[Cite as *Lorenzo v. Millennium Mgt., Inc.*, 2015-Ohio-2614.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

RICHARD LORENZO, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
		CASE NO. 2014-L-093
- vs -	:	
MILLENNIUM MANAGEMENT, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 13 CV 000286.

Judgment: Affirmed.

James T. Tyminski, Jr. and *Shane A. Lawson,* Gallagher Sharp, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115 (For Plaintiffs-Appellants).

Denise B. Workum, Nationwide Insurance - Trial Division, 2 Summit Park Drive, Suite 540, Independence, OH 44131 (For Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiffs-appellants, Richard and Belinda Lorenzo, appeal from the Order of the Lake County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, Millennium Management, Inc., Tamarac Apartments II, LLC, and Tamarac Apartments, LLC, on the Lorenzos' claims for Negligence. The issues to be determined in this case are whether a condition where ice is covered by snow creates an open and obvious danger and whether a parking lot that accumulates ice from water or snowmelt is substantially more dangerous than an invitee would expect of such a lot

in winter conditions in Ohio. For the following reasons, we affirm the decision of the lower court.

{¶2} On February 8, 2013, the Lorenzos filed a Complaint against the appellees and Mother Nature's Son, Inc., which provided snow removal services for Tamarac. The Lorenzos resided in an apartment within the Tamarac Apartments Complex in Willoughby, Ohio, managed by Millennium Management. The Complaint asserted that on February 11, 2011, Richard Lorenzo walked across the complex parking lot, which was covered with "a thick sheet of ice," and slipped, suffering "severe, traumatic, and disabling injuries." In Count One, the Lorenzos alleged Negligence, based on the appellees' failure to prevent/remedy the condition of the ice in the parking lot. In Count Two, they alleged that snow and ice were negligently or recklessly removed, aggravating/creating a hazardous condition. Count Three requested damages for Belinda's loss of companionship and consortium.

{¶3} Appellees, Millennium and Tamarac, filed an Amended Answer on April 8, 2013, raising a cross-claim against Mother Nature's Son.

{¶4} Mother Nature's Son was granted leave to plead and filed its Answer, raising a cross-claim against appellees, and separate Answer to the cross-claim on October 17, 2013. Appellees filed an Answer to the cross-claim on November 13, 2013.

{¶5} The following deposition testimony was presented:

{¶6} On February 11, 2011, Richard Lorenzo, a resident at Tamarac Apartments, went outside to get his mail. According to his testimony, he walked down the sidewalk, which had been shoveled, and into the parking lot. After walking five to ten feet, he slipped, "went up in the air and came down on [his] neck and back."

According to his testimony, later that day, his wife measured the ice in the parking lot, which was five inches high. Richard testified that when he looked into the parking lot prior to the accident, it was "just snow covered. I saw snow."

{¶7} After slipping, Richard was unable to move and was taken to the hospital. Richard was informed by doctors that he had injuries to his neck and spinal cord. He subsequently had surgery, is currently taking pain medication, and has difficulty walking.

{¶8} Douglas Gaus, the property manager of Tamarac Apartments since early 2010, explained that, during snowy weather, Tamarac maintenance employees do some snow plowing to clear parking spaces, and shovel common walkways. An outside company, Mother Nature's Son, plows the parking lot if over two inches of snow fall.

{¶9} Since 2010, Gaus described receiving complaints regarding ice in the parking lots both "periodically" and on a "consistent" basis, although he could not remember the exact number. He believed a few complaints of falls had been recorded over the years, although he was not aware of any injuries that resulted.

{¶10} James Klages, maintenance supervisor at Tamarac, testified that he salts sidewalks and plows small areas of the parking lot, generally parking spaces. When it snows, tenants complain about snow or ice buildup on a daily basis. He explained that "any time the snow falls [tenants] expect us to be out there right then and there." Klages testified that there is frequently ice in the parking lot but management requested that it not be salted. While people have slipped on the ice, he was unaware of any injuries that resulted. He had no knowledge of anyone falling in the area where Richard had.

{¶11} On June 30, 2014, appellees filed a Motion for Summary Judgment. They argued that they did not owe a duty to Richard, since he "slipped on a natural accumulation [of] ice and snow." Mother Nature's Son filed a Motion for Summary Judgment on the same date, raising a similar argument.

{¶12} The Lorenzos filed a Brief in Opposition to Mother Nature's Motion on July 21, 2014. They argued that their expert, Richard Zimmerman, a registered architect, concluded that the ice was an "unnatural accumulation" caused in part by negligence in plowing.

{¶13} On the same date, the Lorenzos filed a Brief in Opposition to appellees' Motion. They argued that, pursuant to Zimmerman's affidavit and report, the design of the parking lot causes slow drainage of melted snow, increasing the likelihood of water "freezing unnaturally." He explained that the sewers, as constructed, increase the likelihood of "ponded water freezing" during the winter, which violates the Ohio Plumbing Code. Zimmerman concluded that the ice upon which Richard slipped was brought about by the property/parking lot's "design, engineering, grading, construction, and maintenance."

{¶14} Mother Nature's Son filed a Reply Brief on July 28, 2014.

{¶15} On August 20, 2014, the trial court issued an Order, granting the Motions for Summary Judgment, dismissing the Lorenzos' Complaint and finding the cross-claims moot. The court found that Zimmerman was not an expert in snow plowing and negligence was not established as to Mother Nature's Son.

{¶16} Regarding the other defendants, the court found that, regardless of the alleged unnatural accumulation of ice, the accumulation of snow was natural. Since

such snow was an open and obvious danger, Richard was on notice of the danger, even if he slipped on ice rather than snow.

{¶17} The Lorenzos timely appeal and raise the following assignments of error:[1]

{¶18} "[1.] The trial court erred in granting summary judgment in appellees' favor by holding that the open and obvious doctrine applied and imposed a duty on appellant to anticipate an unnatural accumulation of ice concealed by snow, thereby negating the appellees' otherwise existing common law duty.

{¶19} "[2.] The trial court erred in granting summary judgment in appellees' favor when genuine issues of material fact exist regarding whether the ice that caused appellant's fall constituted a hazard substantially more dangerous than an invitee should have anticipated."

{¶20} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * 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, that party being entitled to have the evidence * * * construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision." (Citation omitted.) *Peer v. Sayers*, 11th Dist. Trumbull No. 2011-T-0014, 2011-Ohio-5439, ¶ 27.

1. The Lorenzos do not appeal from the grant of summary judgment in favor of Mother Nature's Son.

{¶21} In their first assignment of error, the Lorenzos contend that the ice upon which Richard slipped was not an open and obvious danger and was an unnatural accumulation, caused by the construction/design of the parking lot, for which the appellees are responsible.

{¶22} The appellees assert that the fall was caused by a natural accumulation of ice and snow and that the existence of the snow created an open and obvious danger of which Richard should have been aware.

{¶23} "[I]n 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.

{¶24} "Although the Ohio Supreme Court has never explicitly defined the status of residential tenants in an apartment complex, most premises-liability cases have assumed without discussion that residential tenants are invitees for these purposes, as are their guests." (Citation omitted.) *Harden v. Villas of Cortland Creek, LLC*, 11th Dist. Trumbull No. 2012-T-0088, 2013-Ohio-4629, ¶ 19.

{¶25} An owner or operator of a business premises owes its invitees a "duty of ordinary care in maintaining the premises in a reasonably safe condition" so that its patrons will not be "unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985). Such a business owner is not "an insurer of the customer's safety." *Id.*; *Howard v. Rogers*, 19 Ohio St.2d 42, 249 N.E.2d 804 (1969), paragraph two of the syllabus.

{¶26} It has been held that in Ohio, the hazards of ice and snow are a part of winter. *Lopatkovich v. Tiffin*, 28 Ohio St.3d 204, 206-207, 503 N.E.2d 154 (1986). "[N]o liability will attach to the occupier of premises for a slip and fall occurring due to natural accumulations of ice or snow, these being deemed open and obvious hazards in Ohio's climate, from which persons entering the premises must protect themselves." *Sherwood v. Mentor Corners Ltd. Partnership,* 11th Dist. Lake No. 2006-L-020, 2006-Ohio-6865, ¶ 13; *Armstrong*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, at ¶ 14 ("[w]here a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises"). An occupier of a premises has no duty to remove natural accumulations of ice or snow. *Sherwood* at ¶ 13.

{¶27} Liability, however, may attach to "unnatural" accumulations of ice or snow. *Harden*, 2013-Ohio-4629, at ¶ 22. "An unnatural accumulation of ice and snow is one that has been created by causes and factors other than meteorological forces of nature such as the inclement weather conditions of low temperature, strong winds and drifting snow." *Lawrence v. Jiffy Print, Inc.*, 11th Dist. Trumbull No. 2004-T-0065, 2005-Ohio-4043, ¶ 31. "Unnatural accumulations therefore are caused by the intervention of human action doing something that would cause ice and snow to accumulate in unexpected places and ways." (Citation omitted.) *Harden* at ¶ 23. "Where a construction defect in the premises, existing for a sufficient time, causes injury to a pedestrian by creating an artificial condition such as an unreasonable accumulation of ice on a walkway, the owner or occupier incurs liability." *Marshall v. Plainville IGA*, 98 Ohio App.3d 473, 475, 648 N.E.2d 899 (1st Dist.1994).

{¶28} In the present case, the Lorenzos argue that the appellees are liable not due to their failure to clear ice and snow, but because they created an unnatural accumulation of ice due to the slope/drainage of the parking lot. Regardless of whether this is the case, the trial court found that the snow was an open and obvious danger which should have informed Richard that the parking lot may be dangerous and slippery. We agree with this conclusion.

{¶29} The existence of snow in a parking lot should alert an individual of the dangers associated with such a condition, i.e., the risk of slipping and falling, and is an open and obvious danger. There is no question that snow is frequently accompanied by ice. The Lorenzos do not dispute that Richard was aware of the snow at the time he entered the parking lot, as his deposition testimony confirms this fact. Here, there was no indication that the accumulation of snow was unnatural and not simply from the normal weather conditions of Ohio. The unnatural accumulation described by Zimmerman was ice, which occurs when there is melting of snow and pooling of water. Since the snow was natural, it was an open and obvious danger which warned Richard of the potential chance that there may be ice and slippery conditions. *See Murphy v. McDonald's Restaurants of Ohio, Inc.*, 2nd Dist. Clark No. 2010 CA 4, 2010-Ohio-4761, ¶ 28 (although the plaintiff did not see the ice, he "should have reasonably anticipated the presence of ice next to the snow-covered median"); *Base-Smith v. Lautrec, Ltd.*, 12th Dist. Butler No. CA2013-07-115, 2014-Ohio-349, ¶ 16-19 (where the plaintiff was aware that the area where she was stepping was wet, and had seen that there was snow, she should have known that wet conditions lead to ice and the danger was open and obvious).

{¶30} Although the Lorenzos argue that the existence of snow increased the risk to Richard since it concealed the ice, we disagree. The justification for allowing liability for unnatural accumulations would logically be the risk presented when the danger cannot be anticipated. For example, ice that has accumulated due to dripping water or some other hidden danger may be unexpected, with no warning signs. Ice accumulation when there is snow, however, is completely expected and thus, an individual should exercise appropriate caution. *See Goodwill Industries of Akron, Ohio, Inc. v. Sutcliffe*, 9th Dist. Summit No. 19972, 2000 Ohio App. LEXIS 4131, 7 (Sept. 13, 2000) (taking into consideration the fact that it snowed when determining whether ice accumulated naturally).

{¶31} As this court has held in *Harden*, a separate open and obvious danger supersedes the existence of an unnatural accumulation of ice. *Harden*, 2013-Ohio-4629, at ¶ 26 (darkness outside was an open and obvious danger "obviating any duty from a property owner to its invitees"). The Lorenzos argue that *Harden* does not apply in this case because it found an open and obvious danger existed regarding the darkness, a condition different than the existence of snow. *Harden*, however, is applied for the proposition that an open and obvious danger removes the duty of the property owner to protect against unnatural accumulations of ice.

{¶32} The Lorenzos also argue that there are several cases in which an unnatural accumulation of ice was covered with snow, but courts still found that it created an issue of fact. Although snow existed in those cases, the courts in *Morgan v. Mamone*, 8th Dist. Cuyahoga No. 87612, 2006-Ohio-6944, and *Sherwood*, 2006-Ohio-6865, did not specifically address the issue of whether a natural accumulation of snow

created an open and obvious danger. While we recognize that the court in *Cain v. McKee Door Sales*, 10th Dist. Franklin No. 13AP-352, 2013-Ohio-4217, ¶ 13, found that a natural accumulation of snow was not an open and obvious danger, we are not bound by that court's decision and decline to follow it, in light of the foregoing analysis.

{¶33} The first assignment of error is without merit.

{¶34} In their second assignment of error, the Lorenzos argue that the ice in the parking lot, caused by the configuration of the parking lot/storm sewer, created a condition that was substantially more hazardous than a visitor should anticipate.

{¶35} This court has held that "[i]f an occupier has notice, actual or implied, that a natural accumulation of snow or ice has occurred on his premises and created a condition substantially more dangerous than a business invitee should have anticipated by reason of the knowledge of the conditions prevailing generally in the area, negligence may be proven." *Lawrence*, 2005-Ohio-4043, at ¶ 10; *Sherwood*, 2006-Ohio-6865, at ¶ 15. We note that these cases relate to a natural accumulation of ice, which the Lorenzos contend did not exist in this case. Regardless, presuming that the ice was a natural accumulation, we do not find that it was substantially more dangerous than an invitee should have anticipated.

{¶36} The Lorenzos cite *Mikula v. Tailors*, 24 Ohio St.2d 48, 263 N.E.2d 316 (1970), for the proposition that the hazard here was unnatural and substantially more dangerous than an invitee should anticipate. *Id.* at 57. However, that case is entirely distinguishable. In *Mikula*, a seven inch deep hole existed that was hidden by snow and unable to be anticipated by the plaintiff. In the present matter, even presuming the grading and/or sewer allowed ice to develop, it is not like the danger in *Mikula*, where

there was a serious risk of an individual being harmed by the condition. A seven inch hole is not something that an invitee should anticipate, unlike the condition of ice developing in a parking lot during the winter. *See Juredine v. Heather Hill, Inc.*, 11th Dist. Geauga No. 92-G-1704, 1993 Ohio App. LEXIS 1733, 3 (Mar. 26, 1993) (becoming injured on ice in an indentation, "which ice could accumulate in the slightest of grade variations," is different than being injured by a deep hole covered with snow).

{¶37} Further, it cannot be said that the appellees were on notice that there was a condition on the property that was substantially more dangerous than an invitee should anticipate. While employees were aware of some falls on ice, no injuries were reported. The fact that individuals slipped on ice during the winter in Ohio is not notice of a substantially dangerous condition.

{¶38} Finally, the Lorenzos argue that this case is similar to *Sherwood*, 2006-Ohio-6865, where an issue of fact was found to exist regarding whether an icy area was substantially more dangerous than could be anticipated. We find that case distinguishable from the present case. In *Sherwood*, the ramp where the fall occurred was an area of concern, which business owners took care to salt and shovel due to the "obvious" danger. *Id.* at ¶ 20. In the present case, the facts do not establish that employees were warned of a specific danger in the area where the fall occurred or that reported falls were due to anything other than general slips on ice in winter months.

{¶39} The second assignment of error is without merit.

{¶40} For the foregoing reasons, the Order of the Lake County Court of Common Pleas, granting summary judgment in favor of appellees, is affirmed. Costs to be taxed against appellants.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J. dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶41} Because I believe summary judgment is disfavored in this case, I respectfully dissent.

{¶42} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66 * * * (1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. *See, e.g.*, Civ.R. 56(C).

{¶43} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 121 * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d

356, 359 * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp*., 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-252 * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 * * * (1996)." *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6. (Parallel citations omitted.)

{¶44} In Ohio, no liability attaches for a slip and fall occurring due to natural accumulations of ice or snow, as these are deemed open and obvious hazards. However, liability may attach when an accumulation of ice or snow is "unnatural," that is man-made. *Sherwood v. Mentor Corners L.P*., 11th Dist. Lake No. 2006-L-020, 2006-Ohio-6865, ¶13-14.

{¶45} Plaintiffs supported their claim with an expert report by a licensed architect, who opined, to a reasonable degree of architectural certainty, that the ice was caused by violations of the Ohio Building Code, the Ohio Plumbing Code and other professional standards. In a summary judgment proceeding, wherein all evidence must be construed in the non-movant's favor, the expert report was sufficient to establish a genuine issue of material fact regarding whether Mr. Lorenzo slipped on an unnatural accumulation of ice.

{¶46} Therefore, I dissent.