[Cite as *Jackson v. J-F Ents., Inc.*, 2011-Ohio-1543.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Shawnee Jackson, et al.	Court of Appeals No. L-10-1285
Appellants	Trial Court No. CI0200905042
v.	
J-F Enterprises, Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 31, 2011

* * * * *

Michael A. Bruno, Charles E. Boyk and Nicholas M. Dodosh, for appellants.

Timothy C. James and Brad A. Everhardt, for appellee J-F Enterprises, Inc.

John R. Kuhl, for appellee Hamernik's Snow Removal and Lawn Care, Ltd.

* * * * *

SINGER, J.

{¶ 1} Appellant, Shawnee Jackson, appeals from a judgment of the Lucas County Court of Common Pleas granting summary judgment to appellees, J-F Enterprises ("J-F") and Hamernik's Snow Removal and Lawn Care, Ltd. ("Hamernik"). Jackson had claimed

that appellees were negligent in removing snow from a parking lot where she had slipped and fallen and had sustained injuries. For the reasons that follow, we affirm.

{¶ 2} On December 25, 2008, appellant[1] left her home to purchase a few items. She testified in her deposition that she drove past two convenience stores, avoiding them because there was snow in their parking lots. Appellant eventually chose to stop at Barney's Convenience Store ("Barney's") on Central Avenue in Toledo. Appellee J-F owns and operates Barney's.

{¶ 3} Appellant parked her car and entered the store, noticing as she did that there was ice on the parking lot. After making her purchase, appellant returned to her car. As she approached her car, she slipped and fell, and was injured.

{¶ 4} On June 19, 2009, appellant brought suit. Jackson claimed that appellee J-F was negligent in maintaining its premises. In her amended complaint, appellant added Hamernik, the company contracted to provide snow removal for Barney's, as a defendant.

{¶ 5} Both defendants denied liability and, following discovery, moved for summary judgment. When the trial court granted both summary judgment motions, appellant instituted this appeal. Appellant sets forth the following two assignments of error:

[1]Shawnee Jackson's husband, James Jackson, is also an appellant by virtue of a loss of consortium claim. For clarity, we shall refer to Shawnee Jackson as appellant.

{¶ 6} "A. First assignment of error

{¶ 7} "The trial court erred to the prejudice of the plaintiff-appellants when it granted the motion for summary judgment of defendant-appellee J-F Enterprises, Inc. because the evidence as set forth in the record created a genuine issue of material fact.

{¶ 8} "B. Second assignment of error

{¶ 9} "The trial court erred to the prejudice of the plaintiff-appellants when it granted the motion for summary judgment of defendant-appellee Hamernik's Snow Removal and Lawn Care, Ltd. because the evidence as set forth in the record created a genuine issue of material fact."

{¶ 10} We will address both assignments of error together.

{¶ 11} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated: "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶ 12} Appellant contends that there is a genuine issue of material fact as to whether appellees were negligent in their snow removal practices. In order to establish

actionable negligence, a plaintiff must show that a defendant owes to him or her a duty which has been breached, proximately resulting in injury to the plaintiff. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

{¶ 13} With regard to the claim against Hamernik, it is undisputed that Hamernik was an independent contractor to J-F and that appellant was Barney's business invitee. "An independent contractor owes a general duty of care towards a business invitee; that is, he must exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances." *Nageotte v. Cafaro Co.*, 160 Ohio App.3d 702, 2005-Ohio-2098, ¶ 35. Hamernik owed a duty to appellant as Barney's business invitee to remove snow in compliance with this general degree of care.

{¶ 14} Once a duty is established, the plaintiff has the burden to show that the duty was breached and that the injuries were proximately caused by the breach. *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642**,** 646. In the context of snow and ice removal, the defendant breaches his duty of care if his actions create an *unnatural* accumulation that substantially increases the risk of injury normally associated with winter accumulations of ice and snow. *Zamano v. Hammerschmidt, Inc.*, 6th Dist. No. H-02-031, 2003-Ohio-1618, ¶ 21; *Dunbar v. Denny's Restaurant*, 8th Dist. No. 86385, 2006-Ohio-1248, ¶ 13. Where melted run-off from snow freezes creating black ice, such accumulation of ice is not unnatural. *Flint v. Cleveland Clinic Found.*, 8th Dist. Nos. 80177, 80478, 2002-Ohio-2747, ¶ 19-20.

{¶ 15} Here, appellant contends that the melted run-off from the snow between the parking bumper and the sidewalk created the black ice that caused the accident. Even if this is established, Hamernik did not breach its duty of care to appellant while removing the snow because the melted run-off is not unnatural. Id. Because there was no breach, we need not address the issue of causation. Hamernik is entitled to summary judgment.

{¶ 16} With regard to the claim against J-F, the duty of an owner or occupier to a business invitee is to take ordinary care to maintain the premises in a reasonably safe condition and to warn the invitee of latent or hidden dangers. *Paschal v. Rite Aid Pharmacy, Inc*. (1985), 18 Ohio St.3d 203, 203-204; *Brown v. Helzberg Diamonds*, 168 Ohio App.3d 438, 2006-Ohio-4297, ¶ 13. Where a danger is not latent or hidden, but instead is "open and obvious," a landowner or business owner owes no duty of care to individuals lawfully on the premises. *Armstrong v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, syllabus. The dangers from natural accumulations of ice and snow are ordinarily open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph two of the syllabus. Ice and snow originating from a winter storm and cold temperatures generally are natural accumulations. *Porter v. Miller* (1983), 13 Ohio App.3d 93, 95.

{¶ 17} There are two exceptions to the general rule that owners or occupiers of premises owe no duty to a business invitee to warn or remove dangers associated with open and obvious natural accumulations of snow and ice, which exceptions appellant argues apply.

{¶ 18} The first exception is when "an owner or occupier of property is 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, negligence may be established." *Kaeppner v. Leading Mgt.*, 10th Dist. No. 05AP-1324, 2006-Ohio-3588, ¶11, citing *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 41. In order to be liable under this exception, the defendant must have had superior knowledge of the existing danger. *Moore v. Kroger Co.*, 10th Dist. No. 10AP-431, 2010-Ohio-5721, ¶ 8.

{¶ 19} Appellant argues that a phone call between a store employee and the store manager shortly after the accident shows that J-F had superior knowledge of the dangerous conditions in the parking lot. During this phone call the manager stated that she knew the lot was icy and expected that someone was going to fall.

{¶ 20} Although the substance of this phone call may show that the manager had knowledge that the parking lot was dangerous, it provides no evidence that J-F had *superior* knowledge of the danger to that of appellant. According to appellant, before her fall she saw the ice, recognized the danger caused thereby and took precautions to avoid the danger. She, therefore, had actual knowledge of the danger before her fall that was at least equal to that of the store manager. Where an owner and an invitee have equal knowledge of snow and ice on the premises, this exception to the open and obvious rule cannot be supported. *Milula v. Slavin Tailors* (1970), 24 Ohio St.2d 48, 56. Moreover,

where a plaintiff, prior to a slip and fall, observes snow and ice and is aware of the associated dangers, the plaintiff cannot then invoke this exception to the open and obvious rule by claiming she could not have anticipated said dangers. See *Bailey v. River Properties*, 8th Dist. No. 86968, 2006-Ohio-3846, ¶ 20-22. The first exception to the open and obvious rule cannot be supported.

{¶ 21} The second exception to the open and obvious rule is when a property owner, "* * * 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* (1986), 28 Ohio St.3d 204, 207. Because "the build-up of snow and ice during winter is regarded as a natural phenomenon," in order for a plaintiff to prove unnatural accumulation of ice and snow, "the law requires, at the very least, some evidence of an intervening act by the landlord (or a property owner) that perpetuates or aggravates the pre-existing, hazardous presence of ice and snow." *Porter v. Miller* (1983), 13 Ohio App.3d 93, 95.

{¶ 22} Appellant argues that this exception applies because appellees allowed an unnatural condition to form by the intervening negligent snow removal practices. The sole evidence that appellant presents to show negligent snow and ice removal and unnatural accumulation of ice is an affidavit from an expert in snow removal practices. Appellant's expert witness stated in his affidavit that he had viewed photos of the scene of the accident taken the night of the accident and personally visited the scene on three

occasions in January 2009. The only other pertinent statements contained in the affidavit are the expert's conclusions that:

{¶ 23} "a. The accident was caused by black ice build up caused by negligent and improper snow removal practices that created an unnatural accumulation of snow and ice.

{¶ 24} "b. The snow off the sidewalk was improperly removed and replaced [sic] between sidewalk and the parking bumper in the parking lot which caused the unnatural black ice to form at the parking lot spaces.

{¶ 25} "c. The standard of care was breached by not properly clearing the walk and then running a snow shovel or snow blower between the sidewalk and parking lot."

{¶ 26} In the instant case, appellant appeals from a denial of summary judgment. "In order to defeat summary judgment, the nonmoving party must produce evidence beyond allegations set forth in the pleadings and beyond conclusory statements in an affidavit." *Scott v. Marckel*, 3d Dist. No. 4-07-27, 2008-Ohio-2743, ¶ 18. "[I]t is improper for an expert's affidavit to set forth conclusory statements and legal conclusions without sufficient supporting facts." Id. at ¶ 25, citing *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 335-336; Evid.R. 705. A court should disregard legal conclusions contained in an expert's summary judgment affidavit. *Mitchell v. Norwalk Area Health Serv.*, 6th Dist. No. H-05-002, 2005-Ohio-5261, ¶ 61.

{¶ 27} The expert's affidavit contains at least two legal conclusions, first, that the snow removal was negligent and, second, that the snow and ice accumulations were unnatural. No supporting facts are even mentioned in the affidavit. Such legal

conclusions, standing alone as they do here, do not constitute evidence of negligence or unnatural conditions but are mere allegations.

{¶ 28} Appellant also urges us to conclude that the black ice was unnatural based on her expert witness's assertion that the snow was removed and placed into the space between the bumpers and the sidewalk, and that melted run-off from this snow caused the black ice to form in the parking space where appellant fell. Such facts, even if established, are immaterial. Even if this court accepts that appellees did actively place the snow between the parking bumper and the sidewalk, this second exception to the open and obvious rule does not apply because any resulting accumulation of black ice from typical melted run-off is still not unnatural. *Flint v. Cleveland Clinic Found*., supra, concluding, "[s]imply piling snow on either side of the sidewalk, without more, does not constitute an 'unnatural' accumulation of ice. * * * [Where] run-off from the melting snow pile created the icy patch, several courts, including this one, have concluded that this does not constitute an 'unnatural' accumulation of ice. When snow is removed, it has to be placed somewhere, and 'a certain natural run-off of water is to be expected.'"

{¶ 29} In construing all evidence most strongly in favor of appellant, we conclude that the conditions were natural as a matter of law. The second exception cannot be supported. J-F is entitled to summary judgment.

{¶ 30} Appellant presents no evidence that creates a genuine issue of material fact as to the question of negligence by appellees. Both assignments of error are not well-taken.

{¶ 31} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs pursuant to App.R.24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE