IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HEATHER M. ELDER	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N11C-05-094 JRS
	)	
DOVER DOWNS, INC.	)	
	)	
Defendant.	)	

Date Submitted: May 15, 2012
Date Decided: July 2, 2012

MEMORANDUM OPINION

Upon Consideration of Defendant's Motion for Summary Judgment.
GRANTED.

L. Vincent Ramunno, Esquire, and Lawrence A. Ramunno, Esquire, RAMUNNO & RAMUNNO, P.A., Wilmington, Delaware. Attorneys for Plaintiff.

Michael J. Logullo, Esquire, HECKLER & FRABIZZIO, Wilmington, Delaware. Attorney for Defendant.

SLIGHTS, J.

I.

Before the Court is defendant, Dover Downs, Inc.'s ("Dover Downs"), motion for summary judgment. Plaintiff, Heather Elder ("Elder"), seeks to recover damages for injuries she sustained as a result of a slip and fall that occurred on a patch of snow and ice in the Dover Downs parking lot. After a careful review of the so-called "Continuing Storm" doctrine and other relevant case law, the Court finds as a matter of law that Dover Downs reasonably discharged its duty to Elder to maintain its property safely for business invitees. The Court further finds that Elder's arguments regarding an alleged pre-existing ice patch are not supported by sufficient evidence to create a material issue of fact regarding the circumstances surrounding her slip and fall. Accordingly, Dover Downs's motion for summary judgment must be **GRANTED**.

II.

On January 25, 2010, a rainstorm passed over Dover, Delaware. Temperatures were above freezing for the following days, but dropped below the freezing point during the evening of January 28, 2010. Freezing conditions remained for the following few days. According to local weather reports, the snowstorm at issue began around 10:00 AM on January 30, 2010, and lasted until the early hours of the

following morning.[1] These weather reports were confirmed by the records kept by the grounds-keeping staff at Dover Downs, who were called in that Saturday morning, January 30, to attend to developing conditions in the Dover Downs parking lot.[2] The staff, occupied with clearing the snowfall, did not leave Dover Downs until 5:00 AM the following morning, January 31, 2010.

On January 30, 2010, at approximately 1:30 PM, Elder and her brother, Eric Elder, were approaching the side entrance of Dover Downs. Within the "bus stop area" of the parking lot, Elder encountered a patch of ice, obscured by the snowfall, and fell. Elder reported the incident to Dover Downs, who created a Security Incident Report to document the fall. The report noted that Elder had used her right hand to brace her fall, that the hand appeared red but not swollen and that, after offering to call an ambulance, Elder's brother planned to take her to the hospital. The report included photos of both the area where Elder fell and her injured hand. Dover Downs added surveillance footage of the fall to its file.[3]

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[1] Quality Controlled Local Climatological Data: Dover AFB Airport Report, at 11 (attached as Ex. C to Def. Mot. Summ. J.).

[2] Deposition of Michael Grott ("Michael Grott Dep."), Case No. N11C-05-094 JRS, at 14:12-20 (Dec. 2, 2011).

[3] Dover Downs Hotel and Casino Security Incident Report, at 2 (attached as Ex. 13 to Def. Mot. Summ. J.).

Elder commenced this action seeking damages against Dover Downs for its alleged negligence in allowing the parking lot to remain in an unsafe condition. After the close of discovery, Dover Downs filed this motion for summary judgment.

III.

Dover Downs argues that, pursuant to the Continuing Storm doctrine, it owed Elder no duty to remove the snow and ice that was on its premises at the time of Elder's fall. Dover Downs argues that there is no evidence of any ice in the "bus stop area" that existed prior to the January 30, 2010 snowfall. In fact, Dover Downs provides meteorological expert testimony to show that ice could not have formed on the ground prior to the snowfall due to warm weather patterns in the days preceding January 30, 2010.

In response, Elder contends that, as a business invitee of Dover Downs, the company owed her a duty expeditiously to clear the snow and ice accumulating in its parking lot on January 30, 2010. Elder contends that the Continuing Storm doctrine cannot excuse Dover Downs from clearing the snow and ice for two reasons. First, Elder maintains it was not snowing at the time she fell.[4] Second, she suggests that the

[4] Affidavit of Heather Elder ("Heather Elder Aff.") at ¶ 2-3 (May 1, 2012) ("At the time of my fall, it was not snowing but there was some snow blowing off the roof and/or trees. It had stopped snowing for about 2 hours before my fall, even though, it started snowing again later that day after my fall.").

patch of ice on which she slipped existed prior to the snowfall of January 30, 2010. Because the ice could have existed prior to the snow on January 30, Elder argues Dover Downs had a duty to clear that ice prior to her fall. At the very least, she contends that issues of fact exist that preclude summary judgment.

IV.

In order to grant a motion for summary judgment, the moving party must establish that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[5] All facts must be viewed in the light most favorable to the non-moving party.[6] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[7] When the facts permit a reasonable person to draw only one inference, however, the question becomes one for decision by the Court as a matter of law.[8] Arguments resting upon pure speculation will not survive a motion for summary judgment.[9]

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[5] Super. Ct. Civ. R. 56(c).

[6] *Hammond v. Colt Industries Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

[7] Super. Ct. Civ. R. 56(c).

[8] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[9] *Colgain v. Oy Partek Ab*, 799 A.2d 1151, 1153 (Del. 2002) ("Our Courts have held that an expert opinion based on speculation alone can not defeat a motion for summary judgment."); (continued...)

V.

The general rule is that a landowner has a duty to exercise reasonable care to keep its premises in a safe condition for the benefit of business invitees.[10] This includes remedying dangerous conditions of which the landowner is aware or, through reasonable inspection, should discover.[11] Of particular relevance here, it is well-settled that a landowner has an affirmative duty to its business invitees to keep its premises "reasonably safe" from the dangers posed by the natural accumulation of snow and ice.[12] There is a caveat to this general duty, however, which has come to be known as the "Continuing Storm" doctrine. This Doctrine does not absolve a landowner of its duty to exercise reasonable care in removing snow and ice. Rather, it provides, as a matter of law, that a landowner engages in "reasonable conduct" by

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[9](...continued)
Herring v. Ashland, 2008 WL 4444555, at *1 (Del. Super. Oct. 1, 2008) ("Plaintiff's . . . [argument] is based on speculation not reasonable inferences from the evidence. . . . [and Defendant] is entitled to summary judgment."); *Geier v. Meade*, 2004 WL 243033, at *8 (Del. Ch. Jan. 30, 2004) ("This Court's Rules require more than mere denials and speculation to defeat a motion for summary judgment.").

[10] *Talmo v. Union Park Automotive*, 2012 WL 730332, at *2 (Del. Supr. Mar. 7, 2012) (TABLE).

[11] *Lum v. Anderson*, 2004 WL 772074, at *4 (Del. Super. Mar. 10, 2004) (quoting RESTATEMENT (SECOND) OF TORTS § 343(a) (1965)).

[12] *Woods v. Prices Corner Shopping Ctr. Merchants Assn.*, 541 A.2d 574, 577 (Del. Super. 1988).

waiting until the end of the storm before commencing snow removal operations.[13]

A. The Continuing Storm Doctrine

By most accounts, the Continuing Storm doctrine was first recognized in Virginia and, shortly thereafter, in Iowa.[14] In each case, the courts faced a slip and fall that occurred during a winter storm. The courts declared that the landowner was required to exercise ordinary care in maintaining a safe premises but, in the case of a continuing storm and "in the absence of unusual circumstances, [the landowner] is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow."[15]

In Delaware, the Continuing Storm doctrine first appears in *Young v. Saroukos*.[16] There, the court declared that the landowner owed a duty to remove or render safe natural accumulations of ice.[17] Like Iowa and Virginia, however, the court incorporated the caveat that a landowner, "in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove

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[13] *Young v. Saroukos*, 185 A.2d 274 (Del. Super. 1962).

[14] *See Young*, 185 A.2d at 282 (citing *Walker v. Memorial Hosp.*, 45 S.E.2d 898 (Va. 1948); *Reuter v. Iowa Trust & Savings Bank*, 57 N.W.2d 225 (Iowa 1953)).

[15] *Walker*, 45 S.E.2d at 902. *Reuter*, 57 N.W.2d at 227.

[16] *Young*, 185 A.2d at 274.

[17] *Id*. at 282.

ice and snow."[18] The court went on to conclude, as a matter of law, that the defendant exercised ordinary care in waiting until the end of the storm before attempting to remove the snow and ice on its premises.[19]

Delaware courts have re-visited the Doctrine on numerous occasions since *Young*. In *Morris v. Theta Vest Inc.*,[20] the court was faced with a situation where neither party contested the fact that it was still snowing at the time of the slip and fall. The defendant, however, had begun efforts to remove the snow and ice anyway.[21] As to the underlying duty, the court held that "in the case of a continuing storm, reasonable conduct is to await the storm's end. This is true whether successful or vain efforts to take some earlier action occurred."[22] The court granted summary judgment for the defendants.

In *Sztybel v. Walgreen Co.*,[23] the court faced a situation similar to the one argued by Elder in this case. An initial snow storm produced twenty one inches of snow. Three days after the storm ended, a second storm hit. The plaintiff slipped

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[18] *Id.*

[19] *Id.*

[20] *Morris v. Theta Vest Inc.*, 2009 WL 693253, at *1 (Del. Super. Mar. 10, 2009).

[21] *Id.*

[22] *Id.* at *2.

[23] *Sztybel v. Walgreen Co.*, 2011 WL 2623930 (Del. Super. June 29, 2011).

during the second storm, but claimed that he had slipped on the compacted snow left over from the first storm that was below a layer of fresh snow that had accumulated during the second storm. The court denied summary judgment for the defendant because the jury reasonably could infer that: (a) there were two separate storms; (b) ample time had passed after the first storm to allow the landowner to clear the snow; (c) plaintiff slipped on compacted snow and ice left over from the first storm; and (d) the defendant had breached its duty by not removing the compacted snow from the first storm before the second storm hit.[24]

As these cases suggest, the Continuing Storm doctrine provides landowners a reasonable period of time to clear snow from their premises before their duty to business invitees is breached. In other words, in acting reasonably by awaiting the end of a storm, the landowner, as a matter of law, is excused from performing its duty and, therefore, has not breached its duty to a business invitee.[25] The Doctrine does not absolve a landowner of its duty to business invitees altogether but suspends the duty during a snowstorm and for a reasonable amount of time thereafter.

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[24] *Id.* at ¶ 10.

[25] *Young*, 185 A.2d at 282 ("The general controlling principle is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it.").

The Court makes note of this distinction in an effort to clarify the often-blurred line between duty and breach of duty. In *Cash v. East Coast Property Management*,[26] the Superior Court determined that the storm that caused plaintiff's slip and fall had not abated when the plaintiff slipped and that the Continuing Storm doctrine excused the defendant from clearing the snow and ice. Although the court appeared to conduct a breach analysis - - looking at the defendant's course of action and finding that the defendant acted reasonably as a matter of law - - the court announced its holding by stating that the defendant owed "no legal duty" to the plaintiff under the circumstances.[27] The Supreme Court affirmed the Superior Court's ruling based on the controlling precedent - - cited above in this opinion - - and did so without a clear validation of the Superior Court's framing of the analysis around the premise that the defendant owed "no legal duty."[28] In the end, the Supreme Court stated in *dicta* that: "The absence of a legal duty to remove the icy conditions renders moot the question of whether they exercised reasonable care."[29]

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[26] *Cash v. East Coast Prop. Mgmt.*, 2010 WL 2336867 (Del. Super. June 8, 2010), *aff'd*, 7 A.3d 484 (Del. 2010).

[27] *Cash*, 2010 WL 2336867, at *2.

[28] *Cash*, 7 A.3d 484, at ¶¶ 10-11 (reaffirming the holding in *Morris* that "the landowner *acts* reasonably in waiting until a storm ends before being required to clear any entrances") (emphasis added).

[29] *Id.* at ¶ 16.

Although not usually outcome determinative, the Court finds it important to note the expanse of the *Cash* holding and the tension that could arise from mixing an analysis of duty and breach of duty in these cases. For instance, a situation may arise in which opposing parties reasonably argue over when a snowstorm ceased and the amount of time that passed after cessation before the landowner began clearing the snow. Those issues are disputes of fact for a jury[30] and have no place in the determination of whether the landowner owed a duty to the business invitee, a question of law for the court to determine.[31] Instead, a landowner's duty to a business invitee to clear snow always exists but that duty may be discharged reasonably as a matter of law under certain circumstances. Where the facts are contested and various inferences may be reasonably drawn from them regarding the start and end of a snow storm, it must be left to the jury to determine whether, under the conditions presented, the landlord's conduct in failing to clear the snow was reasonable. The facts in this case, however, present no such contest and allow for a straightforward application of the Continuing Storm doctrine as a matter of law.

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[30] *Roberts v. Delmarva Power & Light Co.*, 2 A.3d 131, 144 (Del. Super. 2009) (noting that determining whether a defendant breached his duty to a plaintiff is best left to the jury when facts are reasonably contested).

[31] *Anderson v. Russell*, 2012 WL 1415911, at *9 (Del. Super. Apr. 18, 2012) (noting that it is well settled that duty is a question of law for courts to decide).

B. Dover Downs Acted Reasonably As A Matter Of Law

Elder testified that it was not snowing at the time she fell in the Dover Downs parking lot. She observed snow being blown off of trees and rooftops and stated that snow began falling again later that day.[32] Taking her testimony as true, together with the uncontested weather reports and testimony of the Dover Downs staff,[33] the Court finds, as a matter of undisputed fact, that the storm at issue began on the morning of January 30, 2010 and did not completely abate until 1:00 AM on January 31, 2010. Elder's testimony that it was not snowing at the time of her fall does not conflict with this conclusion and does not establish that the snowstorm that began on January 30, 2010 had passed when she arrived at Dover Downs. Instead, Elder's testimony, considered in the light most favorable to her, shows at best that there were "lulls in the storm." While Delaware courts have yet to visit the discrete issue of whether lulls in a snow storm alter the analysis required under the Continuing Storm doctrine, courts elsewhere have deemed breaks in precipitation to be "lulls" that do not disrupt the application of the Doctrine's presumption of reasonable conduct.[34] Because Elder

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[32] Heather Elder Aff. at ¶ 2-3.

[33] *See* Michael Grott Dep. at 9:3-4, 15:15-16.

[34] *See, e.g.*, *Ioele v. Wal-Mart Stores, Inc.*, 736 N.Y.S.2d 130, 132 (N.Y. App. Div. 2002) ("We have repeatedly held that lulls or breaks in a winter storm, such as the three-hour lull in the instant case, do not amount to a cessation of the storm which would impose the duty on a defendant (continued...)

has not presented any evidence that would allow a jury reasonably to determine that the storm had completely abated at the time of her fall, the Court must conclude under the Continuing Storm doctrine that Dover Downs did not breach its duty to Elder as a matter of law.

C. There Is No Evidence Of Snow Or Ice That Existed Prior To The Snow Storm

Elder also fails to provide evidence to support her argument that the ice patch on which she slipped and fell predated the January 30, 2010 snowstorm. Elder maintains that water, from an unspecified source, accumulated in an unidentified depression in the parking lot of Dover Downs, and then froze at some unidentified point prior to the January 30 snowstorm. In response, Dover Downs has presented competent evidence, in the form of expert testimony and fact testimony, that Elder's claim of preexisting snow or ice is not accurate. This evidence satisfies Dover

[34](...continued)
to clear snow and ice."). *See also Krutz v. Betz Funeral Homes, Inc.*, 236 A.D.2d 704 (N.Y. App. Div. 1997). In *Krutz*, the plaintiff introduced evidence from a meteorological expert that the storm was one in which lulls or breaks occurred, supporting plaintiff's testimony that it was not snowing at the time of the slip and fall. On defendant's appeal from the Supreme Court's order denying a motion for summary judgment, the Appellate Division held "even if there was a lull or break in the storm around the time of the plaintiff's accident, this does not establish that defendant had a reasonable time after the *cessation* of the storm to correct hazardous snow or ice-related conditions." *Id.* at 705 (emphasis added). The Appellate Division reversed the denial of summary judgment for defendant. *Id.*

Downs' initial burden on its motion for summary judgment.[35] In response, Elder fails to: (1) introduce any evidence that the depression exists or existed; (2) identify a possible source for the water or ice that allegedly accumulated;[36] or (3) introduce any evidence that the weather conditions in the days prior to January 30 were such that an accumulation of ice could have occurred. Without such evidence, no reasonable juror could conclude: (1) that Dover Downs knew about the depression, much less knew about the ice that accumulated there; nor (2) that Dover Downs, by reasonable inspection, could have discovered the condition. The failure of Elder to provide evidence in support of these predicate elements of a premises liability claim is fatal to her claim against Dover Downs.[37]

Elder's citation to *Hazel v. Del. Supermarkets, Inc.*[38] misses the mark. In *Hazel*, the plaintiff slipped in the defendant's store near a pallet of ice cream. The

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[35] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979) (discussing shifting burdens on a motion for summary judgment).

[36] The facilities grounds maintenance manager testified that the area where the ice formed was a high traffic area for employees coming into the building. Michael Grott Dep. at 15:20-16:7 (Dec. 2, 2011). If there was ice prior to the January 30, 2010 snowstorm, Grott testified that he would have been made aware of it. *Id.* at 16:8-19. There was no record of ice in that area prior to the snowfall on January 30. *Id.* at 10:15-11:17.

[37] *See* RESTATEMENT (SECOND) OF TORTS § 343(a) (1965) ("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 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.").

[38] *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705 (Del. 2008).

Supreme Court found the proximity of the pallet to the plaintiff, along with the common knowledge of ice cream's thermodynamics, to be such that "a reasonable jury could conclude that [defendant] should have known that water might have been on the floor in the frozen food aisle, near the ice cream pallet where Hazel fell."[39] Likewise, in *Sztybel*, the plaintiff alleged that he could distinguish between layers of packed snow from an earlier storm and freshly fallen snow. Because that observation could be paired with a logical inference that the packed snow and ice was leftover from a previous storm, the court found that the plaintiff had presented enough evidence to defeat summary judgment.[40]

Elder has done much less than *Sztybel* or *Hazel* in presenting evidence that could support a theory as to the source of the water that froze and caused her slip and fall. Most importantly, Elder introduces no evidence as to how ice could have accumulated in the alleged depression. Instead, she would have the Court (and ultimately the jury) speculate as to the source of the water and the weather conditions that would cause that water to become the ice on which she slipped. There is no evidence of snow or lingering rainwater that remained in the parking lot in the days

[39] *Id.* at 711.

[40] *Sztybel*, 2011 WL 2623930, at ¶ 10.

leading up to the snowstorm of January 30.[41] Moreover, the only source identified in the record that goes beyond pure speculation is the testimony of the Dover Downs groundskeeper who states only that the ice could have accumulated during his crew's attempts to remove the snow from the parking lot *during* the January 30, 2010 snowstorm.[42] Ice accumulation during the snowstorm, as well as attempts (successful or otherwise) to remove that ice, would be addressed by the Continuing Storm doctrine, as discussed above. To merely suggest that the condition preexisted the storm, without offering any evidence to support the suggestion beyond pure speculation, is insufficient to survive a motion for summary judgment.[43]

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[41] *See Ciaio v. Cambridge Court at Hicksville*, 2011 WL 5358519, ¶ 26 (N.Y. Sup. Oct. 28, 2011) ("A general awareness of a dangerous condition or that water can freeze or re-freeze is legally insufficient to constitute or create an inference of constructive notice of the particular condition that caused plaintiff's injury [from a slip and fall on ice].").

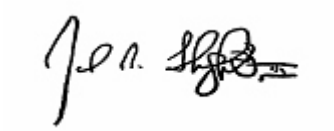
[42] Michael Grott Dep. at 12:9-24.

[43] *Ciaio*, 2011 WL 5358519, at ¶ 26 ("There is nothing in the record that would establish how the white ice condition was created and speculation with regard to the creation or exacerbation of a snow or ice condition is insufficient to otherwise defeat a summary judgment."). *See also Crane v. Triangle Plaza, Inc.*, 591 N.E.2d 936, 942 (Ill. App. Ct. 1992) ("Without a factual link between the water source and the ice formation in question, summary judgment is proper since we determine that breach has not been adequately shown as a matter of law."); *Madeo v. Tri-Land Props.*, 606 N.E.2d 701, 705 (Ill. App. Ct. 1992) ("[Plaintiff] must present some facts to show that the ice was unnatural or caused by the defendant . . . . It is not enough that the plaintiff invites speculation as to the cause of the ice."); *Gilberg v. Toys "R" Us, Inc*, 467 N.E.2d 947, 950 (Ill. App. Ct. 1984) ("There is no record evidence showing the origin of the ice, cause of the depression, or defective design of the parking lot. Plaintiff need not prove his case at a summary judgment hearing; nevertheless, he must present *some* facts to show that origin of the ice was unnatural or caused by the defendant.") (emphasis supplied); *Emmanuel v. Children's Hosp. Corp.*, 2001 WL 498601, at *2 (Bos. Mun. Ct. App. Div. May 4, 2001) ("Mere speculation that the ice in question accumulated (continued...)

VI.

For the reasons stated above, the Court finds, as a matter of law, that Dover Downs acted reasonably in executing its duty of care to Elder. The Court also finds that Elder's contention that the ice preexisted the storm is entirely speculative and without sufficient bases in the record to support a claim. Therefore, Dover Downs's motion for summary judgment is **GRANTED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

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[43](...continued)
unnaturally is insufficient to establish that defendant acted or failed to act in a way that constitutes negligence. Nor has plaintiff established that any act or omission by defendant created a hazardous condition. Plaintiff has no reasonable expectation of proving an essential element at trial, namely that there was 'some evidence of negligence by the property owner.'").