[Cite as *McCauley v. Cocca Dev. Ltd.*, 2020-Ohio-3641.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

JESSICA MCCAULEY,

Plaintiff-Appellant,

v.

COCCA DEVELOPMENT LTD. et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0112

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19 CV 131

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl Waite, Judges.

JUDGMENT:
Affirmed.

Atty. John Regginello, Boyd, Rummell,, Carach, Curry, Kaufman, 26 Market Street, 4th Floor, P.O. Box 6565, Youngstown, Ohio 44501 for Plaintiff-Appellant and

Atty. Paul Ricard, Pelini, Campbell & Williams, 8040 Cleveland Avenue NW, Suite 400, North Canton, Ohio 44720 for Defendant-Appellee.

Dated: June 30, 2020

Robb, J.

{¶1} Plaintiff-Appellant Jessica McCauley appeals the decision of Mahoning County Common Pleas Court granting summary judgment for Defendants-Appellees Cocca Development Ltd. and Dollar General. This is a slip and fall case. The trial court determined the accumulation of snow and ice was a natural accumulation and it was open and obvious. Accordingly, it granted summary judgment for Appellees. The issue in this case is whether those determinations were correct. For the reasons stated below, the trial court's grant of summary judgment is affirmed.

Statement of the Case

{¶2} On February 24, 2015 Appellant went to the Dollar General store located at 9065 Springfield Road in a plaza owned by Cocca Development. It was cold that day and there was snow on the parking lot and sidewalk. Part of the sidewalk appeared to be either wet or icy. While walking on the sidewalk, Appellant slipped on ice, fell, and injured her right ankle and knee.

{¶3} Appellant filed a complaint against Appellees sounding in negligence; she asserted the sidewalk had been negligently maintained causing an unnatural accumulation of water and ice. 1/17/19 Complaint. Following discovery, Appellees filed a motion for summary judgment. 6/6/19 Defendants' Summary Judgment Motion. Appellees asserted the snow and ice was open and obvious, and accordingly, there was no duty to warn. 6/6/19 Defendants' Summary Judgment Motion. Appellant filed a motion in opposition to summary judgment arguing Appellees created the hazard by an improperly constructed downspout near where Appellant fell. 7/3/19 Plaintiff's memorandum in opposition to Defendants' motion for summary judgment. The motion was supported by an affidavit from a civil engineer indicating the downspout was faulty because of improper construction and this lead to an excess amount of water on the sidewalk, which froze when the temperature dropped. Scott Eaton Affidavit attached to Plaintiff's memorandum in opposition to Defendants' motion for summary judgment. Appellant also asserted that the issue of whether the ice on the sidewalk was an open and obvious condition was a jury question because there existed factual discrepancies

as to whether the sidewalk looked wet or icy. 7/3/19 Plaintiff's memorandum in opposition to Defendants' motion for summary judgment.

{¶4} The trial court made a factual determination that the ice and snow was a natural accumulation and determined that it was an open and obvious condition. 9/18/19 J.E. It concluded that Appellant could see and she voluntarily assumed the risk of injury when she chose to walk over that portion of the sidewalk. 9/18/19 J.E. The trial court granted summary judgment for Appellees. 9/18/19 J.E.

{¶5} Appellant timely appealed the trial court's decision.

Standard of Review

{¶6} An appellate court reviews a trial court's summary judgment decision de novo and applies the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 5. A motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the nonmoving party, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ.R. 56(C); *Byrd v. Smith*, 110 Ohio St. 3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10.

{¶7} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293.

{¶8} With that standard in mind, we now address the arguments.

First and Second Assignments of Error

"The trial court erred in granting Defendants' motion for summary judgment where there is uncontroverted expert evidence establishing that the Defendants created the dangerous condition."

"The trial court erred in granting Defendants' motion for summary judgment where the alleged open and obvious nature of the dangerous condition on the Defendants' premises presented a genuine issue of fact."

{¶9} The arguments are addressed together since they both address whether summary judgment was appropriately granted.

{¶10} Appellant argues she presented evidence from Scott Eaton, a civil engineer, indicating that a faulty constructed downspout caused the unnatural accumulation of ice. She contends the civil engineer opined Appellees had knowledge of this condition and that knowledge was evinced by the pitting of the concrete by the downspout, which indicated that the sidewalk was heavily salted at that area. Thus, Appellees were directly responsible for creating the dangerous condition of the icy sidewalk in that area. She further asserts there is a genuine issue of material fact as to whether the ice on the sidewalk was an open and obvious condition.

{¶11} Appellees counter arguing the evidence submitted by Appellant is an attempt to make a tenuous connection between the pitting of the sidewalk and knowledge of the condition of the downspout. However, even if that evidence does show knowledge of the condition on the part of the Appellees, the icy condition was open and obvious. Therefore, the grand of summary judgment was appropriate.

{¶12} The cause of action asserted in this case is negligence based on premises liability. "It is fundamental that in order to establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 8, citing *Menifee v. Ohio Welding Prod., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).

{¶13} Duty is the threshold determination in every negligence case. *Armstrong* at ¶ 13. "'Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.'" *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018 ¶ 23, quoting *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989).

{¶14} In a negligence case alleging premises liability, the status of the person who enters upon the land of another (i.e., trespasser, licensee, or invitee) defines the scope of the legal duty that the landowner owes the entrant. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 662 N.E.2d 287 (1996). Appellant was an invitee because she was a person who rightfully entered Appellees' premises by invitation, express or implied, for some purpose beneficial to Appellees. *Id*. Business invitees are owed a duty of ordinary care: the owner or occupier is to "maintain its premises in a reasonably safe condition" and "warn invitees of known latent or hidden dangers." *Armstrong* at ¶ 5.

{¶15} The undisputed facts of this case indicate Appellant slipped on an icy sidewalk. In Ohio, under premises liability we have a rule that is sometimes referred to as a "no duty winter rule." Under this rule, "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." *Bakies v. RSM Maintenance, Inc.*, 3d Dist. Allen No. 1-19-03, 2019-Ohio-3323, ¶ 23, quoting *Miller v. Tractor Supply Co.*, 6th Dist. Huron No. H-11-0001, 2011-Ohio-5906, ¶ 8, citing *Brinkman v. Ross*, 68 Ohio St.3d 82, 83-84, 623 N.E.2d 1175 (1993) and *Jeswald v. Hutt*, 15 Ohio St.2d 224, 239 N.E.2d 37 (1968), paragraph one of the syllabus. The underlying rationale for this 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* at 84.

{¶16} The Sixth Appellate District has explained that there are two exceptions to the "no duty winter rule." *Diamond v. TA Operating L.L.C.*, 6th Dist. Wood No. WD-12-068, 2013-Ohio-3951, ¶ 9. The first exception is when the owner's active negligence causes the accumulation of ice and snow to be unnatural. *Id*. citing *Miller* at ¶ 10. The second exception is when the natural accumulation of snow and ice has created a condition substantially more dangerous to business invitees than "they should have anticipated by reason of their knowledge of conditions prevailing generally in the area." *Diamond* at ¶ 9, quoting *Miller* at ¶ 11.

{¶17} Appellant is arguing the ice is an unnatural accumulation and was created by Appellees because they had knowledge of the faulty downspout and that downspout caused the ice. A natural accumulation of ice and snow is one which accumulates as a result of an act of nature. *Daley v. Fryer*, 2015-Ohio-930, 30 N.E.3d 213, ¶ 19 (3d Dist.). An unnatural accumulation is one that results from an act of a person. *Id.* Unnatural accumulation refers "to causes and factors other than the inclement weather conditions of low temperatures, strong winds and drifting snow, i.e., to causes other than the meteorological forces of nature." *Id*., quoting *Porter v. Miller*, 13 Ohio App.3d 93, 95, 468 N.E.2d 134 (6th Dist.1983). However, black ice created from run-off of a melting snow pile does not constitute an unnatural accumulation. *Flint v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga Nos. 80177 and 80478, 2002-Ohio-2747, ¶ 20.

{¶18} Here, there is evidence from a civil engineer that Appellant fell on ice resulting from the alleged faulty downspout and Appellees knew of the condition. The pictures taken on the day Appellant fell does appear to show black ice around the downspout. However, it also appears there is some ice in other places caused from melting snow run off. If a faulty downspout caused the black ice, it could be concluded that this was an unnatural accumulation. Appellant's expert opines Appellees knew of the condition because the excessive pitting around the downspout indicated the area was heavily salted due to the amount of ice that occurred there. Appellees do not provide evidence to combat this assertion other than to indicate it is a stretch to say that the pitting of the concrete shows knowledge of the condition. If the condition is considered an unnatural accumulation and there was knowledge, then the "no duty winter rule" is not applicable.

{¶19} The trial court did not find that there was an unnatural accumulation of ice; it stated the ice was a natural accumulation making a factual determination. We could possibly conclude there was a genuine issue of material fact as to whether the accumulation was natural or unnatural. However, even if this court disagrees with the trial court and finds there were genuine issues of material fact regarding whether the alleged defective downspout caused the unnatural accumulation of ice upon which Appellant fell, such determination by this court does not mean that the trial court's grant of summary judgment to Appellees was incorrect. If the ice was open and obvious and

there was no genuine issue of material fact as to that issue, then summary judgment was appropriately granted.

{¶20} When applicable, the open-and-obvious doctrine obviates the duty to warn and acts as a complete bar to any negligence claims. *Armstrong*, 99 Ohio St.3d 79, 2003-Ohio-2573 at ¶ 5. The open and obvious doctrine states that an owner or occupier of property owes no duty to warn invitees entering the property of open and obvious dangers on the property. *Id.* at ¶ 14, citing *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968).

{¶21} It has been explained that the rationale for the so-called "no-duty winter rule" is more expansive than the rationale for the open and obvious doctrine. *Miller*, 6th Dist. Huron No. CVC20100109, 2011-Ohio-5906 at ¶ 9. "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. Franklin No. 06AP-1303, 2007-Ohio-4522, ¶ 22.

{¶22} We have previously held that the open and obvious doctrine applies to unnatural accumulations, thus rendering no duty on the part of the landowner. *Mounts v. Ravotti*, 7th Dist. Mahoning No. 07 MA 182, 2008-Ohio-5045, ¶ 53-56. We are not alone in this determination. *Burress v. Associated Land Group*, 12th Dist. Clermont No. CA2008–10–096, 2009–Ohio–2450, ¶ 14-15; *Whitehouse v. Customer is Everything!, Ltd.*, 11th Dist. Lake No. 2007–L–069, 2007–Ohio–6936, ¶ 72; *Prexta v. BW–3, Akron, Inc.*, 9th Dist. Summit No. 23314, 2006–Ohio–6969, ¶ 13; *Scholz v. Revco Discount Drug Ctr., Inc.*, 2d Dist. Montgomery No. 20825, 2005–Ohio–5916, ¶ 17–19; *Couture v. Oak Hill Rentals, Ltd.*, 6th Dist. Ottawa No. OT–03–048, 2004–Ohio–5237, ¶ 16; *Bevins v. Arledge*, 4th Dist. Pickaway No. 03CA19, 2003–Ohio–7297, ¶ 18–20.

{¶23} In reviewing the evidence, there is no genuine issue of material fact as to whether the ice was open and obvious. The pictures clearly indicate there was snow on the sidewalk and there was either water or ice next to the snow. Although Appellant stated that the sidewalk looked wet, she admitted that the darker coloring of the sidewalk could indicate it was either ice or water. McMannis Depo. 28-30. It is noted that when looking at the picture there are two conclusions that could be drawn. One is that there

was snow and black ice. The other is that there was snow and the sidewalk was wet from run off from the snow. Considering Appellant's admission that it could be either wet or icy and the pictures clearly showing snow next to that wet or icy portion of the sidewalk, it is difficult to conclude that the condition was not open and obvious. "[S]now and ice are a part of wintertime life in Ohio and hazardous winter weather conditions and their attendant dangers are to be expected in this part of the country." *Mayes v. Boymel*, 12th Dist. Butler No. CA2002–03–051, 2002–Ohio–4993, ¶ 14. Moreover, a "reasonable person living in Ohio should be aware that in the wintertime a wet and slippery condition can quickly become an icy and potentially dangerous condition." *Id.* Persons living in Ohio realize the presence of snow and areas that appear to be wet presents a reasonable inference that the wet areas may be ice and not just water. While Appellant's belief that the area was wet rather than icy was mistaken, such mistake does not invalidate the fact that the dangerous conditions were open and obvious. *See Holbrook v. Kingsgate Condominium Association*, 12th Dist. Butler No. CA2009–07–193, 2010–Ohio–850 (affirming summary judgment where two plaintiffs fell on ice, though plaintiffs claimed that the danger was not open and obvious because the areas where they fell looked like "water" and "wet" pavement instead of ice).

{¶24} Therefore, summary judgment was appropriately granted because there was no genuine issue of material fact as to whether the danger was open and obvious. Both assignments of error are meritless and the trial court's decision to grant summary judgment to Appellees is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.