[Cite as *Holbrook v. Kingsgate Condominium Assn.*, 2010-Ohio-850.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

GARY HOLBROOK, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-07-193
	:	O P I N I O N
- vs -	:	3/8/2010
KINGSGATE CONDOMINIUM ASSOCIATION, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008-06-2673

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HENDRICKSON, J.

{¶1} Plaintiffs-appellants, Gary Holbrook and Barbara Barnett, appeal a decision of the Butler County Court of Common Pleas granting judgment in favor of defendant-appellee, Kingsgate Condominium Association, in a negligence action. For

the reasons outlined below, we affirm the decision of the trial court.

{¶2} This case involves three separate slip and fall incidents which occurred in the parking lot of a condominium complex owned and operated by Kingsgate. At all times relevant, Gary Holbrook was a tenant who resided in a condominium ("condo") in the Kingsgate complex. The exterior layout around the condo is relevant to the facts of the case. The front of Holbrook's unit faces a concrete sidewalk. This sidewalk loops to the left and continues around the side of the unit. The sidewalk terminates at an asphalt parking lot behind Holbrook's unit. Holbrook's two designated parking spots are located immediately off this sidewalk.

{¶3} The first fall occurred in the parking lot sometime in December 2006. According to Holbrook, the temperature was around 16° to 18° F outside and it had snowed off and on throughout the week. Rita Markum, a friend visiting from Columbus, parked in one of Holbrook's two designated spots. Shortly after Markum's arrival, she and Holbrook decided to go to the store. Once in the parking lot, Holbrook observed a glassy film surrounding his two parking spots. He assumed this film was water and proceeded across it. When he reached the passenger side of Markum's vehicle, Holbrook turned and fell to the ground. He eased himself up by holding onto the car door, and was able to stand back up without incident.

{¶4} Markum transported Holbrook to Urgent Care after the fall. According to Holbrook, the injuries he sustained included two broken teeth, three broken ribs, and a concussion. When they returned to Holbrook's condo approximately 20 minutes later, Markum parked in the same spot. Holbrook stated that the ice was still present, but he was "extra careful" when exiting the vehicle. He crossed the ice without further incident.

{¶5} Holbrook slipped in the parking lot and fell for a second time one evening in February 2007. He recalled that it was a cold day, and opined that the temperature

was below freezing. Holbrook exited his condo from the front door and continued on the sidewalk to his parking spot. He started his vehicle and left it running to warm up. He then exited the vehicle and returned to his condo through the front door. After a short time, Holbrook returned to his vehicle and drove to the store. Upon returning, he parked in the same spot. Holbrook remembered being in a hurry. He exited his vehicle and walked to the rear driver's side door, where he grabbed a 12-pack of soda and a grocery bag. As he walked towards the sidewalk, he fell on what he believed to be ice near the front of his vehicle. He stood back up, retrieved his groceries, and walked into the condo without further incident. According to Holbrook, he sustained a minor laceration and a minor concussion from the fall.

{¶6} The third fall involved Holbrook's friend, Barbara Barnett. According to Barnett, she visited Holbrook at his residence on February 6, 2007. She noticed that the temperature was around freezing that day. After passing a couple of hours, Barnett and Holbrook decided to go to the store for milkshakes. They exited through the front door of Holbrook's condo and proceeded along the sidewalk to the parking lot. As she approached the passenger side of Holbrook's vehicle, Barnett observed that the pavement surrounding the vehicle looked wet. Figuring it was not ice, she stepped onto the area and fell. Barnett picked herself up by holding on to the car door. She and Holbrook then went to get milkshakes. Holbrook parked in the same spot when they returned. Barnett held onto the door and exited the vehicle without further incident. According to Barnett, she sustained a broken left arm in the fall.

{¶7} Holbrook and Barnett commenced a negligence action against Kingsgate on June 12, 2008, seeking compensatory damages. Kingsgate filed a motion for summary judgment on May 11, 2009, which the trial court granted. Holbrook and Barnett timely appeal, raising one assignment of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT IMPROPERLY GRANTED DEFENDANT-APPELLEES' MOTION FOR SUMMARY JUDGMENT."

{¶10} In challenging the summary judgment award, Holbrook and Barnett argue that Kingsgate owed them a duty of reasonable care to safeguard them from the unnatural accumulation of ice around Holbrook's parking spots. They assert that the ice accumulated as a result of faulty water drainage off the roof of Holbrook's condo.

{¶11} Summary judgment is a procedural device employed to end litigation when there are no issues in a case requiring a formal trial. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2. A trial court's decision on summary judgment is reviewed de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper when (1) there are no genuine issues of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party meets its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing a genuine issue for trial. Id.

{¶12} We first observe that the trial court's decision stated that Holbrook and Barnett were invitees and that this classification was undisputed. Indeed, Holbrook and Barnett classified themselves as invitees in the complaint. While Barnett aptly fits this description, the record indicates that Holbrook was actually a tenant. Nonetheless, Kingsgate's duty towards Holbrook is substantially the same as its duty towards Barnett

under the facts of the case, regardless of whether Holbrook is deemed an invitee or a tenant. *Burress v. Associated Land Group*, Clermont App. No. CA2008-10-096, 2009-Ohio-2450, ¶11.

{¶13} Ohio case law delineates a series of rules pertaining to premises liability where ice and snow are involved. The general rule is that an owner or occupier of land does not owe a duty to business invitees to remove natural accumulations of snow and ice or to warn invitees of the dangers inherent to such accumulations. *Brinkman v. Ross*, 68 Ohio St.3d 82, 83, 1993-Ohio-72. This is because the dangers associated with natural accumulations of snow and ice are typically considered to be so open and obvious that an owner or occupier may reasonably expect that a business invitee will safeguard himself against those dangers. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph two of the syllabus. This general rule is subject to two exceptions.

{¶14} First, a duty to exercise reasonable care to protect business invitees arises when an owner or occupier has actual or constructive notice that a natural accumulation of snow or ice has created a condition substantially more dangerous than an invitee normally associates with snow and ice. *Mikula v. Tailors* (1970), 24 Ohio St.2d 48, paragraph five of the syllabus. In order for liability to attach under this exception, the owner or occupier must have some "superior knowledge" of the existing danger. *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 210.

{¶15} In the present case, the trial court found that Kingsgate did not have superior knowledge that the snow and ice in the parking lot created a condition substantially more dangerous than that normally associated with snow and ice. Holbrook and Barnett do not dispute this finding on appeal. Holbrook testified in his deposition that he had noticed the year-round water accumulation across his parking spots from the time he moved into the residence. He also testified that he notified

Kingsgate of this water accumulation both before and after the falls. Under these facts, it cannot be said that Kingsgate had superior knowledge of the alleged hazard. At most, the parties were on equal notice of the condition.

{¶16} Rather than invoking the superior knowledge exception, Holbrook and Barnett rely upon the second exception to the general rule of non-liability. That is, an owner or occupier has a duty to exercise reasonable care to protect business invitees from *unnatural* accumulations of snow or ice. More precisely, the owner or occupier has a duty "to refrain from creating or allowing the creation of an unnatural accumulation of ice or snow, if that accumulation results in a condition that is substantially more dangerous than would have resulted naturally." *Burress*, 2009-Ohio-2450 at ¶12, quoting *Saunders v. Greenwood Colony*, Union App. No. 14-2000-40, 2001-Ohio-2099.

{¶17} An "unnatural" accumulation of snow or ice entails "causes and factors other than the inclement weather conditions of low temperature, strong winds and drifting snow * * *." *Walters v. Middletown Properties Co.*, Butler App. No. CA2001-10-249, 2002-Ohio-3730, ¶15, quoting *Porter v. Miller* (1983), 13 Ohio App.3d 93, 95. A number of courts have recognized that "the melting of ice and snow and subsequent refreezing is insufficient, standing alone, to impose liability." *Lawrence v. Jiffy Print, Inc.*, Trumbull App. No. 2004-T-0065, 2005-Ohio-4043, ¶22. See, also, *Nemit v. St. Elizabeth Hosp. Med. Ctr.*, Mahoning App. No. 99-CA-202, 2001-Ohio-3315, 2001 WL 741544 at *3; *Kinkey v. Jewish Hosp. Assn. of Cincinnati* (1968), 16 Ohio App.2d 93, 96. Rather, a person must do something that causes snow or ice to accumulate in an unexpected location or manner in order for an accumulation to be considered unnatural. *Lawrence* at ¶14.

{¶18} Unnatural accumulation of snow or ice falls into two sub-categories, man-made and man-caused. *Mayes v. Boymel*, Butler App. No. CA2002-03-051, 2002-Ohio-

4993, ¶10. Man-made accumulation is that which results when the water itself comes from an unnatural, i.e., man-made, source. *Notman v. AM/PM, Inc.*, Trumbull App. No.2002-T-0144, 2004-Ohio-344, ¶24. Man-caused accumulation results when water comes from natural sources but is unnaturally impeded on an owner or occupier's property. Id.

{¶19} In the present matter, Holbrook and Barnett argue that the ice accumulation in the parking lot was man-caused. They submit that natural precipitation fell onto the roof of Holbrook's condo and passed through the downspouts into a grassy area next to the unit. As the grassy area became saturated with water, they insist, the water ran off into the parking lot and froze. Holbrook and Barnett contend that, but for the defective construction and positioning of the downspouts, this water would not have been present in the parking lot.

{¶20} A contention that an unnatural accumulation of snow or ice resulted from a construction defect must usually be accompanied by expert testimony. *Notman* at ¶26. This is because construction defects do not generally fall within the expertise of laypersons. Id. Holbrook and Barnett retained Larry Dehus, the owner of a forensic testing and consulting firm, to testify as an expert. Dehus conducted a visual inspection and evaluation of the area outside Holbrook's condo in June 2007. He documented his findings and conclusions in a written report, a copy of which was attached to his deposition.

{¶21} At his deposition, Dehus opined that the water drainage system employed by the condo complex caused the ice to accumulate around Holbrook's parking spots. He deduced that water flowing from the roof of the building through the downspouts emptied out onto Holbrook's parking spots and, under freezing conditions, produced patches of ice that would not be present in the rest of the parking lot. In order to remedy

the problem, Dehus suggested that the downspouts could be routed to an underground drain which connected to the drain in the parking lot.

{¶22} The Ohio Supreme Court enumerated the threshold considerations in civil cases regarding the competence of expert testimony in *Stinson v. England*, 69 Ohio St.3d 451, 1994-Ohio-35. The *Stinson* court declared:

{¶23} "The admissibility of expert testimony that an event is the proximate cause is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability. An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue. Inasmuch as the expression of probability is a condition precedent to the admissibility of expert opinion regarding causation, it relates to the competence of the evidence and not its weight." Id. at paragraph one of the syllabus. (Internal citations omitted.)

{¶24} Bearing this standard in mind, we do not find that Dehus' testimony was sufficient to create a genuine issue of material fact regarding whether the accumulation of ice across Holbrook's parking spots was man-caused. Dehus was only able to posit a theory about how the ice accumulated across Holbrook's parking spots. However, nowhere in his deposition did he testify that there was a greater than 50 percent likelihood that the drainage setup caused the ice accumulation across Holbrook's parking spots. *Stinson* at paragraph one of the syllabus. Nor can such a conclusion be gleaned from Dehus' testimony as a whole.

{¶25} First, Dehus could not pinpoint precisely where in the parking lot Holbrook or Barnett fell. In addition, Dehus performed his site inspection in June. Therefore, he did not view the area under weather conditions similar to those that existed at the time of Holbrook's and Barnett's falls in December, January, and February, respectively. *Plymale v. Sabina Pub. Library* (Dec. 21, 1987), Clinton App. No. CA87-02-005, at 6.

Dehus also conceded that he did not research the weather conditions for December 2006 and January or February 2007 to ascertain what the weather was like before Holbrook and Barnett fell.

{¶26} Other considerations preclude us from finding that the concept of probability was implicit in Dehus' testimony. Dehus stated that he did not conduct any tests to determine what percentage of the ground saturation around the parking spots came from the downspouts versus what percentage came from natural, undiverted water drainage. In addition, Dehus did not testify that the manner in which the downspouts were constructed violated any building codes. *Martin v. Edgewater Properties, Inc.* (Nov. 25, 1992), Lorain App. No. 92CA005307, 1992 WL 357321 at *2. In fact, he conceded that there was nothing wrong with the downspouts in their current setup or with the grade of the land.

{¶27} We find that Dehus' testimony was too speculative to establish that there was

a greater than 50 percent likelihood that the accumulation of ice in the parking lot was man-caused. That is, Dehus' testimony forged too tenuous a link between the alleged construction defect and the ice around Holbrook's parking spots to support the inference that the accumulation was unnatural. See *Schutt v. Rudolph-Libbe, Inc.* (Mar. 31, 1995), Wood App. No. WD-94-064, 1995 WL 136777 at *6 (holding that summary judgment on proximate cause is generally inappropriate *unless* evidence of causation is "so meager and inconclusive that a finding of proximate cause would rest on speculation and conjecture"). Moreover, the record is devoid of any other evidence to support this theory of causation.

{¶28} Holbrook and Barnett failed to produce any evidence that the cause of their falls was "an unnatural accumulation of ice * * * [resulting] in a condition that [was]

substantially more dangerous than would have resulted naturally." *Saunders*, 2001 WL196498 at *3. To the contrary, the evidence in the record establishes that Holbrook and Barnett were injured by an open and obvious condition of which they were readily aware. Holbrook testified that he had been trying to get Kingsgate to salt the area around his parking spots because the ice was an "ongoing" problem. He also stated that he spoke with an employee in the management office about the ice on two occasions before his first fall. At the time of his first fall, Holbrook described seeing a "glassy film" under Markum's vehicle, which he did not believe to be ice. Once he treated the film as ice after his fall and proceeded more carefully, he did not fall again on that occasion.

{¶29} Holbrook attempted to retreat from his statements later in his deposition, insisting that he merely saw ice around the drain in the parking lot and not in the area he fell. But Holbrook again contradicted himself when he admitted that he noticed an accumulation of precipitation around his parking spots all year long, including winter. He also testified that he had observed the water around his parking spots ever since he moved into the unit and that Kingsgate had done nothing to fix the problem.

{¶30} Similarly, Barnett admitted that she was aware of the icy conditions in the area she fell. By her own account, she had visited Holbrook at his residence "hundreds," if not "thousands," of times. Barnett admitted that she was aware that the icing became severe around Holbrook's parking spots before she actually fell there, and that she had seen Holbrook fall in that area sometime in December 2006 or January 2007. On the day of her fall, she described the area around Holbrook's parking spots as wet-looking and "real black." She explained that she "thought nothing about it" and "figured it wasn't frozen" when she stepped onto the area and fell. Once she treated the wetness as ice and proceeded with care, she did not fall a second time.

{¶31} After viewing the evidence in a light most favorable to Holbrook and Barnett, we conclude that Holbrook and Barnett have failed to produce sufficient evidence to sustain their claim that the ice accumulation in the parking lot was man-caused and, hence, unnatural. The evidence supports that there were no genuine issues of material fact and that Kingsgate was entitled to judgment as a matter of law. Therefore, the trial court properly granted summary judgment in favor of Kingsgate.

{¶32} The sole assignment of error is overruled.

{¶33} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.