[Cite as *Gress v. Wechter*, 2013-Ohio-971.]

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

Nicole Gress	Court of Appeals No. H-12-023
Appellant	Trial Court No. CVC 20110826
v.	
Frank W. Wechter	**DECISION AND JUDGMENT**
Appellee	Decided: March 15, 2013

* * * * *

Kevin Zeiher and Kyle Wright, for appellant.

James Glowacki and Stephen Doucette, for appellee.

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, Nicole Gress, appeals an award of summary judgment issued by the Huron County Court of Common Pleas to landlord-appellee, Frank Wechter, in a slip and fall negligence and negligence per se suit. Appellant has timely appealed.

I.

{¶ 2} Appellee is the owner of a "side by side" rental home. Appellant moved into the left unit in April of 2010, and appellant's mother moved into the right side. Each unit had its own driveway, although either tenant could use the other's driveway. The parties' oral lease agreement required that appellant maintain the outdoor premises including shoveling and salting the common areas. Appellant received a rent abatement for purchasing her own salt and providing her own shovels.

{¶ 3} Around mid-day on January 15, 2011, appellant was carrying boxes from her mother's driveway to the front porch. While walking along the front walkway connecting the driveway and porch, appellant slipped on a patch of ice, falling on her tailbone. Appellant alleges serious injury. According to appellant, the ice had been there for "maybe a few days or so," and although she had "bag salted" it a few times, the ice remained.

{¶ 4} On September 30, 2011, appellant sued appellee alleging that he negligently created and maintained a hazardous condition by failing to repair overhead gutters that leaked onto the walkway and caused ice to accumulate. Following discovery, appellee moved for summary judgment, arguing that because he had neither a contractual nor a legal duty to clear the walkway, he was not liable as a matter of law. Appellant opposed the motion, alleging not only common law negligence but also negligence per se based upon statutory violations of Ohio's Landlord-Tenant Law, R.C. 5321 and Norfolk, Ohio's building code. Moreover, appellant complained that the *absence* of gutters, not faulty

gutters as originally alleged, had allowed ice to gather on the walkway which proximately cause her to fall.

{¶ 5} On September 12, 2012, the trial court granted appellee's motion, finding, "that the Defendant did not owe a duty to clear the ice accumulation in question under the rental agreement or under the common law. Further, the Court finds that the accumulation of ice was open and obvious. Further the Court finds that the Plaintiff's reference to a statutory duty under the Norwalk Codified Ordinance is misplaced as Section 1306.11 does not, by its plain language, require the installation or maintenance of gutters and down spouts." This timely appeal followed.

II.

{¶ 6} Appellant sets forth three assignments of error:

1. The Trial Court abused its discretion by finding that Appellee does not owe a duty under the rental agreement or common law, therefore failing to apply the controlling authority in the Ohio Landlord-Tenant Act, including the landlord's duty to repair.

2. The Trial Court abused its discretion, by finding that the open and obvious doctrine defeats Appellant's claim when an overriding duty to repair exists under the Ohio Landlord-Tenant Act.

3. The Trial Court abused its discretion in finding that Section 1306.11 of the Norwalk Codified Ordinance does not require the installation or maintenance of gutters or downspouts.

{¶ 7} Appellant couches all three assignments of error under an abuse of discretion standard. The proper standard of review in a summary judgment case, however, is de novo. That is, the court of appeals employs the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d. 105, 671 N.E.2d 241 (1996); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). A motion for summary judgment 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).

{¶ 9} Appellant's assignments of error blend the common law and statutory claims. For the sake of clarity, we treat appellee's first assignment of error as a challenge to the trial court's grant of summary judgment on the negligence claim and the second and third assignments of error as a challenge to the trial court's grant of summary judgment on the statutory claims.

{¶ 10} In its judgment entry, the trial court found that appellee did not owe a *contractual* duty under the rental agreement to clear the common areas. In her first assignment of error, appellant makes mention of that finding. She does not, however, appear to challenge it. Indeed, the parties agree that it was appellant, not appellee, who was charged with maintaining the walkway free of snow and ice. We agree that appellee had no contractual duty to clear any ice accumulation.

{¶ 11} Next, we address whether appellee had a common law duty to clear the ice. To avoid summary judgment in a negligence action, the plaintiff must demonstrate (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately resulting from the breach. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). Recently, we discussed the duty of a premises owner to remove ice and snow. In *Hosler v. Shah*, 6th Dist. No. L-12-1066, 2012-Ohio-5553, ¶ 9, we said,

> 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. *** The underlying rational 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 v. Ross*, 68 Ohio St.3d 82, 83-84, 623 N.E.2d 1175 (1993). This a more expansive rational 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." (Citations omitted.)

{¶ 12} Appellant does not appear to challenge the trial court's conclusion that the ice patch was anything other than a natural accumulation. Indeed, appellant states, "Therefore, if the danger was open and obvious, then the landowner, i.e. landlord, owed no duty of care to individuals lawfully on the premises, i.e. tenants." We agree with the trial court that the ice upon which appellant fell was a natural accumulation and as such appellee owed no common law duty of care.

{¶ 13} Similarly, there is no statutory duty of a landlord to maintain leased premises free of naturally accumulating snow and ice. In *LaCourse v. Fleitz*, 28 Ohio St.3d 209, 503 N.E.2d 159 (1986) syllabus, the Supreme Court of Ohio specifically found that R.C. 5321.04(A)(3), which requires a landlord to "[k]eep all common areas of the premises in a safe and sanitary condition," does not impose a duty on landlords to keep common areas of the leased premises clear of natural accumulations of ice and snow. Absent a duty to the injured party, there can be no actionable negligence claim. Appellant's first assignment of error is not well taken.

{¶ 14} In her second and third assignments of error, appellant argues that the trial court failed to consider appellee's duty to repair a defective condition as set forth in R.C. 5321.04(A)(1) and (2). Appellant claims that "the defective condition was Appellee's failure to erect gutters and downspouts and the dangerous condition created by this omission, which was the icy condition in the ingress and egress of the rental property," caused her injury.

{¶ 15} First, we note that appellant's complaint makes no reference to R.C. 5321.04(A) and is limited to negligence claim for "creating and maintaining a hazardous condition." Appellant first raised R.C. 5321.04(A) as a theory of relief in her memorandum opposing summary judgment. Civ.R. 8(A) requires only that a pleading contain a short and plain statement of the circumstances entitling the party to relief and the relief sought. A party is not required to plead the legal theory of recovery. *Illinois*

Controls, Inc. v. Langham, 70 Ohio St.3d 512, 526, 639 N.E.2d 771 (1994). We find the language in the complaint sufficient to state a claim under R.C.5321.04.

{¶ 16} R.C. 5321.04 provides, in relevant part,

> (A) A landlord who is a party to a rental agreement shall do all of the following:
>
> (1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;
>
> (2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition; ***

{¶ 17} A landlord's violation of the duty imposed by R.C. 5321.04(A)(1) or (2) constitutes negligence per se. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 23 citing *Sikora v. Wenzel*, 88 Ohio St.3d 493, 727 N.E.2d 1277 (2000). Moreover, the "open and obvious" doctrine does not dissolve this statutory duty to repair. *Robinson* 112 Ohio St.3d at ¶ 25. However, violation of the statute does not in, and of itself, render the landlord liable. The tenant must also show proximate cause and that the landlord had knowledge of the defective condition. *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 427 N.E.2d 774 (1981). A landlord will be excused from liability if he "neither knew nor should have known of the factual circumstances that caused the violation." *Sikora* 88 Ohio St.3d at 498. Thus, to survive summary judgment, appellant must have shown 1) a violation of the statute; 2) that the violation proximately caused her injuries; and 3) that appellee knew or should have known of the defective condition.

{¶ 18} With respect to appellant's claim under R.C. 5321(A)(1), the trial court held that plaintiff's reliance on a municipal building code was misplaced as the plain language of the ordinance did not require the installation or maintenance of gutters and downspouts. The ordinance at issue provides,

> 1306.11 ROOFS, GUTTERS, DOWNSPOUTS AND CHIMNEYS
>
> The roof of every structure or use within the City shall be maintained weathertight. All missing shingles, or other roofing materials, shall be replaced with materials of similar kind, nature, design and color as the original thereof. Any roof segment, or distinguishable portion thereof, having more than twenty-five percent (25%) of its total area comprised of missing shingles, or other roofing material, then the roof segment or distinguishable portion thereof shall be replaced or repaired with materials of similar kind, nature, design, and color as the original thereof.

{¶ 19} We agree that the ordinance may not form the basis for appellant's R.C. 5321(A)(1) claim. Two of the three sentences pertain to the *style* of replacement building materials that may be used. Moreover, we do not read the building code's use of the word "weathertight" as a mandate that each roof within the city limits be equipped with gutters and downspouts, and appellant offers no authority to support such an interpretation. It is well-settled that words in a statute shall be given their plain meaning unless otherwise indicated. *Ohio Assn. of Publ. School Emp. v. Twin Valley Local School Dist. Bd. of Edn.,* 6 Ohio St.3d 178, 181, 451 N.E.2d 1211 (1983). We find that the trial

court did not err in determining that appellant's claim under R.C. 5321(A)(1) failed as a matter of law. Appellant's third assignment of error is not well taken.

{¶ 20} Appellant also maintains that the trial court erred in entering summary judgment with respect to R.C. 5321.04(A)(2), which, as previously noted, requires a landlord to "[m]ake all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." Under 5321.04(A)(2), a plaintiff must first establish that a defective condition exists on the premises which renders it unfit or uninhabitable. "The meaning and interpretation of the statutory phrase 'fit and habitable' will not be liberally construed to include that which does not clearly fall within the import of the statute. *** Fitness and habitability entails such defects as lack of water or heat, faulty wiring or vermin infestations' and does not include such items as missing handrails." *Avila v. Gerdenich Realty Co*., 6th Dist. No. L-07-1098, 2007-Ohio-6356, ¶ 9 quoting *Parks v. Menyart Plumbing and Heating Supply Co., Inc.*, 8th Dist. No. 75424, (Dec. 9, 1999); *Accord Mullins v. Grosz,* 10th Dist. No. 10AP-23, 2010-Ohio-3834, ¶ 34 ("[W]e cannot find that the lack of a handrail or gating in the porch/step/walkway area of the premises constitutes a defective condition rendering the premises unfit and uninhabitable.")

{¶ 21} The facts in this case indicate that the front porch was not equipped with gutters or downspouts for the duration of appellant's tenancy and indeed for the entire time appellee has owned the home since 1999 or 2000. We find that the absence of gutters, in this case, did not as a matter of law render the home unfit or uninhabitable.

Accordingly, liability may not be predicated under R.C. 5321.04(A)(2), and appellant's second assignment of error is not well taken.

{¶ 22} For the foregoing reasons, we conclude that summary judgment was appropriate in this matter, as appellee was entitled to judgment as a matter of law. Accordingly, all three assignments of error are found not well taken, and the judgment of the Huron 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE