[Cite as *Miller v. Tractor Supply Co.*, 2011-Ohio-5906.]

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

James Miller, et al.	Court of Appeals No. H-11-001
Appellants	Trial Court No. CVC 2010 0109
v.	
Tractor Supply Co., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: November 10, 2011

* * * * *

Joseph A. Zannieri, for appellants.

Jeffrey R. Lang, for appellee Tractor Supply Company.

Edwin A. Coy, for appellee District Petroleum Products, Inc.

* * * * *

HANDWORK, J.

{¶ 1} This appeal arises from a slip and fall on naturally accumulated ice at a gas station parking lot. The Huron County Court of Common Pleas granted summary judgment in favor of defendants-appellees, Tractor Supply Company ("TSC") and

District Petroleum Products, Inc. ("District Petroleum"). Plaintiffs-appellants, James Miller and Norma Jean Miller, contend that genuine issues of material fact remain to be tried. Finding that summary judgment was properly granted, we affirm the decision of the trial court.

{¶ 2} On a rainy February 10, 2008, James Miller drove his son-in-law's Ford Expedition pickup truck to the gasoline station at the TSC retail store on State Route 250 in Norwalk, Ohio. Mr. Miller's intent was to put $20 worth of gas in the truck, but he was uncertain as to the side of the vehicle on which the gas tank was located. He decided to pull into a parking lot on the premises, which was adjacent to the gas pumps, in order to ascertain the location of the tank before entering the line of cars at the pumps. As he exited the vehicle, Mr. Miller slipped and fell on a patch of "black ice" and sustained serious injuries to his hip and leg.

{¶ 3} On February 1, 2010, the Millers brought suit against appellees, alleging that the fall occurred on premises operated by District Petroleum under a lease from TSC. The gravamen of their complaint was that appellees "failed to either warn business invitees of the slippery conditions on their parking lot and the ramp areas leading up to the gas pumps or they failed to salt or scrape the ice away from the areas traveled by the vehicles approaching the pumps." In early November 2010, appellees filed separate

motions for summary judgment, both arguing in part that they owed no duty of care to business invitees in regard to natural accumulations of ice and snow on their premises.[1]

{¶ 4} The record on summary judgment included the deposition of District Petroleum's assistant manager at the TSC station, Richard Biemler, who testified that when he arrived at work around 1:00 p.m. on February 10, 2008, "[t]he parking lot was all ice." Mr. Miller testified at his deposition that "when I started pulling into the parking lot [sometime between 2:00 and 3:00 p.m.], that the ice was starting to form on the hood of the vehicle of the Expedition, but at that time I did not know that the parking lot was nothing but black ice." Miller denied observing any ice on the surface of the roads or the TSC parking lot before his fall.

{¶ 5} On December 7, 2010, the trial court entered summary judgment in favor of appellees, finding that owners or occupiers of land generally owe no duty to their business invitees to remove or warn of dangers associated with the natural accumulation of ice in their parking areas. The trial court further found that none of the recognized exceptions to this general "no duty rule" apply in this case, because "it is clear that rain had begun to freeze over * * * [and Mr. Miller] was aware that conditions were such that ice could be forming [on the parking lot] as he noticed ice forming on the hood of his vehicle at the time he pulled into the parking lot."

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[1]In addition, TSC argued that the ice presented an open and obvious danger and District Petroleum argued that it did not lease, maintain, or control the portion of the parking lot where Mr. Miller fell. Although appellees reassert these arguments on appeal as alternative grounds in support of summary judgment, our disposition of the matter renders it unnecessary for us to consider the merits of those assertions.

{¶ 6} The Millers now appeal that judgment, asserting as their sole assignment of error that "[t]he court erred when it rendered summary judgment on conflicting evidence." They argue that a genuine issue of fact remains as to whether appellees had superior knowledge to that of Mr. Miller in regard to the icy condition of their parking lot. According to appellants, appellees' superior knowledge of that condition gives rise to a duty to exercise reasonable care for the protection of their invitees. We do not agree.

{¶ 7} The arguments advanced by appellants in their initial brief are based exclusively on the law of premises liability as reiterated in *Darling v. Fairfield Med. Ctr.* (2001), 142 Ohio App.3d 682. In that case, the court articulated the general duty owed by business owners and operators to maintain their premises in a reasonably safe condition for the protection of business invitees, explaining that "the proprietor's duty is normally predicated upon his superior knowledge of a dangerous condition on his premises." Id. at 684-685. That duty, however, is generally eliminated in cases involving natural accumulations of ice and snow, subject only to certain narrow exceptions. See *Sherlock v. Shelly Co.*, 10th Dist. No. 06AP-1303, 2007-Ohio-4522, ¶ 21. Appellants' reliance on *Darling* is therefore entirely misplaced. Nevertheless, since appellants do discuss one of the exceptions to the no-duty rule in their reply brief, we will consider their arguments in that context.

{¶ 8} It has long been established in Ohio that an owner or occupier of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow from the premises, or to warn invitees of the dangers associated with such natural

accumulations of ice and snow. *Brinkman v. Ross* (1993), 68 Ohio St.3d 82, 83-84; *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, paragraph one of the syllabus; *Abercrombie v. Byrne-Hill Co., Ltd.*, 6th Dist. No. L-05-1010, 2005-Ohio-5249, ¶ 12. This rule has been dubbed by some courts as Ohio's "no-duty winter rule." See *Bowen v. Columbus Airport Ltd. Partnership*, 10th Dist. No.07AP-108, 2008-Ohio-763, ¶ 11.[2]

{¶ 9} The underlying rationale for the no-duty winter rule "is that everyone is assumed to appreciate the risks associated with natural accumulations of ice and snow and, therefore, everyone is responsible to protect himself or herself against the inherent risks presented by natural accumulations of ice and snow." *Brinkman*, 68 Ohio St.3d at 84. This is a more expansive rationale than forms the basis for the open-and-obvious doctrine. "The no-duty winter rule assumes everyone will appreciate and protect themselves against risks associated with natural accumulations of ice and snow; the open and obvious doctrine assumes only those who could observe and appreciate the danger will protect themselves against it." *Sherlock v. Shelly Co.*, supra, at ¶ 22. Thus, the issue of which party has superior knowledge or a better appreciation of a natural accumulation

[2]The rule applies "even where a city ordinance requires the landowner to keep the sidewalks free of ice and snow." *Brinkman*, supra, 68 Ohio St.3d at 85. See, also, *Lopatkovich v. Tiffin* (1986), 28 Ohio St.3d 204, 206-207, *Millsap v. Lucas Cty.*, 6th Dist. No. L-07-1381, 2008-Ohio-2083, ¶ 29. Thus, appellants' contention that the snow removal provisions of Norwalk Codified Ordinances 905.02 and 905.03 required appellees to keep their entrance areas clear of ice and snow does nothing to alter the essential inquiry in this case.

of ice and snow on the premises is generally irrelevant, since the invitee is charged with an appreciation of those risks as a matter of law. *Brinkman*, 68 Ohio St.3d at 84.

{¶ 10} There are two recognized exceptions to the no-duty winter rule. One exception is for injuries that result from an unnatural accumulation of ice or snow. This exception applies "where the owner of the premises is actively negligent in permitting or creating an unnatural accumulation of ice and snow." *Bowen*, supra, 2008-Ohio-763, ¶ 13. We need not address this exception, since appellants do not dispute that Mr. Miller's injuries were caused by a natural accumulation of ice.

{¶ 11} The other exception, which is referenced in appellants' reply brief, applies when an owner or occupier of business premises is shown to have actual or implied notice that "the natural accumulation of snow and ice on his premises has created there a condition substantially more dangerous to his business invitees than they should have anticipated by reason of their knowledge of conditions prevailing generally in the area." *Debie v. Cochran Pharmacy-Berwick, Inc*. (1967), 11 Ohio St.2d 38, paragraph one of the syllabus. See, also, *Jackson v. J-F Ents., Inc*., 6th Dist. No. L-10-1285, 2011-Ohio-1543, ¶ 18; *Moore v. Kroger Co*., 10th Dist. No. 10AP-431, 2010-Ohio-5721, ¶ 8; *Sanfilippo v. Village Green Mgt. Co*., 12th Dist. No. CA2010-04-027, 2010-Ohio-4211, ¶ 14; *Kaeppner v. Leading Mgt., Inc.*, 10th Dist. No. 05AP-1324, 2006-Ohio-3588, ¶ 11.

{¶ 12} This exception was first applied by the Supreme Court of Ohio in *Mikula v. Tailors* (1970), 24 Ohio St.2d 48. In that case, a business invitee brought suit against the owner of a parking lot for injuries sustained when she stepped into a hole in the parking

lot that was covered with snow. In discussing the propriety of a jury charge in regard to the "improper accumulation" exception, the court found that "a natural accumulation of snow which fills or covers [a deep] hole [in the surface of a parking lot] is a condition substantially more dangerous than that normally associated with snow" and that a business invitee "is not bound to anticipate that condition as an ordinary hazard resulting from the snow." Id. at 57.

{¶ 13} Courts have since limited this exception to cases in which a natural accumulation of ice or snow conceals another danger. Thus, in *Crossman v. Smith Clinic*, 3d Dist. No. 9-10-10, 2010-Ohio-3552, ¶ 15, the Third District Court of Appeals found that "the cases referencing an 'improper accumulation' are instances where a natural accumulation of snow fall hid or covered a hazardous condition about which the property owner knew or should have known." Similarly, the federal district court in *Jeffries v. United States* (Mar. 30, 2010), N.D.Ohio No. 3:09CV00430, found that "a substantially more dangerous condition exists when the ice and snow conceal what otherwise would have been considered an open and obvious danger. * * * Ohio courts have found such conditions only given significant concealed dangers." (Citations omitted.) The Tenth District, in *Cooper v. Valvoline Instant Oil Change*, 10th Dist. No. 07AP-392, 2007-Ohio-5930, ¶ 24, found that naturally accumulated ice on a sidewalk did not create a condition substantially more dangerous than normally associated with ice and snow because, unlike in *Mikula*, the accumulation "did not conceal a defect or hazard that an invitee would not anticipate from her knowledge of conditions prevailing in the area."

{¶ 14} In this case, there is no evidence that the ice upon which Mr. Miller fell concealed another hazard or danger. The hazard here was simply the slippery nature of the naturally accumulated ice on appellees' parking lot. Black ice, moreover, is not a condition substantially more dangerous than is normally associated with freezing rain. The formation of black ice on pavement and other outdoor surfaces is an ordinary and expected consequence of winter precipitation and should be anticipated by a business invitee who observes on a rainy February afternoon that ice is starting to form on the hood of his vehicle.

{¶ 15} In *Karcher v. Zeisler-Morgan Properties , Ltd*. (Dec. 26, 1999), 8th Dist. No. 70199, the Eighth District Court of Appeals explained:

{¶ 16} "Ohio winters pose such well recognized dangers [as parking lots extensively covered by black ice]. Wet surfaces freeze and form ice. The record does not support a conclusion that the Lot posed a substantially more dangerous condition than a reasonable person could appreciate. Indeed, it is well within the common experience of most people to appreciate the inherent risk in traversing a wet parking lot on a cold winter evening." See, also, *Simpson v. Concord United Methodist Church*, 2d Dist. No. 20382, 2005-Ohio-4534, ¶ 27 (finding in part that black ice, although difficult to see, is a condition "commonly associated with accumulations of snow and ice," thus presenting "no risk of injury substantially more dangerous than the risk presented by snow and ice."); *Burton v. CFA Med. Bldg. and Garage* (June 17, 1999), 8th Dist. No. 74335 (finding that black ice conditions resulting from rain in cold weather "are sufficiently

well known in this region so that invitees may reasonably be expected to recognize and guard against them.").

{¶ 17} Since there is no dispute that Mr. Miller slipped on a natural accumulation of ice in appellees' parking lot, and no recognized exception to the no-duty winter rule is applicable in this case, we conclude that the trial court properly granted summary judgment in favor of appellees. Accordingly, appellants' sole assignment of error is not well-taken.

{¶ 18} The judgment of the Huron County Court of Common Pleas is affirmed. Appellants are liable for 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE