[Cite as *Hosler v. Shah*, 2012-Ohio-5553.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Beverly Jean Hosler	Court of Appeals No. L-12-1066
Appellant	Trial Court No. CI0201101198
v.	
Dr. Raju Shah, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: November 30, 2012

* * * * *

Paris M. Bottoni, for appellant.

Michael P. Murphy and Justin D. Harris, for appellee, Care Enterprises.

* * * * *

SINGER, P.J.

{¶1} Appellant appeals an award of summary judgment issued by the Lucas County Court of Common pleas to a premises owner in a slip and fall negligence suit. Because there was no evidence that the snow and ice upon which appellant fell was unnatural or unusually dangerous, we affirm.

{¶2} In 2009, appellant, Beverly Jean Hosler, worked for Dr. Raju Shah in a Maumee, Ohio building owned by appellee, Care Enterprises d/b/a St. Luke's Hospital. On January 14, at approximately 8:30 a.m., appellant came to work, parking in a lot also owned and maintained by appellee. The parking lot, which had not been cleared or salted, was covered by a coating of ice with a thin layer of snow on top. As appellant neared the building she slipped and fell. Appellant alleges serious injury.

{¶3} On January 13, 2011, appellant sued both Dr. Shah and appellee, alleging that her injury was caused by their negligence in failing to clear and salt the parking lot upon which she fell. Dr. Shah was subsequently dismissed from the suit.

{¶4} Following discovery, appellee moved for summary judgment, arguing that because, by appellant's own admission, the ice and snow upon which she fell was a natural accumulation and an open and obvious hazard, it could not be held liable for appellant's injury as a matter of law. Appellant responded with a memorandum in opposition, asserting that, since appellant was required to park in this particular lot, a question of fact existed as to whether appellee owed a duty to its tenant, Dr. Shah, and, by extension, to his employees. Moreover, at least one other person had fallen on the lot at issue on the same morning and appellee had established a previous course of conduct by previously regularly clearing the lot.

{¶5} On February 13, 2012, the trial court granted appellee's summary judgment motion. This appeal followed. Appellant sets forth a single assignment of error:

I. The Trial Court committed prejudicial error by granting Defendant, Care Enterprises dba St. Luke's Hospital's Motion for Summary Judgment.

{¶6} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as in trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶7} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but

must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶8} "To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom." *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

{¶9} In a recent case, we had occasion to discuss the duty of a premises owner to remove ice and snow. In *Miller v. Tractor Supply Co.*, 6th Dist. No. H-11-001, 2011-Ohio-5906, ¶ 8-9, we stated:

> It has long been established in Ohio that an owner or occupier of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow from the premises, or to warn invitees of the dangers associated with such natural accumulations of ice and snow. *Brinkman v. Ross*, 68 Ohio St.3d 82, 83-84, 623 N.E.2d 1175(1993); *Jeswald v. Hutt*, 15 Ohio St.2d 224, 239 N.E.2d 37 (1968), paragraph one of the syllabus; *Abercrombie v. Byrne-Hill Co., Ltd.*, 6th Dist. No. L-05-

1010, 2005-Ohio-5249, ¶ 12. This rule has been dubbed by some courts as Ohio's "no-duty winter rule." *See Bowen v. Columbus Airport Ltd. Partnership,* 10th Dist. No.07AP-108, 2008- Ohio-763, ¶ 11.

The underlying rationale for the no-duty winter rule "is that everyone is assumed to appreciate the risks associated with natural accumulations of ice and snow and, therefore, everyone is responsible to protect himself or herself against the inherent risks presented by natural accumulations of ice and snow." *Brinkman,* 68 Ohio St.3d at 84. This is a more expansive rationale than forms the basis for the open-and-obvious doctrine. "The no-duty winter rule assumes everyone will appreciate and protect themselves against risks associated with natural accumulations of ice and snow; the open and obvious doctrine assumes only those who could observe and appreciate the danger will protect themselves against it." *Sherlock v. Shelly Co.*, [10th Dist. No. 06AP-1303, 2007-Ohio-4522] at ¶ 22. Thus, the issue of which party has superior knowledge or a better appreciation of a natural accumulation of ice and snow on the premises is generally irrelevant, since the invitee is charged with an appreciation of those risks as a matter of law. *Brinkman,* 68 Ohio St.3d at 84.

{¶10} Absent a duty to the injured party, there can be no actionable negligence. *Mussivand, supra.*

{¶11} There are two exceptions to the winter rule: when the accumulation of ice and snow is unnatural because of the owner's active negligence, *Miller* at ¶ 10, and when "the natural accumulation of snow and ice on his premises has created there a condition substantially more dangerous to his business invitees than they should have anticipated by reason of their knowledge of conditions prevailing generally in the area." *Id.* at ¶ 11, quoting, *Debie v. Cochran Pharmacy-Berwick, Inc.*, 11 Ohio St.2d 38, 227 N.E.2d 603 (1967), paragraph one of the syllabus.

{¶12} In this matter, it is undisputed that the snow and ice upon which appellant slipped was a natural accumulation. Nevertheless, appellant maintains that there is evidence by which reasonable minds could differ as to whether appellee assumed the duty to clear the lot. Moreover, according to appellant, there is a question of fact as to whether appellant was forced to traverse appellee's parking lot. Appellant cites *Hammond v. Moon*, 8 Ohio App.3d 66, 455 N.E.2d 1301(10th Dist. 1982) for the proposition that a landlord may expressly or impliedly assume the duty to remove snow and ice and that an individual who is required to enter and exit premises by a specific path does not assume the risk for taking such a path.

{¶13} *Hammond* is ordinarily cited to negate an assumption of the risk defense. *See, e.g., Hill v. Monday Villas Prop. Owners Assn.*, 2d Dist. No. 24714, 2012-Ohio-836, ¶ 23, *Bowen*, 10th Dist. No. 07AP-108, 2008-Ohio-763 at ¶ 14. On an assumption of the risk defense, *Hammond* is not factually analogous to this case. Hammond was required

to exit her office over a set of snow covered stairs. Here, appellant had a parking lot from which to choose an alternative path. *See Hill* at ¶ 23.

{¶14} With respect to *Hammond's* 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*. Moreover, we agree with the Second District Court of Appeals disfavoring such a rule on the ground that it 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." *Hill* at ¶ 23 fn 1, quoting *Pacey v. Penn Garden Apts.*, 2d Dist. No. 17370, 1999 WL 76841(Feb. 19, 1999).

{¶15} The parties agree the snow and ice upon which appellant fell was a natural accumulation. Appellant presents no evidence that the snow and ice upon which she fell was substantially more dangerous than appellant might ordinarily expect to encounter. Thus, construing the facts most favorably to appellant, appellee was entitled to judgment as a matter of law. Appellant's sole assignment of error is not well-taken.

{¶16} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment Affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE