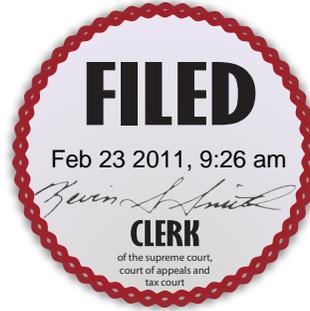


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM SMITH,)

Appellant-Plaintiff,)

vs.)

ARBOR WOODS APARTMENTS,)

Appellee-Defendant.)

No. 25A03-1005-CT-262

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable A. Christopher Lee, Judge
Cause No. 25C01-0810-CT-433

FEBRUARY 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Senior Judge

Plaintiff-Appellant William Smith appeals the trial court's grant of summary judgment to Defendant-Appellee Arbor Woods Apartments ("Arbor Woods"). We reverse and remand.

I. ISSUE

Smith raises one issue, which we restate as whether the trial court erred by granting summary judgment to Arbor Woods.

II. FACTS AND PROCEDURAL HISTORY

Smith was a tenant at the Arbor Woods apartment complex. On December 1, 2007, at 6:30 p.m., Smith left his apartment to take his dog for a walk. Rain, sleet, and freezing rain had fallen during the day. Smith waited until the precipitation was over before he went outside. He saw that the sidewalks, streets, and trees were covered with ice. Smith walked down a sidewalk with his dog, and as he turned around to return to his apartment, he slipped on ice and fell, sustaining injury.

Smith sued Arbor Woods, which filed a motion for summary judgment. After a hearing, the trial court granted Arbor Woods' motion and entered judgment in favor of Arbor Woods. Smith now appeals.

III. DISCUSSION

We review an appeal from the grant of summary judgment de novo. *Eads v. Cmty. Hosp.*, 932 N.E.2d 1239, 1243 (Ind. 2010). Summary judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Indiana Trial Rule 56(C). All facts and reasonable inferences drawn from those

facts are construed in favor of the nonmoving party. *Cox v. Paul*, 828 N.E.2d 907, 911 (Ind. 2005).

In this case, Smith proceeded under a theory of negligence. To sustain an action for negligence, a plaintiff must establish: (1) a duty owed by the defendant to conform its conduct to a standard of care arising from its relationship with the plaintiff; (2) a breach of that duty; and (3) an injury proximately caused by the breach of that duty. *Benton v. City of Oakland City*, 721 N.E.2d 224, 232 (Ind. 1999). Summary judgment is “rarely appropriate” in negligence cases. *Rhodes v. Wright*, 805 N.E.2d 382, 387 (Ind. 2004) (quoting *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996)). This is because negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person—one best applied by a jury after hearing all of the evidence. *Rhodes*, 805 N.E.2d at 387.

Here, the parties do not dispute that Smith, as a tenant, was an invitee on Arbor Woods’ property and that Arbor Woods owed Smith a duty to exercise reasonable care for his protection. Instead, the parties dispute whether Arbor Woods breached its duty to Smith by failing to clear snow and ice from the sidewalks around Smith’s building. The determination of a breach of duty, which requires a reasonable relationship between the duty imposed and the act alleged to have constituted the breach, is usually a matter left to the trier of fact. *Mangold ex rel. Mangold v. Ind. Dep’t of Natural Res.*, 756 N.E.2d 970, 975 (Ind. 2001). Only where the facts are undisputed and lead to but a single inference or conclusion may the court as a matter of law determine whether a breach of duty has occurred. *Id.*

Our Supreme Court has adopted Sections 343 and 343A of the Restatement (Second) of Torts to illustrate the contours of a landowner's duty toward an invitee. *See Smith v. Baxter*, 796 N.E.2d 242, 243 (Ind. 2003). Those sections provide, in relevant part:

§ 343

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts §§ 343 & 343A (1965).

In *Countrymark Coop., Inc. v. Hammes*, 892 N.E.2d 683, 686 (Ind. Ct. App. 2008), *trans. denied*, Turner, a truck driver, came to a gasoline terminal to pick up gasoline. As Turner was filling his tanker truck, the meter on the terminal's gas racks malfunctioned, and Turner could not finish pumping gas into his truck. Turner attempted to summon assistance from terminal employees, but no one responded. Next, Turner walked towards a maintenance building to seek assistance, and he slipped and fell on ice, sustaining injuries. Turner sued the terminal, and the terminal moved for summary judgment. The terminal asserted that even if it owed a duty to Turner as an invitee, the danger posed by the ice was so obvious that there was no breach of duty. *Id.* at 686. The

trial court denied the terminal's motion, and Turner prevailed at trial. *Id.* at 687. On appeal, the terminal argued that the trial court should have granted its motion for summary judgment. This Court rejected the terminal's claim. Following a discussion of Sections 343 and 343A of the Restatement (Second) of Torts, this Court concluded as follows regarding a breach of duty:

genuine issues of material fact exist as to whether [the terminal], by the exercise of reasonable care, would have discovered the dangerous condition and should have realized that it involved an unreasonable risk of harm to Turner, whether [the terminal] should have expected that Turner would fail to protect himself from the danger, and whether [the terminal] failed to exercise reasonable care to protect Turner. Further, given [the terminal's] failure to staff the gas racks, genuine issues exist as to whether [the terminal] should have anticipated the harm despite Turner's knowledge of the danger or the obviousness of the danger.

Id. at 691-692.

In the current case, rain, sleet, and freezing rain had been falling all day. Smith waited until after the precipitation had ended before going outside with his dog at 6:30 pm. Smith saw ice on the roads, parking lots, and sidewalks when he went outside. No one had spread salt on the sidewalks or otherwise cleaned off the ice. Earlier that day, Smith had noted that someone had plowed or shoveled off the apartments' driveway. Smith was wearing rubber-soled slippers with treads like tennis shoes, which he thought would provide adequate traction on ice. As he walked down the sidewalk, he took small steps and chose a path that seemed the least slippery. Nevertheless, Smith fell as he turned around to return to his apartment.

Arbor Woods contends that the danger of slipping and falling was an obvious danger, and that Smith acknowledged that walking on the icy sidewalks was dangerous.

Consequently, Arbor Woods reasons that Smith failed to protect himself, and Arbor Woods cannot have breached its duty to Smith. We disagree. Even if the ice presented a danger that was obvious to Smith, there is a dispute of material fact as to whether Arbor Woods should have expected its tenants to fail to protect themselves from the danger. It is reasonable that a landlord should expect that tenants might need to leave their apartments even under icy conditions. There is also a dispute of material fact as to whether Arbor Woods should have anticipated the harm to Smith even though Smith was aware of the danger posed by the ice. Arbor Woods had plowed or cleaned off the apartments' driveway earlier in the day, so it had knowledge of the risk posed by ice and snow and was aware of its tenants' need to leave their apartments despite the weather.

Arbor Woods argues that Smith did not face a compelling circumstance that required him to walk on the ice because Smith could have stood on the porch of his apartment building while the dog went into the front yard to relieve itself. There is no requirement under Sections 343 or 343A that an invitee's conduct be undertaken for compelling circumstances in order to establish a landowner's liability. *Smith*, 796 N.E.2d at 245.

Under these circumstances, we conclude that there is a dispute of material fact as to whether Arbor Woods breached its duty to Smith. *See Countrymark*, 892 N.E.2d at 692 (affirming the trial court's denial of the terminal's motion for summary judgment because there was an issue of material fact as to breach of duty). Therefore, Arbor Woods is not entitled to summary judgment as a matter of law, and the trial court's entry of judgment must be reversed. To the extent there develops evidence of negligence on

the part of each party, it will be for the trier of fact to allocate fault under the Comparative Fault Act. *See Estate of Mintz v. Conn. Gen. Life Ins. Co.*, 905 N.E.2d 994, 999 (Ind. 2009) (reversing the trial court’s grant of summary judgment as to the plaintiff’s negligence claim against a defendant because the allocation of fault is entrusted “to the sound judgment of the fact-finder”).

IV. CONCLUSION

For the reasons stated above, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Affirmed.

MATHIAS, J., concurs.

BROWN, J., dissents with separate opinion.

**IN THE
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)	
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vs.)	No. 25A03-1005-CT-262
)	
ARBOR WOODS APARTMENTS,)	
)	
Appellee-Defendant.)	

Brown, J., dissenting

I respectfully dissent and would affirm the trial court.

As a matter of law, a person is required to make reasonable use of his faculties and senses to discover dangerous conditions to which he might be exposed. Kostidis v. General Cinema Corp. of Indiana, 754 N.E.2d 563, 574 (Ind. Ct. App. 2001), trans. denied. Under the circumstances presented, and because Smith has acknowledged that he was aware of the icy conditions present on the sidewalk, no reasonable fact-finder could find that Arbor Woods should have anticipated that Smith would not discover or realize the danger, nor take steps to protect himself. See Ozinga Transp. Systems, Inc. v. Michigan Ash Sales, Inc., 676 N.E.2d 379, 386 (Ind. Ct. App. 1997) (holding that the undisputed evidence was insufficient to create any triable issues with regard to breach of

duty and noting that the undisputed evidence clearly established that the injured person's fall was caused by a combination of fly ash and weather conditions and that the person was aware of the slippery nature of fly ash and could not have been informed of any facts of which he was not already aware), reh'g denied, trans. denied.

For these reasons I would affirm the trial court's grant of summary judgment in favor of Arbor Woods.