

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Peter H. Luft,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 11AP-16
	:	(C.P.C. No. 08CVC-11-15806)
Ravemor, Inc. et al.,	:	
	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 29, 2011

Law Offices of James P. Connors, and James P. Connors, for appellant.

John P. Mazza, for appellee Katzinger's Inc.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, Peter H. Luft, appeals the judgment rendered by the Franklin County Court of Common Pleas in favor of appellee, Katzinger's Inc. ("Katzinger's"). For the reasons that follow, we affirm the judgment of the trial court.

{¶2} This appeal concerns a slip and fall that occurred on February 5, 2004 on a sidewalk outside of Katzinger's Delicatessen in Columbus, Ohio. Luft filed suit against Katzinger's, the owner of the building. On November 1, 2008, the trial court granted summary judgment in favor of Katzinger's. Before the trial court issued a final judgment

entry reflecting this disposition, however, Luft voluntarily dismissed his claims. He refiled these claims against Katzinger's along with other claims unrelated to the February 5, 2004 incident. These unrelated claims have no substantive relevance to the instant appeal.

{¶3} Katzinger's and Luft both sought summary judgment in competing motions before the trial court. The court granted Katzinger's motion, denied Luft's motion, and journalized its judgment on May 15, 2009. This judgment entry lacked Civ.R. 54(B) certification, and other claims remained pending. The remainder of the matter was resolved in a judgment entry filed on December 6, 2010. This timely appeal followed, in which Luft raises the following assignments of error:

1. The trial court erred by denying Peter Luft's motion for summary judgment against Katzinger's Inc.
2. The trial court erred by granting Katzinger's Inc.'s [sic] motion for summary judgment.

{¶4} These assignments of error challenge the resolution of the competing summary judgment motions and will be addressed together. At issue, therefore, is whether the trial court erred in resolving the competing summary judgment motions.

{¶5} An appellate court's review of summary judgment is *de novo*. *Helton v. Scioto Cty. Bd. of Comms.* (1997), 123 Ohio App.3d 158, 162. Under such a review, an appellate court stands in the shoes of the trial court and conducts an independent review of the record. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. The judgment must be affirmed if any of the grounds raised by the movant support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶6} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could 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 most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶7} The events of February 5, 2004 are largely undisputed. At all relevant times, the sidewalks adjacent to Katzinger's premises were public sidewalks, which were owned by the city of Columbus. However, Katzinger's and the city of Columbus were parties to a lease, which permitted Katzinger's customers to use the sidewalks for dining.

{¶8} On February 5, 2004, Luft arrived at the delicatessen sometime between 12:30 and 1:00 p.m. Luft parked his car in an area Katzinger's used for loading and unloading deliveries. While Katzinger's posted "no parking" signs in this area, this policy was rarely enforced. Luft exited his car on the driver's side, walked around its back-end and onto the sidewalk, and then entered the delicatessen without incident. He then decided to take his briefcase back to his car. He approached the passenger side, opened the passenger door, and placed the briefcase on the passenger seat. Upon closing the passenger door, Luft slipped and fell to the ground. He was unconscious for anywhere from two to twelve minutes. After regaining consciousness, he sat on a window ledge and saw a couple of inches of ice in the area where he had fallen. One of Katzinger's employees, Evelyn Spillman, confirmed that she too saw approximately two to three

inches of ice. Based upon these events, Luft filed suit and presented claims for negligence and negligence per se against Katzinger's.

{¶9} To establish a claim for negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately from the breach. *Feldman v. Howard* (1967), 10 Ohio St.2d 189. Furthermore, in cases of negligence per se, a party can conclusively establish the first two elements of negligence, duty, and breach of duty, by merely proving the commission of or omission of a specific act prohibited or required by statute. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, ¶15.

{¶10} Based upon the circumstances and arguments presented herein, the determinative issue hinges upon whether Katzinger's owed Luft a duty of care.

{¶11} "[U]nder the common law of 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 responsible party owes the entrant." *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 417, 1994-Ohio-427. It is undisputed that Luft was a business invitee at Katzinger's Delicatessen on February 5, 2004.

{¶12} Business owners generally owe business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that invitees are not subjected to unreasonable dangers. *Estate of Mealy v. Sudheendra*, 11th Dist. No. 2003-Ohio-T-0065, 2004-Ohio-3505, ¶29. Business owners similarly owe invitees the duty to warn of latent or hidden dangers. *Pesci v. William Miller & Assoc., LLC*, 10th Dist. No. 10AP-800, 2011-Ohio-6290, ¶12, quoting *Hill v. W. Res. Catering, Ltd.*, 8th Dist. No. 93930, 2010-Ohio-2896, ¶10. When dangers are open and obvious, however, no duty of care is owed because it is assumed that invitees protect themselves against such dangers. *Bacon v.*

Fowlers Mill Inn & Tavern, 11th Dist. No. 2007-G-2753, 2007-Ohio-4958, ¶14, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph one of the syllabus. The open and obvious nature of the danger serves as its own warning. *Pesci* at ¶13, quoting *W. Res. Catering* at ¶9.

{¶13} For cases relating to the accumulation of ice and snow, it is settled that an owner or occupier generally owes neither a duty to remove nor a duty to warn business invitees of the dangers associated with the natural accumulation of ice and snow. *Miller v. Tractor Supply Co.*, 6th Dist. No. H-11-001, 2011-Ohio-5906, ¶8, citing *Brinkman v. Ross*, 68 Ohio St.3d 82, 83-84, 1993-Ohio-72. This is known as the "no-duty winter rule." *Id.* This rule applies even when municipal ordinances require landowners to keep sidewalks free of ice and snow. *Id.* at fn. 2, citing *Brinkman* at 85; see also *Lopatkovich v. Tiffin* (1986), 28 Ohio St.3d 204, 206. The rationale is that individuals are assumed to appreciate and protect themselves against the inherent dangers associated with ice and snow during Ohio winters. *Brinkman* at 84, citing *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, and *Sidle*.

{¶14} Nevertheless, Ohio courts recognize two exceptions to this no-duty winter rule. *Miller* at ¶10. The first exception regards the "unnatural" accumulation of ice and snow, while the latter regards the "improper" accumulation. *Id.* at ¶10, 13.

{¶15} Under the unnatural accumulation exception, liability may attach when an owner or occupier either permits or creates unnatural accumulations of ice and snow. *Id.*, quoting *Bowen v. Columbus Airport Ltd. Partnership*, 10th Dist. No. 07AP-108, 2008-Ohio-763, ¶13; see also *Marshall v. Plainville IGA* (1994), 98 Ohio App.3d 473, 475, quoting *Lopatkovich* at 207. Thus, under the law, the unnatural accumulation must result

from some sort of human activity or intervention. *Bacon* at ¶17, citing *Porter v. Miller* (1983), 13 Ohio App.3d 93; see also *Community Ins. Co. v. McDonald's Restaurants of Ohio, Inc.* (Dec. 11, 1998), 2d Dist. No. 17051.

{¶16} The improper accumulation exception arises when a natural accumulation conceals a hazardous condition, which is substantially more dangerous than conditions normally associated with ice and snow, and about which the owner or occupier has actual or constructive knowledge. *Miller* at ¶12, 13, citing *Mikula v. Tailors* (1970), 24 Ohio St.2d 48, 57, and *Crossman v. Smith Clinic*, 3d Dist. No. 9-10-10, 2010-Ohio-3552, ¶15.

{¶17} With regard to the no-duty winter rule, Luft's arguments focus on an abandoned, unused driveway located in the sidewalk in front of the delicatessen. According to Luft, this abandoned driveway caused an unnatural accumulation of ice and snow to form in the depression in the sidewalk. Alternatively, he argues that water and ice naturally accumulated within this depression and then froze and became an icy patch that was difficult to discern from the surrounding sidewalk. Consequently, Luft argues that the no-duty winter rule is inapplicable based upon his alternative arguments.

{¶18} With respect to the unnatural accumulation exception, there was no evidence showing that Katzinger's permitted or created an unnatural accumulation. Katzinger's policy was to shovel snow and apply salt to the sidewalks when needed. With the exception of Luft's speculative testimony that Katzinger's employees may have improperly shoveled the sidewalk, no evidence shows any human activity on the part of Katzinger's. Instead, the opposite was shown in the record before us. The laws of nature and gravity caused the pooling and subsequent freezing of the water in the abandoned driveway. Nothing about this process was unnatural. Indeed, melted run-off which

accumulates and refreezes is not an unnatural phenomenon during Ohio winters. *Bacon* at ¶50 (Trapp, J., concurring), citing *Hoeningman v. McDonald's Corp.* (Jan. 11, 1990), 8th Dist. No. 56010. Under Ohio law, individuals must anticipate this natural process and protect themselves against the associated dangers. *Id.* As a result, the unnatural accumulation exception is inapplicable herein. Thus, we see no error in the trial court's decision to grant summary judgment on this basis.

{¶19} With respect to the improper accumulation exception, there was no evidence showing that the observable icy patch was substantially more dangerous than conditions normally associated with ice and snow. Indeed, walking on an observable patch of ice is no more dangerous than the conditions normally associated with ice and snow, which include the risk of slipping and falling. No reasonable juror could conclude to the contrary based upon the evidence in the record. We consequently see no error in the trial court's judgment in this regard.

{¶20} Finally, as a procedural matter, Luft argues that he should have been entitled to summary judgment. He argues that his motion was unaddressed by the trial court. He argues that his negligence and negligence per se claims should succeed as a matter of law.

{¶21} From our review, however, the trial court did consider and address Luft's motion. Its analysis of the negligence claim mirrored our own, which is set forth above. Luft argues that his negligence per se claims were based upon an affidavit of David Hughes, an architect and building inspector. In his affidavit, Hughes averred that the abandoned driveway was unsafe and unreasonably dangerous. According to Hughes, it violated a city ordinance pertaining to the construction of driveways. However,

Katzinger's did not construct the driveway. Rather, by all accounts, it had been in existence since Katzinger's opened its doors in 1984. Hughes also referenced a Columbus city ordinance requiring owners and occupiers to keep premises free and clear of ice and snow. However, as referenced above, the no-duty winter rule applies even where municipal ordinances require owners to keep premises free of ice and snow. See *Miller* at fn. 2, *Brinkman* at 85, and *Lopatkovich* at 206. Because Luft failed to demonstrate genuine issues of material fact with respect to the exceptions to the no-duty winter rule, this argument similarly fails.

{¶22} Based upon the foregoing, no genuine issues of material fact exist, and Katzinger's is entitled to judgment as a matter of law. We accordingly overrule Luft's two assignments of error and affirm the judgment rendered by the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
