[Cite as *Schunk v. Whitewood Condominiums at Northpointe Unit Owners Assn., Inc.*, 2015-Ohio-5163.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VIRGINIA SCHUNK	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellant	:	Hon. Sheila G. Farmer
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
WHITEWOOD CONDOMINIUMS AT NORTHPOINTE UNIT OWNERS ASSOCIATION, INC., et al.	:	Case No. 2015CA00069
	:	
Defendants - Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2014-CV-01120
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	December 7, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
C. VINCENT CHOKEN DAVID A. WELLING Choken Welling LLP 55 S. Miller Road., Ste. 203 Akron, Ohio 44333	JAMES J. REAGAN 50 South Main Street Suite 615 Akron, Ohio 44308

Baldwin, J.

{¶1} Plaintiff-appellant Virginia Schunk appeals from the March 20, 2015 Judgment Entry of the Stark County Court of Common Pleas granting the Motion for Summary Judgment filed by defendant-appellee Whitewood Condominiums at Northpointe Unit Owners Association, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Virginia Schunk resides in a condominium which is part of the condominium community Whitewood Condominiums at Northpointe. Appellee Whitewood Condominiums at Northpointe Unit Owners Association maintains the common areas.

{¶3} At approximately 5:30 p.m. on January 5, 2013, appellant attempted to take an envelope to her mailbox at the end of her driveway. On the day in question, appellant exited her home through a door in the garage and pushed a button to open the garage door. As the garage door was opening, appellant observed ice on the ground. She then attempted to sneak out of a corner of the garage and took one step out of the garage before slipping and falling, landing on her left hip. Appellant testified during her deposition that ice caused her to fall and that when she was on the ground, her clothes got all wet and water was dripping down on her from icicles that were hanging from her gutters. Appellant remained on the ground until approximately 8:00 p.m. when a pizza delivery man saw her and called for assistance.

{¶4} On May 9, 2014, appellant filed a complaint for premises liability and negligence against appellee and Ejco Management, LLC, a property management company employed by appellee. Appellee filed an answer to appellant's complaint on

June 10, 2014 and, on January 27, 2015, filed a Motion for Summary Judgment. Appellant filed a response in opposition to appellee's Motion for Summary Judgment on February 13, 2015 and appellee filed a reply brief on February 19, 2015.

{¶5} Pursuant to a Judgment Entry filed on March 20, 2015, the trial court granting appellee's Motion for Summary Judgment.

{¶6} Appellant now appeals from the trial court's March 20, 2015 Judgment Entry, raising the following assignment of error on appeal:

{¶7} THE TRIAL COURT ERRED IN ITS JUDGMENT ENTRY AND OPINION GRANTING THE DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF-APPELLANT'S COMPLAINT, AS THERE EXISTED GENUINE ISSUES OF MATERIAL FACT, SUPPORTED BY EVIDENCE, AND THEREFORE APPELLEE WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

SUMMARY JUDGMENT

{¶8} Civ.R. 56 states, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered

> unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶9} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.,* 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning–Ferris Inds. of Ohio, Inc.,* 15 Ohio St.3d 321, 474 N.E .2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.,* 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist.1999).

{¶10} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000–Ohio–186, 738 N.E .2d 1243.

{¶11} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrates absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle,* 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist.1991).

{¶12} It is pursuant to this standard that we review appellant's assignment of error.

I

{¶13} Appellant, in her sole assignment of error, argues that the trial court erred in granting summary judgment in favor of appellee because there are genuine issues of material fact. We disagree.

{¶14} Appellant argues, in part, that the trial court erred in granting summary judgment in favor of appellee on appellant's breach of contract claim.[1] Under Ohio law, generally there is no duty for landowners to keep common areas clear of a natural accumulation of ice and snow. See *LaCourse v. Fleitz,* 28 Ohio St.3d 209, 503 N.E.2d 159 (1986). However, a landowner may assume such duty through express agreement

[1] The trial court, in its Judgment Entry, found that appellant's complaint did not specifically state a breach of contract claim, but construed the complaint as if such a claim had been asserted.

or such duty may be implied from a course of conduct. *Hammond v. Moon,* 8 Ohio App.3d 66, 455 N.E.2d 1301 (10th Dist. 1982).

{¶15} Appellant argues that there is an express agreement for snow removal in Article IX of the Declaration of Whitewood Condominiums at Northpointe, which is captioned "Maintenance and Repair." Section 9.1 states, in relevant part, that the "association shall maintain and repair the Common Areas, including and not limited to…walkways, drives, parking areas…provided, however, that the Association shall not be required to perform cleaning or snow and/or ice removal with respect to patio and deck areas." However, the Disclosure Statement states on page 7 under "Operating Expenses" as follows: "(iii) Snow Removal - It is anticipated that the Association will cause the private driveways to be plowed, as needed, the anticipated costs are based on normal conditions and estimates of a professional property manager." It is well-established in Ohio that where two clauses of a contract appear to be inconsistent, the specific clause prevails over the general. *Gibbons-Grable Co. v. Gilbane Bldg. Co.*, 34 Ohio App.3d 170, 517 N.E.2d 559 (8th Dist. 1986). Thus, the language in the Declaration, which is more specific, controls.

{¶16} With respect to plowing on an "as needed" basis, appellant obtained records from the National Climatic Data Center (U.S. Department of Commerce) showing that Jan. 3rd, 4th and 5th, 2013 had trace snowfall and the average temperature over these days was 17, 26, and 26 degrees, respectively. Appellant also produced records showing that no plowing, salting or de-icing occurred for three days prior to appellant's fall.

{¶17} However, as noted by the trial court in its decision, appellee "never expressly assumed the responsibility to plow the driveways each day, but rather on an "as needed" basis.'" We concur with the trial court that, based on the "trace" amounts of snow, it "would be unreasonable if not impossible for [appellant's] driveway to be monitored and plowed…" We find that the trial court did not err in finding that reasonable minds could only conclude that there was no breach of contract and in granting summary judgment on such claim.

{¶18} As is stated above, appellant, in her complaint, also set forth claims alleging that appellee was negligent. [I]n order to establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." *Armstrong v. Best Buy Co., Inc.,* 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, 2 at ¶ 8, citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). Appellant specifically contends that appellee had a duty to protect her from an unnatural or man-made accumulation of ice, which was solely under appellee's control. "'Unnatural' accumulation must refer to causes and factors other than the inclement weather conditions of low temperature, 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; extremely severe snow storms or bitterly cold temperatures do not constitute 'unnatural' phenomena." *Porter v. Miller*, 13 Ohio App.3d 93, 95, 468 N.E.2d 134 (6th Dist. 1983). Appellant notes that she slipped on ice which was from water dripping from the roof and gutters.

{¶19} However, "[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*,* 788 N.E.2d 1088, syllabus, citing *Sidle v. Humphrey,* 13 Ohio St.2d 45, 233 N.E.2d 589 (1968). As noted by the court in *Base-Smith v. Lautrec, Ltd.*, 12th Dist. Butler No. CA2013–07–115, 2014 -Ohio- 349 at paragraph 14:

> Even when a plaintiff's slip and fall was due to unnatural accumulations of snow and ice, this court, and numerous others, have found the open and obvious doctrine applicable, thus absolving the duty of care on the part of the landowner. *Burress v. Associated Land Group,* 12th Dist. Clermont No. CA2008–10–096, 2009–Ohio–2450, ¶ 14; *Mounts v. Ravotti,* 7th Dist. Mahoning No. 07 MA 182, 2008–Ohio–5045, ¶ 53; *Whitehouse v. Customer is Everything!, Ltd.,* 11th Dist. Lake No.2007–L–069, 2007–Ohio–6936, ¶ 72; *Prexta v. BW–3, Akron, Inc.,* 9th Dist. Summit No. 23314, 2006–Ohio–6969, ¶ 13; *Scholz v. Revco Discount Drug Ctr., Inc.,* 2d Dist. Montgomery No. 20825, 2005–Ohio–5916, ¶ 17–19; *Couture v. Oak Hill Rentals, Ltd.,* 6th Dist. Ottawa No. OT–03–048, 2004–Ohio–5237, ¶ 16; *Bevins v. Arledge,* 4th Dist. Pickaway No. 03CA19, 2003–Ohio–7297, ¶ 18–20.

{¶20} See also *Workman v. W & W Dev. Corp*., 5th Dist. Richland No. 2010–CA–0138, 2011-Ohio-2305. In *Workman,* the appellant brought a negligence action

against a self-service car wash owner for personal injuries that he allegedly sustained from falling on black ice in car wash bay. The appellant argued that the appellee was liable because the ice was an unnatural accumulation caused by the appellee. This Court, in affirming the decision of the trial court granting summary judgment in favor of the appellee, stated, in relevant part, as follows at paragraph 22:

> We find the trial court did not err in determining that the question of whether the accumulation of ice was natural or unnatural was immaterial to the ultimate issue of what duty appellee owed appellant. We further find the trial court did not err in determining the appellant was aware the floor might be slippery. Whether he attributed this to ice or simply the moisture on the floor, it is undisputed appellant tested the floor before he stepped out of his vehicle because he believed it could be slick.

{¶21} In the case sub judice, appellant, during her deposition, testified that as her garage door opened up, she could see that it was icy on the ground. She further testified that nothing obstructed her view of the ice and that she thought that she could sneak out of a corner of the garage. We concur with the trial court that the ice, whether it was a natural or unnatural accumulation, was open and obvious to appellant who, by her own admission, had actual knowledge of the same. We further find that there is no evidence that appellee had knowledge that the ice accumulation existed. Based on the foregoing, we find that appellee owed no duty to appellant and that appellant's negligence claim fails as a matter of law.

{¶22} Based on the foregoing, we find that the trial court did not err in granting summary judgment in favor of appellee.

{¶23} Appellant's sole assignment of error is, therefore, overruled.

{¶24} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Baldwin, J.

Farmer J. concur.

Hoffman, P.J. concurs in part
and dissents in part

Hoffman, P.J., concurring in part and dissenting in part

{¶25} I concur in the majority's analysis and disposition of Appellant's assignment of error as it relates to her negligence claim based upon premise liability. However, I respectfully dissent from its decision as it relates to Appellant's breach of contract claim.

{¶26} I begin by noting the open and obvious doctrine is not an available defense to a breach of contract claim.

{¶27} The majority bases its decision on the fact the agreement calls for snow removal "as needed." But the contract does not so limit the condominium association's duty with respect to ice removal. It is the condominium association's alleged failure to remove the ice which forms the basis of Appellant's claim – not the failure to plow snow. I find when construing the evidence in the light most favorable to Appellant, reasonable minds could differ as to whether Appellees breached Article IX of the Declaration of Whitewood Condominiums at Northpoint.