant	JUDGES: Hon. Sheila G. Farmer, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J.
-vs-	Case No. 2009CA00048
ALLSTATE INSURANCE CO., ET AL. STEAMATIC, ET AL. Defendant-Appellee	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2008CV02562
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 23, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee Allstate Indenmity Company
LAVELL MASON, PRO SE 241 Proudly Street S.W. Massilon, Ohio 44646	KATY E. RYAN RICHARD D. SWEEBE Ulmer & Berne LLP Skylight Officer Tower 1660 West 2nd St., Suite 1100 Cleveland, Ohio 44113-1448
	For Defendant-Appellee Carrara Enterprises dba Steamatic of NE Ohio
	JAMES M. LYONS KENNETH CALDERONE 3737 Embassy Parkway P.O. Box 5521 Akron, Ohio 44334

Hoffman, J.

{¶1} Appellant Lavell Mason[1] appeals the January 30, 2009 Judgment Entry of the Stark County Court of Common Pleas granting judgment in favor of Defendants-appellees Allstate Indemnity Company and Carrara Enterprises d/b/a Steamatic of NE Ohio.

STATEMENT OF THE FACTS AND CASE[2]

{¶2} Appellant Lavell Mason and her husband Robert Mason filed the within action in the Stark County Court of Common Pleas asserting claims of bad faith against Allstate Indemnity Company ("Allstate") and negligence against Carrara Enterprises d/b/a Steamatic of NE Ohio ("Steamatic").

{¶3} On June 4, 2007, the Masons returned home after several days to find the electrical outage caused a refrigerator leak which inturn caused liquid, including blood from defrosted meat, to spill onto and seep into their kitchen floor. The Masons submitted a claim under their homeowners insurance policy with Allstate.

{¶4} In handling the claim, Allstate retained the services of Steamatic. Steamatic sprayed the area with a kerosene type solvent on June 8, 2007, and later employed an ozone machine to remove the odor.

{¶5} During the remediation process, the Masons complained of Steamatic's use of kerosene in the product and the ozone machine. Appellant alleges she suffered

[1] Plaintiff Robert Mason did not file an appeal in this matter. Plaintiff Lavell Mason filed an appellate brief pro se on her own behalf.

[2] Appellant's brief does not properly set forth a statement of the facts as required under Appellate Rule 16 and the Local Rules of this Court. In our analysis and disposition of the appeal, we rely upon the statement of the facts set forth in the appellees' briefs and the record on appeal.

an allergic reaction to the spray, including difficulty breathing while in the house and chapped lips. Appellant was not aware of an allergy to kerosene prior to the incident at issue.

{¶6} On October 29, 2008, Steamatic filed a motion for summary judgment stating there is no evidence to prove general or specific causation with regard to the alleged injury and contamination.

{¶7} On December 4, 2008, Allstate filed a motion for summary judgment stating the contractual relationship between Allstate and Appellants precludes a negligence claim, the Masons cannot establish a duty, proximate cause or damages in their negligence claim, and Allstate acted reasonably when it handled the insurance claims.

{¶8} Appellees introduced evidence in support of their motions for summary judgment demonstrating Allstate paid for additional living expenses and structural repair to the residence. In addition, two independent industrial hygienists testified the air and surface quality of the home was acceptable. Further, Steamatic submitted an affidavit of its President, Justin Sucato, stating the product used was appropriate, intended to be used in situations to nullify organic odors and is authorized by the USDA. Similarly, he affirms the use of the ozone machine was appropriate.

{¶9} Via Judgment Entry of January 30, 2009, the trial court granted Appellees' respective motions for summary judgment, and dismissed the Mason's claims. The trial court found the Masons failed to offer any evidentiary material to support their claims or to rebut the arguments presented in the motions for summary judgment.

{¶10} Appellant Lavell Mason now assigns as error:

{¶11} "I. THE COURT'S FINDING THAT THE SUMMARY OF JUDGMENT SHOULD BE GRANTED ON BEHALF OF THE DEFENDANT – APPELEES, DESPITE DILIGENT EFFORTS BY THE PLAINTIFF – APPELLANT, DUE TO FAILURE TO PROVIDE SUFFICIENT EVIDENCE, WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

I.

{¶12} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶13} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶14} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a

genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107.

{¶15} Appellant argues the trial court's entry of summary judgment "despite diligent efforts by the plaintiff-appellant, due to failure to provide sufficient evidence, was not supported by clear and convincing evidence."

{¶16} Upon review of Appellant's merit brief and the record on appeal, Appellant did not present any evidence or legal argument in support of her claims in response to Appellees' motions for summary judgment in the proceedings before the trial court. Pursuant to *Dresher* and Ohio Civil R. 56, Appellant had the burden to establish specific facts and evidence demonstrating a genuine issue of material fact for trial.

{¶17} On appeal, we are limited to the record of the trial court. Factual assertions appearing in a party's brief, but not in any papers submitted for consideration to the trial court below, do not constitute part of the official record on appeal, and an appellate court may not consider these assertions when deciding the merits of the case. *Akro-Plastics v. Drake Industries* (1996), 115 Ohio App.3d 221, 226, 685 N.E.2d 246, 249.

{¶18} Further, Appellant's merit brief on appeal fails to comply with Ohio App. Rule 16 as Appellant does not support her arguments on appeal with references to the

record, legal citations, or other authority. Compliance with the rule is mandatory. Further, an appellate court may rely upon App. R. 12(A) in overruling or disregarding an assignment of error due to lack of briefing on an assigned error. *Henry v. Gastaldo* 2005-Ohio-4109.

{¶19} In order to prove actionable negligence, Appellant must demonstrate a duty owed by the defendant; the defendant's failure to comply with that duty; and injuries proximately caused by such failure. *See Thrash v. U-Drive It Company* (1953), 158 Ohio St. 465. Appellant has not demonstrated a prima facie case of causation, and without reliable expert testimony the causation standard cannot be satisfied.

{¶20} Upon review of the record, we find Appellant has not demonstrated a genuine issue of material fact exists, and the trial court did not err in finding Appellees were entitled to summary judgment as a matter of law.

{¶21} The January 30, 2009 Judgment Entry of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROBERT MASON, ET AL. LAVELL MASON	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
ALLSTATE INSURANCE CO., ET AL. STEAMATIC, ET AL.	:	
Defendant-Appellee	:	Case No. 2009CA00048

For the reasons stated in our accompanying Opinion, the January 30, 2009 Judgment Entry of the Stark County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY