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IN THE
COURT OF APPEALS OF INDIANA

LINDA HARTER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 27A04-0701-CV-21
	)	
LARRY COUCH and ROSE COUCH,	)	
	)	
Appellee-Defendants.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0701-PL-14

August 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Linda Harter appeals a grant of summary judgment in favor of her landlords, Larry and Rose Couch, in Harter's negligence lawsuit against the Couches. Harter challenges the trial court's ruling as the sole issue on appeal.

We affirm.

The facts favorable to the non-movant, Harter, are that on April 26, 1998, Harter and the Couches entered into a lease whereby Harter rented one-half of a duplex owned by the Couches in Gas City, Indiana. Entry into Harter's apartment was gained via a porch that exclusively served her residence. Harter was responsible for mowing the lawn and for snow removal. At some point prior to the incident that is the subject of this lawsuit, Harter notified the Couches that there were leaks where the eaves trough abutted the roof of the front porch above the front door. According to Harter, Larry Couch acknowledged the problem and told her he would "get to it." *Appellant's Brief* at 5. It appears the Couches never repaired the problem about which Harter complained.

Snow fell on January 30, 2003. Sometime around 9:00 p.m., Harter shoveled and spread salt on her porch. Snow continued to accumulate during the night. Harter arose earlier than usual the next morning because she was concerned about the condition of the roads. At the time, although it was only twenty-two degrees, there was a mist falling and ice was present on her porch. When she stepped onto her porch, Harter "knew the ice was there" and "knew it was slick", therefore she held onto the side of the duplex and "inched" along. *Appellant's Appendix* at 39. As she prepared to step down off of the porch, Harter slipped, fell, and broke her leg.

On January 28, 2005, Harter filed a complaint for damages alleging the Couches were negligent in the following manner: "Defendants were negligent as Landlords because they failed to properly maintain the eaves troughs on the leased premises, which resulted in an accumulation of ice on the front porch and which caused Plaintiff's fall." *Id*. at 1. The Couches answered in denial and asserted several affirmative defenses, including a third-party defense, set-off, and incurred risk. On August 4, 2006, the Couches filed a motion for summary judgment, arguing they did "not have a duty to protect Harter from injuries due to alleged defective conditions on the property once possession and control of the property have been surrendered." *Id*. at 9. The trial court granted the Couches' motion on November 3, 2007.

In order to prevail on a motion for summary judgment in a negligence case, the defendant must establish that the undisputed material facts negate at least one element of the plaintiff's claim. *Olds v. Noel*, 857 N.E.2d 1041 (Ind. Ct. App. 2006). A defendant's duty to the plaintiff to exercise reasonable care is a required element in the tort of negligence. *Id*. "'Summary judgment in a negligence case is particularly appropriate when the court determines that no duty exists because, absent a duty, there can be no breach and, therefore, no negligence.'" *Id*. at 1043. (quoting *Reed v. Beachy Const. Corp.*, 781 N.E.2d 1145, 1148-49 (Ind. Ct. App. 2002), *trans. denied*).

When reviewing a motion for summary judgment, we apply the same standard as the trial court. *Perry v. Driehorst*, 808 N.E.2d 765 (Ind. Ct. App. 2004), *trans. denied*. Summary judgment is appropriate only if no genuine issues of material fact exist, and the

moving party is entitled to judgment as a matter of law. *Id*. Like the trial court, we may not look beyond the evidence specifically designated to the trial court. *Id*. After the movant has established that no genuine issue of material fact exists by submitting the materials contemplated by Trial Rule 56, the nonmovant must set forth specific facts, using supporting materials as contemplated under the T.R. 56, which show the existence of a genuine issue for trial. *Id*. "A trial court's grant of summary judgment is clothed with the presumption of validity, and the appellant bears the burden of demonstrating that the trial court erred." *Id*. at 768.

In Indiana, as a general rule, the question whether a duty is owed with respect to the maintenance and condition of real property depends primarily upon whether the defendant was in control of the premises when the accident occurred. *Olds v. Noel*, 857 N.E.2d 1041. We have summarized the rule specifically applicable in the landlord-tenant setting as follows: "'As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.'" *Id*. at 1044 (quoting *Pitcock v. Worldwide Recycling, Inc.*, 582 N.E.2d 412, 414 (Ind. Ct. App. 1991)).

The Couches claimed successfully to the trial court that they had surrendered complete control and possession of the leased premises to Harter and therefore had no duty to her with respect to the condition of the premises. Harter's response in opposition to summary judgment was three-fold. First, she contended she did not have exclusive

control of the premises because the Couches occasionally assumed responsibility to make structural repairs to the premises. Therefore, she contends the general rule of non-liability does not apply. Second, she contends the ice had accumulated as the result of a defective condition in the premises – a condition that the lease forbade her from repairing. Third, she contends the lease she signed provided for only a one-year tenancy, which rendered her a month-to-month tenant at the time of this incident.

We begin with the last argument. Harter's entire argument on this point is: "Plaintiff also contends that the lease expired after one year and at the time of the fall the parties were operating under a month to month tenancy. There are no provisions in the lease regarding renewal or holdover." *Appellant's Brief* at 8.

Each contention in an appellant's brief "must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]" Ind. Appellate Rule 46(A)(8)(a). Harter's argument on this issue is bereft of citations to authority or the appendix in which the disputed evidence appears, or indeed anything other than the above-quoted statement. "'A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record.'" *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509, 514 (Ind. Ct. App. 2005) (quoting *Romine v. Gagle*, 782 N.E.2d 369, 386 (Ind. Ct. App. 2003), *trans. denied*), *trans. denied*. Harter has waived this issue.

Harter contends the general rule of non-liability does not apply in this situation because she did not have exclusive control of the premises, which in turn is based upon

the fact that the Couches occasionally assumed responsibility to make structural repairs thereto. We rejected a substantially similar argument in *Olds v. Noel*, 857 N.E.2d 1041. In that case, a mail carrier slipped and fell on the sidewalk of a leased, single-family house and sued the landlord. There, as here, the plaintiff claimed the landlord was liable notwithstanding the general rule of non-liability, primarily because the landlord had not surrendered complete control and possession of the leased premises to the tenants, who were not parties to the lawsuit. In support of that claim, the plaintiff noted the landlord reserved in the lease the right of entry to make repairs for the safety, preservation, or improvement of the premises. We rejected that argument, explaining:

> First, Olds points to no legal precedent to support his contention that a mere right to entry works to defeat the transfer of control and possession of a leased premises to the lessees of that premises. Indeed, such a provision is common in most every lease of any single--or multi-unit residential premises. To agree with Olds here, then, would be to rule that all of those leases leave a landlord subject to liability for any injury to any third-party invitee anywhere on the premises of a leased property. The exception would swallow the general rule.

Id. at 1046. Although *Olds* involved a claim against a landlord by a third-party defendant, the principle is the same. The surrender of possession and control that triggers the general rule of non-liability need not be so complete as to utterly bar the landlord's right of entry onto the property. As we indicated in *Olds*, the definition of surrender we apply in cases such as this must accommodate the landlord's right of entry to inspect, maintain, and repair the leased property. *See Olds v. Noel*, 857 N.E.2d 1041.

The arrangement in the lease between the Couches and Harter gave the Couches no greater right of entry upon the leased premises than did the one that, in *Olds*, we concluded did not vitiate the general rule of non-liability. The same result attains here. The right to enter the property reserved by the Couches in the lease did not subject them to general liability upon the basis of failing to surrender possession and control to Harter.

Harter contends that, notwithstanding the general rule of non-liability, the ice upon which she slipped and fell had accumulated as the result of a defective condition in the premises – a condition that the lease forbade her from addressing. In support of this argument, Harter contends the following contract provision prevented her from fixing the defect in the eaves: "Tenant agrees not to make any alterations or improvements to said premises or to put any nails or screws in the walls without the previous consent of the landlord." *Appellant's Appendix* at 6. We cannot agree that this provision operated as she claims. We note in this regard that "alterations and improvements" in this context is not synonymous with "repairs." Also, prior to the fall, and during the period of tenancy, Harter had, in fact, paid for other work done on the premises, such as purchasing new sinks and a tub enclosure, new carpet, and a carport. Harter also hired a painter to paint some rooms in the leased premises. In short, Harter was not rendered powerless by the lease to remedy a structural problem that might arise.

Finally, and perhaps most significantly, Harter opposed summary judgment on the following ground: "There are genuine issues of material facts, as set forth in Plaintiff's Memorandum, regarding control and repair of the premises and as to whether the

accumulation of ice and snow on the porch was open and obvious." *Appellant's Appendix* at 21. In support of this contention, Harter denied that the allegedly dangerous condition was open and obvious by pointing out (1) it was dark when Harter fell, (2) it was cloudy, and (3) "even though Plaintiff noticed the ice on the porch, she did not see how bad it was." *Id*. at 26. Harter does not reiterate this argument on appeal. Indeed, it would seem that the material designated by the Couches forecloses any possibility of success on that point. At a deposition, Harter explained the incident, in pertinent part, as follows:

> I – when I started out, I started out to start my car to warm it up and then go back in and finish getting ready for work. *So I inched out. I held onto the side of the house and inched – I knew the ice was there.* Now how bad it was. I didn't know that until the EMTs came to get me. *But I inched across there. I knew it was slick* and made it to the last – the last step just before you step down to another step, and that's when I went off.

Appellant's Appendix at 38-39 (emphasis supplied). Elsewhere in the deposition, Harter described the conditions outside when she awoke that morning: "It was raining a heavy – not a heavy rain but a mist. It had snowed though sometime during the night because there was snow and ice both on the – on the ground and on the porch." *Id*. at 41. Clearly, Harter acknowledged not only that the ice on the porch was open and obvious, but also that she was specifically aware of its presence.

Considering the facts most favorable to Harter, and after reviewing the materials designated by the parties, we affirm the grant of summary judgment in favor of the Couches.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.