[Cite as *Brewton v. Monnette*, 2013-Ohio-3948.]

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

Sherry Ann Brewton	Court of Appeals No. L-13-1068
Appellant	Trial Court No. CI0201206623
v.	
John L. Monnette, Jr., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: September 13, 2013

* * * * *

Marvin K. Jacobs and Mark I. Jacobs, for appellant.

Robert J. Bahret and Christine M. Gaynor, for appellees.

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, Sherry Ann Brewton, timely appeals the March 19, 2013, judgment of the Lucas County Court of Common Pleas which granted summary judgment in favor of defendants-appellees, John Monnette, Jr. and Debra S. Monnette. The primary issue before the court in this premises liability case is whether the trial court

erred when it held that as a matter of law, the Monnettes were not liable to Brewton for injuries resulting when Brewton slipped on snow and ice at the apartment building they owned. Brewton assigns the following errors for our review:

1. The trial court erred in finding that Appellees did not have a contractual duty to Appellant by implied course of conduct to remove natural accumulations of snow and ice.

2. The trial court erred in finding that Appellees did not owe a common-law duty to Appellant to clear the sidewalk of an unnatural accumulation of snow and ice.

{¶ 2} For the reasons that follow, we find appellant's assignments of error not well-taken and we affirm the trial court's judgment.

I. Factual Background

{¶ 3} Brewton leased an apartment in a building owned by the Monnettes at 4344 W. Bancroft Street in the village of Ottawa Hills. On January 13, 2011, Brewton fell and broke her arm when she slipped on the sidewalk in front of the building while attempting to get her mail. Brewton describes that to get her mail, she drove her car onto the driveway, which had been fully cleared of snow and ice. She exited her car and walked across the sidewalk, which she claims had been partially cleared.[1] In walking

[1] A photograph attached to Brewton's brief in opposition to the motion for summary judgment shows that the sidewalk to one side of the driveway had been cleared, but the sidewalk to the other side of the driveway had not been cleared.

across the sidewalk, she fell. She contends that her fall was the result of the Monnettes' failure to clear the sidewalk of snow and ice.

{¶ 4} Brewton had entered into a written lease agreement with the Monnettes on October 4, 2006. The lease agreement provided that Brewton was responsible for snow removal on "walks and driveways on the premises." Despite this provision, during the time she resided at the apartment, the Monnettes had arranged for removal of snow and ice from the common areas. Brewton argues that based on their previous course of conduct, the Monnettes impliedly assumed a contractual duty to remove natural accumulations of snow and ice. Alternatively, she argues that the Monnettes created an unnatural accumulation of snow and ice on the sidewalk by clearing the snow and ice from the driveway, but only partially clearing the sidewalk.

{¶ 5} The trial court granted summary judgment on Brewton's claim that the Monnettes were contractually obligated to remove the snow and ice, citing this court's opinion in *Hosler v. Shah*, 6th Dist. Lucas No. L-12-1066, 2012-Ohio-5553. In the trial court, Brewton did not raise the argument presented in her second assignment of error, that the Monnettes created an unsafe condition by the manner of clearing the snow and ice, thus the trial court did not address it in its opinion.

{¶ 6} For the following reasons, we find Brewton's assignments of error not well-taken and we affirm the judgment of the trial court.

II. Standard of Review

{¶ 7} 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 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).

{¶ 8} 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).

III. Analysis

{¶ 9} To establish actionable negligence, one must show 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).

{¶ 10} Under Ohio common law, a landlord is under no duty to clear naturally accumulated snow and ice from common areas. *LaCourse v. Fleitz*, 28 Ohio St.3d 209, 210, 503 N.E.2d 159 (1986). *See also Brinkman v. Ross*, 68 Ohio St.3d 82, 83, 623 N.E.2d 1175 (1993) ("In Ohio, it is well established that an owner or occupier of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow from the private sidewalks on the premises, or to warn the invitee of the dangers associated with such natural accumulations of ice and snow."). This is because the dangers from natural accumulations of snow and ice are generally so obvious and apparent that a landlord may reasonably expect that tenants will recognize the risk and act to protect themselves against it. *Id*. This is sometimes referred to by courts as Ohio's "no-duty winter rule." *Miller v. Tractor Supply Co.*, 6th Dist. Huron No. H-11-001, 2011-Ohio-5906, ¶ 8.

{¶ 11} Two exceptions to this rule exist: (1) when the accumulation of snow and ice is unnatural because of the owner's active negligence; and (2) when the natural accumulation of snow and ice has created a condition substantially more dangerous than what would ordinarily be anticipated. *Hosler v. Shah*, 6th Dist. Lucas No. L-12-1066, 2012-Ohio-5553, ¶ 11. The first exception contemplates a condition caused by the act of a human being intervening to cause ice and snow to accumulate in "unexpected places and ways." *Thatcher v. Lauffer Ravines, L.L.C.*, 10th Dist. Franklin No. 11AP-851, 2012-Ohio-6193, ¶ 17, *modified on reconsideration, sub nom., Cecilia Thatcher v. Lauffer Ravines, L.L.C.*, 10th Dist. Franklin No. 11AP-851, 2013-Ohio-765. Courts have generally limited the second exception to situations where snow and ice have concealed another hazardous condition that the landlord should have known about, such as where snow covers a hole. *Miller* at ¶ 12-13.

{¶ 12} Relying on *Oswald v. Jeraj*, 146 Ohio St. 676, 679, 67 N.E.2d 779 (1946), Brewton argues that yet another exception may exist where the landlord obligates itself to remove the snow and ice, either by express or implied contract. Brewton claims that the Monnettes impliedly assumed the duty to clear the sidewalk of snow and ice because they had done so in the past. She also argues that the manner of removing snow and ice created an unnatural accumulation of snow and ice on the sidewalk. We find no merit to either argument.

{¶ 13} Brewton first argues that the Monnettes had a contractual duty to clear the common areas of the apartment building of snow and ice. The lease agreement between

Brewton and the Monnettes provides that "Lessee agrees to * * * be responsible for snow removal on walks and driveways of the premises." Thus, the Monnettes were not obligated under the written agreement to remove snow and ice. Brewton claims, however, that by clearing the walks and driveway during the four winters during which she lived at the apartment, the Monnettes' course of conduct established an implied agreement to continue to do so.

{¶ 14} As the trial court recognized, we recently addressed a similar argument in *Hosler v. Shah*, 6th Dist. Lucas No. L-12-1066, 2012-Ohio-5553. There a tenant's employee fell in a parking lot that was covered by a layer of snow and ice and had not been cleared or salted. The employee, citing *Hammond v. Moon*, 8 Ohio App.3d 66, 455 N.E.2d 1301 (10th Dist.1982) (a case applying *Oswald*), argued that the landlord had expressly or impliedly assumed the duty to remove the snow and ice. The trial court dismissed the employee's claim and we affirmed. We explained that the employee's reliance on *Hammond* was misplaced and that there exists no implied duty on the part of a landlord to clear natural accumulations of ice and snow:

> 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*[, 68 Ohio St.3d 82, 83, 623 N.E.2d 1175]. 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* [*v. Monday Villas Prop. Owners Assn.*, 2d Dist. [Hamilton] No. 24714, 2012-Ohio-936], at ¶ 23 fn 1, quoting *Pacey v. Penn Garden Apts.*, 2d Dist. [Montgomery] No. 17370, 1999 WL 76841 (Feb. 19, 1999). *Hosler* at ¶ 14.

{¶ 15} The Eighth, Tenth, and Twelfth District Courts of Appeals have held similarly. *See, e.g.*, *Thatcher*, 10th Dist. Franklin No. 11AP-851, 2012-Ohio-6193, at ¶ 40 (recognizing that court had previously called into question an implied assumption of duty based on landlord's past practice of clearing common areas after snowfall); *Yanda v. Consolidated Mgmt., 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."); *Sanfilippo v. Vill. Green Mgt. Co.*, 12th Dist. Clermont No. CA2010-04-027, 2010-Ohio-4211, ¶ 21 ("We do not read *Oswald* to abrogate any of the longstanding rules of premises liability in cases involving snow and ice. * * * So long as a landlord who voluntarily clears a common area (1) does not create a condition substantially more dangerous than a tenant normally associates with snow and ice, and (2) does not create an unnatural accumulation of snow or ice by his efforts, a tenant can still be expected to remain vigilant of the open and obvious dangers that accompany wintry weather in Ohio.")

{¶ 16} Brewton tries to distinguish our decision in *Hosler* by (1) urging that the landlord's duty to an *employee* of a tenant is different than a landlord's duty to a tenant; and (2) characterizing *Hosler* as a common law negligence claim and the present case as a contractual claim between a landlord and a tenant. First, as *Hammond* recognized, the duty owed to an employee of a tenant is the same as the duty owed to the tenant herself. *Hammond* at 67. Second, the inquiry in both *Hosler* and the present case is the same: did the landlord owe a *duty*? The argument that the Monnettes assumed a contractual obligation to clear natural accumulations of snow and ice is merely Brewton's theory for establishing the existence of a duty—it does not transform this case into something other than a negligence action. *Hosler* is applicable to Brewton's claims.

{¶ 17} We, therefore, hold again today that absent one of the two exceptions to Ohio's no-duty winter rule, a landlord owes no duty to a tenant to remove natural accumulations of snow and ice. Here, Brewton presented no evidence in the trial court that either exception applies. The trial court properly granted summary judgment to the Monnettes. Brewton's first assignment of error is not well-taken.

{¶ 18} Brewton next argues in her second assignment of error that there is a question of fact as to whether the Monnettes' manner of clearing the snow and ice on the driveway, but only partially clearing the sidewalk, caused an unnatural accumulation of snow and ice. She did not raise this issue in the trial court, and is, therefore, precluded from raising it for the first time on appeal. *Hanley v. DaimlerChrysler Corp.*, 158 Ohio App.3d 261, 2004-Ohio-4279, 814 N.E.2d 1245, ¶ 23. In any event, Brewton has not

described how the clearing of only one side of the sidewalk altered the natural accumulation of snow and ice resulting in a more dangerous condition. *Lopatkovich v. City of Tiffin*, 28 Ohio St.3d 204, 207, 503 N.E.2d 154 (1986) (finding summary judgment appropriate where plaintiff presented no evidence of improper snow removal). Having presented no evidence upon which a reasonable fact-finder could conclude that the Monnettes caused an unnatural accumulation of snow and ice, Brewton's second assignment of error is not well-taken.

IV. Conclusion

{¶ 19} The trial court properly concluded that the Monnettes owed no duty to Brewton to remove snow and ice from the sidewalk in front of her apartment and Brewton presented no evidence that the Monnettes caused an unnatural accumulation of snow and ice. The judgment of the Lucas County Court of Common Pleas is, therefore, affirmed. The costs of this appeal are assessed to appellant 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.

Mark L. Pietrykowski, J.

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JUDGE

Stephen A. Yarbrough, J.

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JUDGE

James D. Jensen, J.
CONCUR.

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JUDGE