[Cite as *Sleeper v. Casto Mgt. Servs.*, 2013-Ohio-3336.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brian J. Sleeper et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 12AP-566 (C.P.C. No. 11CVC-01-727)
Casto Management Services et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 30, 2013

Blue + Blue, LLC, and *Jason A. Blue,* for appellants.

Raymond H. Decker, Jr., for appellee Casna Limited Partnership; *Surdyk, Dowd & Turner Co., L.P.A., Edward J. Dowd,* and *Joshua R. Schierloh,* for appellee Caribbean Jerks, L.L.C..

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Plaintiffs-appellants, Brian J. Sleeper ("Sleeper") and Suzanne E. Sleeper (collectively "plaintiffs"), appeal from judgments of the Franklin County Court of Common Pleas granting the respective summary judgment motions of defendants-appellees, Caribbean Jerks, LLC. ("Caribbean Jerks") and Casna Limited Partnership[1] ("Casna") (collectively "defendants"). Because (1) statements made by a Caribbean Jerks' employee were inadmissible hearsay against Casna, (2) plaintiffs did not establish that

[1] Plaintiffs filed this action against Casto Management Services ("Casto"), a property management company hired by Casna, alleging that Casto owned the subject property. Casna, the true property owner, has participated in this lawsuit and noted in several filings that plaintiffs incorrectly referred to Casna as Casto in the complaint. Neither party has filed a motion to substitute Casna as the correct party.

Caribbean Jerks owed Sleeper a duty at the time of his fall, (3) plaintiffs failed to establish that Casna was actively negligent in permitting or creating an unnatural accumulation of ice, and (4) plaintiffs waived any claim they may have had regarding incomplete discovery, we affirm.

I. Facts & Procedural History

{¶ 2} Plaintiffs filed a complaint against defendants on January 18, 2011. Plaintiffs alleged that defendants negligently failed to keep their premises free from unnatural accumulations of ice and snow, resulting in injury to Sleeper. Mrs. Sleeper asserted a claim for loss of consortium.

{¶ 3} The events giving rise to the complaint occurred on January 21, 2009. At 6:30 p.m. on that date, Sleeper and his co-worker, Joseph Scarfo, went to Caribbean Jerks, a restaurant and bar located in a shopping center in Lewis Center, Ohio. Casna owned the shopping center, and leased one unit in the shopping center to Caribbean Jerks.

{¶ 4} When Sleeper and Scarfo arrived, "evening was setting in, it was starting to get dark," and it was cold. (Sleeper Depo., 33.) Sleeper and Scarfo socialized for a couple of hours, drinking beer and eating nachos. At approximately 10:30 p.m., the men decided to leave and exited out the front door of the restaurant. Scarfo walked out first and Sleeper followed close behind. Sleeper explained that he walked across the sidewalk attached to the front of Caribbean Jerks, "stepped out off the curb, * * * walked straight out, approximately, five or six steps," then slipped and fell on a patch of ice. (Sleeper Depo., 40.) Sleeper estimated the patch of ice was "about the size of a mid-size vehicle." (Sleeper Depo., 50.) Sleeper sustained injuries as a result of his fall.

{¶ 5} After Sleeper fell, Scarfo looked around the area to ascertain what had caused the patch of ice. Scarfo observed a "spouting rain gutter over top had a leak in it," noting "it was obvious" that the leaky gutter had caused the ice patch. (Scarfo Depo., 41.) Sleeper testified that B.J. Maselli, a server and bartender at Caribbean Jerks, contacted Sleeper in the hospital shortly after the accident. Maselli told Sleeper "there was a leak in that gutter right above the exit way, * * * that there was ice all in that area." (Sleeper Depo., 63.) Sleeper stated that Maselli "may have made some comment of [the leak has] been there." (Sleeper Depo., 104.) Scarfo stated that when he spoke to Maselli two weeks

after the incident, Maselli told Scarfo that "he had asked to have [the leaky gutter] fixed because it was obviously a safety hazard." (Scarfo Depo., 44.)

{¶ 6} On January 9, 2012, Casna filed a motion for summary judgment. Casna supported its motion for summary judgment with the affidavit of Beth VanderPol, Casna's property manager. Casna asserted that it had not breached any alleged duty, as the evidence demonstrated either that Sleeper fell on a natural accumulation of ice or that Casna had never received notice of the leaky gutter prior to the accident. Casna also asserted that the open-and-obvious doctrine precluded recovery. Plaintiffs filed a motion in opposition to Casna's summary judgment motion on January 23, 2012, asserting that the ice was an unnatural accumulation and that Casna had notice of the leaky gutter.

{¶ 7} On January 27, 2012, Caribbean Jerks filed its motion for summary judgment. Caribbean Jerks supported its motion for summary judgment with the affidavit of Mindi Durbin, the owner of Caribbean Jerks. Durbin incorporated the lease agreement between Casna and Caribbean Jerks into her affidavit by reference. Caribbean Jerks argued that, pursuant to the lease agreement, it did not have a duty to maintain the roof, gutters, or parking lot area, as those were all considered common areas under Casna's possession and control. Caribbean Jerks alternatively argued that the ice was a natural accumulation and an open-and-obvious hazard. On February 7, 2012, plaintiffs filed a motion in opposition to Caribbean Jerks' summary judgment motion, asserting that genuine issues of material fact existed regarding which defendant had control over the area where Sleeper fell.

{¶ 8} On April 23, 2012, the trial court issued a decision granting Casna's motion for summary judgment. The court noted that to find Casna owed Sleeper a duty of care at the time of his injury, plaintiffs had to present evidence demonstrating that Casna was actively negligent in permitting or creating an unnatural accumulation of ice and snow. VanderPol's affidavit established that Casna never received notice of a leaky gutter prior to Sleeper's accident. Plaintiffs relied on Maselli's statements to Sleeper and Scarfo to demonstrate that Casna had received notice of the leaky gutter. The court refused to consider Maselli's statements, finding they were inadmissible hearsay. The court concluded that, as there was no "evidence that Casna knew or should have known about the unnatural ice accumulation from the leaky gutter," plaintiffs failed to establish that

Casna owed plaintiffs a duty of care. (Decision Granting Casna's Motion for Summary Judgment, 5.) The court further concluded that the ice was an open-and-obvious hazard, obviating Casna's duty of care.

{¶ 9} On June 6, 2012, the trial court issued a decision granting Caribbean Jerks' motion for summary judgment. The court reviewed the relevant provisions in the lease agreement and concluded that the area of the parking lot where Sleeper fell was a common area under the possession and control of Casna. As such, the court found that "Caribbean Jerks had no duty to maintain the area in which Mr. Sleeper fell." (Decision Granting Caribbean Jerks' Motion for Summary Judgment ("Caribbean Decision"), 7.) The court further observed that, even if Caribbean Jerks had a duty to maintain the premises, the ice was an open-and-obvious hazard.

II. Assignments of Error

{¶ 10} Plaintiffs appeal, assigning the following errors:

> [I.] THE TRIAL COURT ERRED WHEN IT STRUCK THE DEPOSITION TESTIMONY OF JOSEPH SCARFO AND BRIAN SLEEPER AS HEARSAY VIOLATION SWHEN [SIC] THE STATEMENTS ARE THE ADMISSIBLE TESTIMONY OF A PARTY-OPPONENT.
>
> [II.] THE TRIAL COURT ERRED WHEN IT RULED THAT DEFENDANTS/APPELLEES CARIBBEAN JERKS, LLC AND CASNA LIMITED PARTNERSHIP WERE NOT LIABLE IN NEGLIGENCE FOR THE INJURIES CAUSED TO PLAINTIFF/APPELLANT BRIAN SLEEPER.
>
> [III.] THE TRIAL COURT ERRED WHEN IT RULED THAT DEFENDANTS/APPELLEES CARIBBEAN JERKS, LLC AND CASNA LIMITED PARTNERSHIP DID NOT HAVE SUPERIOR KNOWLEDGE OF THE HAZARD THAT CAUSED PLAINTIFF/APPELLANT BRIAN SLEEPER'S INJURIES.
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> [IV.] THE TRIAL COURT ERRED WHEN IT RULED THAT THE OPEN AND OBVIOUS DOCTRINE BARRED PLAINTIFF/APPELLANT'S CLAIM AGAINST DEFENDANTS/APPELLEES CARIBBEAN JERKS, LLC AND CASNA LIMITED PARTNERSHIP.
>
> [V.] THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS/APPELLEES WHERE DEFENDANTS/APPELLEES HAD NOT SATISFIED THE SUMMARY JUDGMENT STANDARD.

III. Standard of Review

{¶ 11} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 12} 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).

{¶ 13} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

IV. First Assignment of Error—Hearsay

{¶ 14} Plaintiffs' first assignment of error asserts the trial court erred by striking Scarfo's and Sleeper's deposition testimony relating statements made by Maselli. Plaintiffs assert that the statements were admissible under Evid.R. 801(D)(2)(d), as statements made by a party opponent.

{¶ 15} Sleeper stated that Maselli contacted Sleeper in the hospital and said that "he had mentioned [the leaky gutter] to the property owner before the injury had happened." (Sleeper Depo., 109.) Scarfo stated that when Maselli told Scarfo that he had asked the property owner to fix the leaky gutter, Scarfo understood Maselli's comment to mean Maselli had made the request before Sleeper's injury, because Scarfo could "actually hear the frustration in [Maselli's] voice stating that he had stated it was an issue and that it had to be repaired." (Scarfo Depo., 44-45.) Plaintiffs assert that these statements demonstrate that Casna received notice of the leaky gutter before Sleeper's injury.

{¶ 16} Although the trial court found these statements to be inadmissible hearsay when applied to Casna, the court expressly considered the statements against Caribbean Jerks. In granting Caribbean Jerks' motion for summary judgment, the court noted that "[e]ven assuming that Mr. Masselli's statement is not inadmissible hearsay with respect to Caribbean Jerks, * * * Mr. Maselli's statement only demonstrates knowledge of a condition that Caribbean Jerks had no duty to fix and that was open and obvious." (Caribbean Decision, 10-11.) Accordingly, plaintiffs' argument under this assignment of error relates only to the trial court's decision granting Casna's motion for summary judgment.

{¶ 17} Absent an exception, hearsay may not be considered in a motion for summary judgment. *Ohio Receivables, L.L.C. v. Williams*, 2d Dist. No. 25427, 2013-Ohio-960, ¶ 10. " 'Hearsay' is a statement, other than the one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Evid.R. 801(D)(2)(d) provides that a statement is not hearsay if "[t]he statement is offered against a party and is * * * a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

{¶ 18} "[T]he pivotal inquiry for admission of a statement under Evid.R. 801(D)(2)(d) is whether the statement was made by an agent or employee of the party-opponent, during the existence of the relationship." *Davis v. Sun Refining & Marketing Co.*, 109 Ohio App.3d 42, 53 (2d Dist.1996). *See also Ball v. Consol. Rail Corp.*, 142 Ohio App.3d 748, 756 (8th Dist.2001), citing *Pappas v. Middle Earth Condominium Assn.*, 963 F.2d 534, 537 (2d Cir.1992) (noting that "[w]here admission through agency is alleged, one must show the existence of an agency relationship"). For a statement to qualify as an admission of a party-opponent, the agency relationship need not encompass authority to make damaging statements, but requires only the authority to take action concerning the subject matter of the statements. *Mowery v. Columbus*, 10th Dist. No. 05AP-266, 2006-Ohio-1153, ¶ 59. " 'In keeping with the liberal policy of admitting statements under Evid.R. 801(D)(2), the fact and scope of the agency can be proven through circumstantial evidence.' " *Id.*, quoting *Ball* at 756.

{¶ 19} Plaintiffs have not presented any evidence indicating that Maselli was an employee or agent of Casna. Plaintiffs assert that Maselli's statements should be admissible in this action against both Caribbean Jerks and Casna because Maselli was an employee of Caribbean Jerks, and plaintiffs' "suit is against both co-defendants, jointly and severally." (Reply brief, 5.) Casna notes that, although Casna and Caribbean Jerks are co-defendants in this action, they "are two separate parties with separate interests in this litigation." (Casna's brief, 7.)

{¶ 20} It is the "principal's control of the relationship [which] provides the basis for attributing the statement of an agent as an admission." *Ball* at 756 (finding that statements made by an independent contractor were inadmissible against the party who hired the independent contractor, as "such relationships do not satisfy the requirements of Evid.R. 801(D)(2)(d)"). Maselli was a server and bartender working on behalf of Caribbean Jerks. Maselli never worked for Casna, and Casna never exerted control over Maselli. As such, Sleeper's and Scarfo's statements relating Maselli's statements were inadmissible hearsay against Casna. The fact that plaintiffs seek damages against Casna and Caribbean Jerks jointly and severally concerns only the apportionment of liability, and has no effect on the rules of evidence.

{¶ 21} Based on the foregoing, plaintiffs' first assignment of error is overruled.

V. Second, Third & Fourth Assignments of Error—Summary Judgment Properly Granted

{¶ 22} Plaintiffs' second assignment of error asserts the trial court erred in concluding defendants were not negligent because defendants breached their duty to protect Sleeper from an unnatural accumulation of ice. Plaintiffs' third assignment of error asserts the trial court erred when it found defendants did not have superior knowledge of the hazardous condition presented by the ice. Plaintiffs' fourth assignment of error asserts the trial court erred in concluding that plaintiffs' claims were barred by the open-and-obvious doctrine.

{¶ 23} To establish a cause of action for negligence, plaintiffs were required to show (1) the existence of a duty, (2) a breach of that duty, and (3) an injury resulting proximately therefrom. *Menifee v. Ohio Welding Prod., Inc.*, 15 Ohio St.3d 75, 77 (1984), citing *Di Gildo v. Caponi*, 18 Ohio St.2d 125 (1969); *Feldman v. Howard*, 10 Ohio St.2d 189 (1967). A trial court properly grants a motion for summary judgment "[w]hen the defendants, as the moving parties, furnish evidence which demonstrates the plaintiff has not established the elements necessary to maintain his negligence action." *Feichtner v. Cleveland*, 95 Ohio App.3d 388, 394 (8th Dist.1994), citing *Keister v. Park Centre Lanes*, 3 Ohio App.3d 19 (5th Dist.1981).

A. Caribbean Jerks—No Duty

{¶ 24} Whether a duty exists is a question of law for the court to determine. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989). A defendant's duty of care is determined by the relationship between the plaintiff and defendant and the foreseeability of injury. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642 (1992). Plaintiff was a business-invitee at Caribbean Jerks restaurant. As such, Caribbean Jerks had a " 'duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger.' " *Cordle v. Bravo Dev., Inc.*, 10th Dist. No. 06AP-256, 2006-Ohio-5693, ¶ 9, quoting *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203 (1985).

{¶ 25} Caribbean Jerks moved for summary judgment asserting that, as the lessee, it did not have a duty to maintain the area where plaintiff fell or to maintain the gutter which allegedly leaked water into the parking lot. "It is a fundamental tenet of premises

tort law that to have a duty to keep premises safe for others one must be in possession and control of the premises." *Wireman v. Keneco Dist. Inc.*, 75 Ohio St.3d 103, 108 (1996). *See also Brown v. Cleveland Baseball Co.*, 158 Ohio St. 1 (1952), paragraphs four and five of the syllabus. "In determining the issue of control between a landlord and tenant, the logical starting point is the lease." *Carrozza v. Olympia Mgt., Ltd.*, 12th Dist. No. CA96-11-228 (Sept. 2, 1997), citing *Beaney v. Carlson*, 174 Ohio St. 409, 412 (1963). *See also Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 133-34 (1995) (although tenant owed a duty of care to the plaintiff "while she was on [tenant's] premises * * *, once she finished her business and left the supermarket that relationship no longer existed"; when plaintiff entered the parking lot, she became "an invitee of [landlord], the entity which retained possession and control over the" parking lot).

{¶ 26} The lease agreement defines the premises leased to Caribbean Jerks as "storeroom number 01030 in the Shopping Center," encompassing 38 feet of frontage and approximately 80 feet of depth. (Lease Agreement, Section 1.01(F).) The lease provides that the "common areas shall be subject to the exclusive control and management of Landlord" and defines common areas to include "the interior and exterior areas and facilities within the Shopping Center, which are: (i) not leased to a tenant, or (ii) by nature not leasable to a tenant for the purpose of the sale of merchandise or the rendition of services to the general public." (Lease Agreement, Section 9.03, 9.01.) The lease states that the common areas include, but are not limited to, "all parking areas and facilities, sidewalks, roadways, driveways, entrances and exits, * * * utilities, water filtration and treatment facilities, * * * roofs, [and] equipment." (Lease Agreement, Section 9.01.) Casna agreed to "perform snow and ice mitigation on parking areas, service drives, and drive lanes; * * * maintain, replace or repair drainage systems; * * * [and] maintain, repair, and/or replace any roof, gutters or down spouts in the Shopping Center." (Lease Agreement, Section 9.05.)

{¶ 27} In opposing Caribbean Jerks' motion for summary judgment, plaintiffs asserted that a genuine issue of material fact existed regarding which defendant had the duty to maintain the area where plaintiff fell. Plaintiffs relied on a section of the lease titled "tenant's obligations" in which Caribbean Jerks agreed to "be responsible for removing litter, ice and snow * * *, and all hazards or obstructions from the sidewalk area

in front of and the loading area in the rear of the Premises." (Lease Agreement, Section 11.01.) The lease defined the term "sidewalk area in front of the Premises" to mean "the entire depth of the sidewalk from outside curb face to building face, along the entire front of the Premises." (Lease Agreement, Section 6.05.)

{¶ 28} Sleeper was injured after he walked across the sidewalk in front of Caribbean Jerks, "stepped out off the curb, * * * [and] walked straight out, approximately five or six steps." (Sleeper Depo., 40.) Sleeper explained that the area where he fell was the "blacktop surface" located between the sidewalk and the parking spaces, where cars typically drive. (Sleeper Depo., 42-43.) VanderPol explained that the entire blacktop area was the parking lot and thus a common area under the terms of the lease. (VanderPol Depo., 54-56.) VanderPol also agreed that, if a gutter had to be repaired or maintained, that was Casna's responsibility as the landlord. (VanderPol Depo., 56.)

{¶ 29} Plaintiffs failed to establish that a genuine issue of material fact existed for trial. Sleeper was not on the sidewalk when he was injured, as he had stepped off the curb and onto the blacktop. The lease agreement and VanderPol's testimony demonstrate that Casna retained possession and control of the entire blacktop area and the roof and gutters. As such, plaintiffs could not establish that Caribbean Jerks owed Sleeper a duty at the time of his injury, and the trial court properly granted Caribbean Jerks' Civ.R. 56 motion for summary judgment.

B. Casna—No Duty

{¶ 30} For "injuries caused by accumulations of ice and snow, Ohio law provides that an owner or occupier generally owes no duty to remove natural accumulations of snow or warn users of the dangers associated with such accumulations." *Thatcher v. Lauffer Ravines, LLC,* 10th Dist. No. 11AP-851, 2012-Ohio-6193, ¶ 15, citing *Brinkman v. Ross,* 68 Ohio St.3d 82, 83-84 (1993). "The rationale is that individuals are assumed to appreciate the inherent risks associated with ice and snow arising during typical Ohio winters and protect themselves against such dangers." *Id.*, citing *Brinkman* at 84. "This is sometimes referred to as the 'no-duty winter rule.' " *Id.*

{¶ 31} Ohio courts recognize two exceptions to the general rule that an owner or occupier of property owes no duty to invitees regarding natural accumulations of ice and snow. The first exception provides that "where an owner or occupier is actively negligent

in permitting or creating an unnatural accumulation of ice and snow, the no-duty rule is inapplicable." *Kaeppner v. Leading Mgt.*, 10th Dist. No. 05AP-1324, 2006-Ohio-3588, ¶ 11, citing *Lopatkovich v. Tiffin*, 28 Ohio St.3d 204, 207 (1986). "An 'unnatural' accumulation is one created by causes and factors other than natural meteorological forces." *Thatcher* at ¶ 17. Natural meterological forces include inclement weather conditions, low temperatures, drifting snow, strong winds, and freeze cycles. *Id.* Unnatural accumulations, therefore, are the result of human action which causes ice and snow to accumulate in unexpected places and ways. *Id.*, citing *Porter v. Miller*, 13 Ohio App.3d 93 (6th Dist.1983). *See also Lawrence v. Jiffy Print, Inc.*, 11th Dist. No. 2004-T-0065, 2005-Ohio-4043, ¶ 15-16, quoting *Notman v. AM/PM, Inc.*, 11th Dist. No. 2002-T-0144, 2004-Ohio-344, ¶ 24 (noting that unnatural accumulation may be man-made, i.e. when water " 'comes from natural sources, but is unnaturally impeded on a land-owner's property,' " or may be man-caused, i.e. " 'when the water itself comes from an unnatural, i.e. man-made source' ").

{¶ 32} The second exception applies to natural accumulations of ice and snow. Under this exception to the no-duty rule, an owner or occupier of property may be liable if they are "shown to have had actual or implied notice that a natural accumulation of ice or snow on his or her property has created a condition substantially more dangerous than a business invitee should have anticipated by reason of knowledge of conditions prevailing generally in the area." *Kaeppner* at ¶ 11, citing *Debie v. Cochran Pharmacy-Berwick, Inc.*, 11 Ohio St.2d 38 (1967). For example, this exception would apply to create a duty where a parking lot owner had notice that a natural accumulation of snow had, by reason of covering a hole in the surface of the parking lot, created a condition substantially more dangerous to a business invitee than that normally associated with snow. *Mikula v. Tailors*, 24 Ohio St.2d 48 (1970), paragraph five of the syllabus.

{¶ 33} "In regards to issues of slip and fall on ice or snow, the threshold question is whether the accumulation of ice is natural." *Jiffy Print, Inc.* at ¶ 12. The evidence in the record demonstrates that it was cold when Sleeper and Scarfo arrived at the restaurant. However, when asked if it had rained or snowed on the day of the accident or the previous day, Sleeper stated "I don't recall of any weather." (Sleeper Depo., 44.) Sleeper stated that although it was cold, he did not wear a jacket into the restaurant. Scarfo noted that,

aside from the circle of ice where Sleeper fell, the remainder of the parking lot "was dry * * *, there was not any snow. There wasn't any ice, there wasn't anything at all in the lot." (Scarfo Depo., 36.) Scarfo also stated that he did not see any icicles in the area of the gutter, explaining "it was just wet." (Scarfo Depo., 43.) Scarfo and Sleeper also stated that there was no ice on the sidewalk area corresponding to Caribbean Jerks. (Scarfo Depo., 52; Sleeper Depo., 41.) After Sleeper fell, Scarfo stated that he saw water dripping from the gutter onto the asphalt.

{¶ 34} Viewing the evidence in a light most favorable to plaintiffs, we can only find that the ice in the parking lot resulted from a leak in the gutter, and was accordingly an unnatural accumulation of ice. There was no evidence indicating that it had rained or snowed on the day of the incident, and Scarfo stated that, aside from the ice on which Sleeper fell, the parking lot was completely dry. Accordingly, the evidence does not indicate that the ice formed solely as a result of meteorological forces such as rain, snow, or a thawing and re-freezing cycle. *See Bailey v. St. Vincent DePaul Church*, 8th Dist. No. 71629 (May 8, 1997), citing *Hoenigman v. McDonald's Corp.*, 8th Dist. No. 56010 (Jan. 11, 1990) (noting that "the freeze and thaw cycle * * * remains a natural accumulation"). Because the ice was an unnatural accumulation, the issue before this court resolves to whether Casna was actively negligent in creating or permitting the unnatural accumulation of ice.

{¶ 35} VanderPol averred that that she "was unaware of the condition at issue, and had never received any notice of any leaking downspout/gutter from the restaurant building leased by Caribbean Jerks, LLC or any ice formation in the sidewalk/parking lot in advance of Mr. Sleeper's fall." (VanderPol Affidavit, ¶ 9.) VanderPol further averred Casna "had not been provided any notice or indication that there existed any gutter/downspout leaks, overhead or otherwise, with respect to the building leased by Caribbean Jerks, LLC or any ice formation in the parking lot." (VanderPol Affidavit, ¶ 10.) VanderPol incorporated by reference a roof incident report depicting all the roofing work orders Casna received from its tenants in the shopping center in 2008 and 2009. The roof incident report does not contain any request from Caribbean Jerks regarding a leaky gutter near its premises. VanderPol stated in her deposition that she visits the shopping center at least twice a month, "maybe more, depending on maintenance issues," and never

noticed a puddle of water in the common area in front of Caribbean Jerks restaurant. (VanderPol Depo., 45-46.)

{¶ 36} In their motion in opposition to Casna's motion for summary judgment, plaintiffs argued that Scarfo's and Sleeper's testimony repeating Maselli's statements demonstrated that Casna had notice of the defect before the accident. As indicated above, these statements were inadmissible hearsay against Casna, and the trial court properly refused to consider them. Plaintiffs did not present any other evidence to establish that Casna had notice of the leaky downspout before Sleeper's injury. As such, plaintiffs failed to carry their reciprocal burden under *Dresher* to establish a genuine issue of material fact regarding whether Casna was actively negligent in creating or permitting the ice patch in the parking lot area.

{¶ 37} Plaintiffs cite to *Tyrrell v. Investment Assoc. Inc.*, 16 Ohio App.3d 47, 49 (1984), and *Garden Woods Apartments v. Gee*, 2d Dist. No. 13962 (1993) to establish that "the ice caused by the leaking downspout was an unnatural accumulation of ice." (Appellant's brief, 13.) However, we have already determined the ice was an unnatural accumulation and plaintiffs do not explain how either case establishes that Casna was actively negligent in permitting or creating the ice.

{¶ 38} Moreover, the factual differences between *Tyrrell* and the present case demonstrate why the evidence here does not support a finding of active negligence. In *Tyrrell*, the plaintiff slipped and fell on ice on a sidewalk in front of a drugstore. The court determined the ice was an unnatural accumulation, as it formed from a leak in the canopy which extended over the sidewalk. The evidence demonstrated that the drugstore employees "had been aware for several years that water occasionally dripped from the edge of the canopy and formed ice in front of [the] store." *Id.* at 48. The court observed that, while the employees were unaware of the specific icy patch which caused the plaintiff's fall, "there was evidence that the employees knew about the hazard from the dripping canopy which periodically created [the icy] condition" on the sidewalk. *Id.* at 49. Because the drugstore employees had knowledge of the defective canopy and its tendency to create unnatural accumulations of ice, a "jury could reasonably find that the drug store failed to exercise reasonable care for its customers' safety." *Id.*

{¶ 39} Unlike *Tyrrell*, here there is no evidence indicating that Casna had knowledge that a leaky gutter existed on its property, or that such gutter had a tendency to form ice patches on the asphalt below. In the absence of some evidence indicating that Casna had knowledge of the leaky gutter, we cannot find that Casna was actively negligent in creating or permitting the ice to exist in the parking lot. *See Calabrese v. Romano's Macaroni Grill*, 8th Dist. No. 94385, 2011-Ohio-451, ¶ 16-17 (distinguishing the case from *Tyrrell*, because the restaurant manager "testified that he had never received reports of a leak in the vestibule area"); *Abercrombie v. Byrne-Hill Co., Ltd.*, 6th Dist. No. L-05-1010, 2005-Ohio-5249, ¶ 18 (distinguishing the case from *Tyrrell* because the action was against the "property owner, not the proprietor of the nail salon," and "there [was] no evidence that the property owner had knowledge of the hazard or created the hazard"). *Compare Perotti v. Gordon Square Restaurant & Lounge*, 8th Dist. No. 55639 (July 27, 1989) (finding competent, credible evidence in the record to support the jury's finding that the appellant lounge was actively negligent in permitting an unnatural accumulation of ice and snow on its sidewalk where the evidence demonstrated that: (1) a defective gutter existed above the entrance to the lounge, (2) water had been observed flowing from the defect for more than a year before the accident, (3) the owner of the lounge was aware of the defect and had requested a repair estimate, and (4) the defect was not repaired).

{¶ 40} In moving for summary judgment, plaintiffs also asserted that "Casna improperly lit the parking lot in front of the restaurant, making the ice exceptionally dangerous since it was harder to see." (Motion in Opposition to Casna's Motion for Summary Judgment, 7.) In *Gee*, the evidence indicated that a lamppost next to an icy sidewalk was not functioning, and the court observed that "[l]iability may attach where ice and snow accumulation combines with other defects, of which the owner has superior knowledge, to create a danger substantially greater than those generally prevailing." *Id.*, citing *LaCourse v. Fleitz*, 28 Ohio St.3d 209, 210-11 (Dec. 26, 1986). There is no evidence to support plaintiffs' contention that the lighting was inadequate. Although Sleeper testified that the lights were not on in the parking lot when he arrived at 6:30 p.m., Sleeper stated that lights illuminated the sidewalk and parking lot when he left Caribbean Jerks later that evening. Sleeper recalled that there "was lighting in the parking lot at the point of impact," that he had no difficulty observing the conditions around him when he

fell, and specifically stated that "the lighting situation was adequate." (Sleeper Depo., 39, 47, 106.)

{¶ 41} Plaintiffs failed to respond to Casna's summary judgment motion with admissible evidence which created a genuine issue of material fact regarding whether Casna was actively negligent in permitting the ice to form in the parking lot. Because there was no evidence demonstrating that Casna received notice of the leaky gutter before Sleeper's slip and fall, the active negligence exception to the no-duty winter rule was inapplicable in this case. Accordingly, the general rule applies, obviating any duty Casna may have had toward Sleeper. The trial court did not err in granting Casna's motion for summary judgment, and plaintiffs' second assignment of error is overruled.

1. Superior Knowledge

{¶ 42} Plaintiffs contend in their third assignment of error that the trial court erred when it found that defendants did not have superior knowledge of the hazardous condition of the ice. The superior knowledge exception to the no-duty winter rule, noted above, provides that "when ice has accumulated *by natural means*, a property owner shall be liable if that party had superior knowledge, i.e. notice, that the accumulation of ice created a condition substantially more dangerous to its business invitees than they should have anticipated by reason of their knowledge of conditions prevailing generally in the area." (Emphasis added.) *Goodwill Industries of Akron, Ohio, Inc. v. Sutcliffe*, 9th Dist. No. 19972 (Sept. 13, 2000). We have already concluded that the ice in the parking lot was an unnatural accumulation, resulting from a seam in the gutter above the parking lot. Because the ice was unnatural, the superior knowledge exception is inapplicable in this case. Plaintiffs' third assignment of error is overruled.

2. Open-and-Obvious Doctrine

{¶ 43} Plaintiffs' fourth assignment of error asserts the trial court erred in finding the open-and-obvious doctrine applicable in this case. "The 'open-and-obvious' doctrine further limits the owner's duty to warn an invitee of those dangers on the premises that are either known to the invitee or so obvious and apparent to the invitee that he or she may reasonably be expected to discover them and guard against them." *Thatcher* at ¶ 12. "The rationale for this doctrine is that, because the open-and-obvious nature of the hazard itself serves as a warning, the property owner may reasonably expect persons lawfully on

the premises to discover the hazard and take appropriate measures to protect themselves." *Id.*, citing *Simmers* at 644. Notably, "the dangerous condition at issue does not actually have to be observed by the plaintiff in order for it to be an 'open and obvious' condition under the law. Rather, the determinative issue is whether the condition is observable." *Lydic v. Lowe's Companies, Inc.*, 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶ 10.

{¶ 44} As the two men left the restaurant, Sleeper followed immediately behind Scarfo. Scarfo explained that he stepped "off the sidewalk, * * * looked down," and saw the circle of ice. (Scarfo Depo., 32.) Scarfo "stepped off to the right side" of the ice to avoid stepping on it. (Scarfo Depo., 32.) Scarfo explained that he was able to perceive the ice with plenty of time to step to the side and avoid it, noting that the area where the ice was located was "darker in coloration than the rest of the parking lot." (Scarfo Depo., 36.) Scarfo agreed that there was "nothing obstructing the ice from anybody seeing" it. (Scarfo Depo., 53.) At the time Sleeper fell, he was looking "[f]orward," towards his vehicle. (Sleeper Depo., 51.)

{¶ 45} As Scarfo was able to perceive the ice and avoid it, it appears the ice patch was observable. However, "Ohio courts have split on the question of whether the open-and-obvious rule applies to unnatural accumulations," and this court specifically has yet to definitively resolve the issue. *Thatcher* at ¶ 19-21. In the instant case, we have already determined that neither Caribbean Jerks nor Casna owed Sleeper a duty at the time of his fall. As such, any ruling on the open-and-obvious doctrine would be superfluous. Therefore, we find plaintiffs' fourth assignment of error moot.

VI. Fifth Assignment of Error—Additional Discovery

{¶ 46} Plaintiffs assert in their fifth assignment of error that the trial court erred in granting defendants' motions for summary judgment because, "[a]t the time Defendants/Appellees filed for summary judgment, discovery had not been completed." (Appellants' brief, 16.) Plaintiffs note that, at the time defendants filed their respective summary judgment motions, neither Maselli nor Durbin had appeared for their scheduled depositions. Plaintiffs also note that they would have liked to interview Brett Marinello, the head of Casna's maintenance department, and Ohio Shades of Green, the company Casna hired to perform snow removal services.

{¶ 47} "The remedy for a party who has to respond to a motion for summary judgment before adequate discovery has been completed is a motion under Civ.R. 56(F)." *Morantz v. Ortiz*, 10th Dist. No. 07AP-597, 2008-Ohio-1046, ¶ 20. "Civ.R. 56(F) allows a party the opportunity to request additional time to obtain, through discovery, the facts necessary to adequately oppose a motion for summary judgment." *Id. See* Civ.R. 56(F). To be entitled to the relief provided for under Civ.R. 56(F), the party must file a motion for continuance pursuant to Civ.R. 56(F), including an affidavit "stating the reasons justifying an extension of discovery." *Id.* at ¶ 22.

{¶ 48} "Ohio courts have held that a failure to request a continuance for additional discovery and to comply with the provisions of Civ.R. 56(F) waives the issue on appeal." *Conkey v. Eldridge*, 10th Dist. No. 98AP-1628 (Dec. 2, 1999), citing *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 87 (8th Dist.1987). "[T]he Supreme Court of Ohio has held that Civ.R. 56(F) does not have to be complied with strictly if substantial discovery has not yet occurred and if a party in responding to the summary judgment motion indicates that more time for discovery is needed." *Id.*, citing *Tucker v. Webb Corp.*, 4 Ohio St.3d 121, 122-23 (1983).

{¶ 49} Plaintiffs did not file a Civ.R. 56(F) motion in the trial court requesting additional time to conduct discovery. Plaintiffs also did not indicate in their memorandums in opposition to defendants' respective summary judgment motions that they needed more time to complete discovery. Rather, in both memorandums in opposition, plaintiffs relied on the existing evidence to assert that genuine issues of material fact existed for trial.

{¶ 50} Because plaintiffs did not move under Civ.R. 56(F) or request additional time for discovery in their responses to the motions for summary judgment, plaintiffs have waived any argument they may have had regarding the need for additional discovery. *See Jackson v. Walker*, 9th Dist. No. 22996, 2006-Ohio-4351, ¶ 17; *Morantz* at ¶ 23.

{¶ 51} Based on the foregoing, plaintiffs' fifth assignment of error is overruled.

VII. Conclusion

{¶ 52} Having overruled plaintiffs' first, second, third, and fifth assignments of error, rendering plaintiffs' fourth assignment of error moot, we affirm the judgments of

the Franklin County Court of Common Pleas granting the respective summary judgment motions of Casna and Caribbean Jerks.

Judgments affirmed.

SADLER and DORRIAN, JJ., concur.

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