[Cite as *Moore v. Kroger Co.*, 2010-Ohio-5721.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Theodora Moore et al.,	:	
Plaintiffs-Appellants,	:	
		No. 10AP-431
v.	:	(C.P.C. No. 09CVC 2 1801)
The Kroger Co. et al,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 23, 2010

Michael D. Christensen Law Offices, LLC, and *Chandra L. Higgins*, for appellants.

Weston Hurd LLP, Kevin R. Bush, and *Steven G. Carlino*, for appellee The Kroger Company.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Theodora Moore (referred to individually as "appellant") and James Moore, plaintiffs-appellants, appeal from a judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by Kroger Co. and Kroger Store 315 (collectively referred to as "Kroger"), defendants-appellees.

{¶2} On February 7, 2007, at approximately 7:30 p.m., appellant visited the Kroger grocery store located at 2000 East Main Street, Columbus, Ohio. As she

approached the entrance to the store, she was injured when she slipped and fell on ice and snow covering a speed bump. A Kroger employee completed an incident report regarding appellant's fall.

{¶3} On February 6, 2009, appellants filed an action against Kroger, alleging negligence. On June 3, 2009, Kroger filed a motion for summary judgment, in which it argued that it had no duty to protect appellant from the natural accumulation of ice and snow. On October 21, 2009, appellants filed a motion to compel discovery after Kroger failed to provide a copy of the incident report pursuant to a discovery request. Without ruling on the motion to compel discovery, on April 8, 2010, the trial court issued a judgment granting Kroger's motion for summary judgment. Appellants appeal the judgment of the trial court, asserting the following assignments of error:

> I. The trial court erred by granting summary judgment in favor of Defendants when the record presents genuine issues of material fact that demand resolution by the trier of fact.
>
> II. The trial court erred when it impliedly denied Plaintiff's Motion to Compel the Incident Report.

{¶4} Appellants argue in their first assignment of error that the trial court erred in granting summary judgment to Kroger. Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. Appellate review of a lower court's entry of summary

judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of genuine issues of material fact as to the essential elements of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. Id. Once this burden is satisfied, the non-moving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id. The non-moving party may not rest upon the allegations or denials in the pleadings, but must affirmatively demonstrate the existence of a genuine issue of material fact to prevent the granting of a motion for summary judgment. Civ.R. 56(C); *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶5} In an action for negligence, a plaintiff must prove (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. The status of the person who enters upon the land of another defines the scope of legal duty that the owner owes the entrant. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137.

{¶6} Here, the parties agree that appellant was a business invitee. A business invitee is one who enters another's land by invitation for a purpose that is beneficial to the owner. Id. With respect to business invitees, an owner's duty is to keep the premises in reasonably safe condition and warn of dangers that are known to the owner. *Eicher v.*

U.S. Steel Corp. (1987), 32 Ohio St.3d 248. Liability only attaches when an owner has superior knowledge of the particular danger which caused the injury, as an invitee may not reasonably be expected to protect himself from a risk he cannot fully appreciate. *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 210.

{¶7} Furthermore, a business owner's duty to business invitees does not extend to hazards from natural accumulations of ice and snow. *Tyrrell v. Investment Assoc., Inc.* (1984), 16 Ohio App.3d 47, 49. "[I]t is well established that an owner or occupier of land ordinarily owes no duty to business invitees to remove natural accumulations of ice and snow from the private sidewalks on the premises, or to warn the invitee of the dangers associated with such natural accumulations of ice and snow." *Brinkman v. Ross*, 68 Ohio St.3d 82, 83, 1993-Ohio-72. Thus, a premises owner who maintains a private motor vehicle parking area, for the accommodation of those he serves in a professional or business way, is under no legal obligation to remove a natural accumulation of snow and ice. *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, paragraph one of the syllabus.

{¶8} However, there are two exceptions to the general "no-duty" snow rule. The first exception is when the land owner or occupier is shown to have actual or implied notice that the natural accumulation of snow and ice on his premises has created 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. In order to be liable, the land owner or occupier must have superior knowledge of the existing danger. *LaCourse* at 210.

{¶9} The second exception to the general rule is when the owner or occupier of land is actively negligent in permitting or causing an unnatural accumulation of ice or snow. *Lopatkovich v. Tiffin* (1986), 28 Ohio St.3d 204, 207. Essentially, a natural accumulation of ice and snow is one which accumulates as a result of an act of nature, whereas an unnatural accumulation is one that results from an act of a person. *Porter v. Miller* (1983), 13 Ohio App.3d 93, 95. Thus, a property owner may be liable for the unnatural accumulation of ice and snow where there is evidence of an intervening act by that owner which perpetuates or aggravates the pre-existing, hazardous presence of ice and snow. Id.

{¶10} We must first determine the threshold issue of whether the ice and snow upon which appellant slipped was a natural or unnatural accumulation thereof. A natural accumulation of ice and snow is one that accumulates as a result of an act of nature or meteorological forces of nature. *Coletta v. Univ. of Akron* (1988), 49 Ohio App.3d 35, 37 (act of nature); *Porter* at 95 (meteorological forces of nature). An "unnatural accumulation" refers to causes and factors other than winter weather's low temperatures, strong winds, drifting snow, and natural thaw and freeze cycles. *Mubarak v. Giant Eagle, Inc.*, 8th Dist. No. 84179, 2004-Ohio-6011, ¶18-19. Thus, an unnatural accumulation is caused by some human intervention or some condition that caused the ice to accumulate improperly. *Community Ins. Co. v. McDonald's Restaurants of Ohio, Inc.* (Dec. 11, 1998), 2d Dist. No. 17051. Furthermore, salting, shoveling or plowing does not in and of itself transform a natural accumulation to an unnatural one without some negligence on the part of the owner or his or her agents. Id. Thus, an "accumulation of ice and snow is not rendered 'unnatural' by the landowner's removal of the top layer of snow by plowing,

exposing the accumulated ice and snow underneath." *Coletta* at syllabus. Subsequent accumulations after the initial plowing are not unnatural or is melted run-off from snow piled onto a sloped area which runs down and re-freezes, as this must be anticipated by all who live in a snow belt area. *Hoenigman v. McDonald's Corp.* (Jan. 11, 1990), 8th Dist. No. 56010.

{¶11} In the present case, appellants present arguments premised upon both that the snow and ice were natural accumulations and that they were unnatural accumulations. The trial court found the accumulations were natural, and Kroger argues the same. Kroger asserts that appellant's own testimony established that the snow and ice were natural accumulations caused by typical winter weather in Ohio. Appellant counters that the snow and ice were unnatural accumulations based upon the affidavit of her expert, Dr. Oname Scott-Emaukpor, who opined that (1) the arc and length of the speed bump created an angular slope with the level ground, causing a dangerous condition when snow and ice accumulated on it; (2) the yellow paint on the speed bump acted as a sealant against the usual absorption of ice and snow by the asphalt, causing the ice and snow to accumulate much faster and melt much slower; and (3) excess snow and ice accumulated on the speed bump due to the impact between the tires of the oncoming vehicles and the speed bump, causing snow and ice built up on the undercarriage of vehicles to dislodge.

{¶12} The pertinent evidence in the record was as follows. Appellant testified in her deposition that it was dark outside at the time of the incident. Appellant said it had snowed earlier in the day. She said she had stepped about four feet from her husband's vehicle near the front entrance of the store, when she slipped and fell. She fell "right next

to" the speed bump, which was "pretty well covered" in snow. Appellant said it was not "really visible" that there was a speed bump. She said it was "more just like hunks of ice, because there was a lot of snow in that accumulation area." She did not recall whether the parking lot and the area in front of the store had fresh snow that had not been plowed. Appellant said she never looked back to see what she had actually tripped on. She testified she fell "in that area where they got that speed bump." She later went back and saw that traffic driving over the speed bump caused more snow to build up in the area, and she determined that it was the snow and ice that was piled up around the speed bump that caused her to fall.

{¶13} Paul Walker, the manager at the Kroger store in question, testified in his deposition that there was nothing unusual or unnatural about how snow collected in the area of the speed bump. He said when he arrived at the store after appellant's fall, he did not see any snow or ice chunks around or on the speed bump. He further testified that the size of the speed bump was "pretty flat." He did not remember there being a problem that snow or ice accumulated around the edges of the speed bump. He also said that he had never witnessed snow falling off the undercarriages of cars as they drove over the speed bump, and Kroger did not go out and shovel snow off cars in the parking lot or prevent cars with snow on them from driving in the parking lot.

{¶14} Appellant and her husband also submitted affidavits in which they averred that the speed bumps in front of the store had a buildup of snow and ice around the edges that surrounded and concealed the speed bump.

{¶15} After reviewing the above testimony of appellant and Walker, as well as the affidavits of Scott-Emaukpor and the other evidence in the record, we find there exists no

genuine issue that the snow and ice upon which appellant fell were natural accumulations. Assuming there was snow and ice around the speed bump, as appellant and her husband contend, the testimonies of appellant and Walker present nothing to suggest that the snow and ice were caused by anything other than the natural characteristics and tendencies of snow and ice during the winter season. Appellant said the area around the speed bump had hunks of ice and a lot of snow accumulation. She also said she later witnessed snow collecting in the area from cars driving through it. Walker testified that there was nothing unusual about how snow collects in the area of the speed bump and there was never any problem with snow accumulating around the speed bump. The testimony from these two sources suggests that the snow and ice around the area of the speed bump was caused by falling snow and then either staying in its original place of rest or being displaced due to contact with foot traffic and vehicular traffic. There was no condition here that caused the snow and ice to accumulate improperly. Snow falling from the sky that is thereafter displaced by usual and normal foot and vehicular traffic does not bear a significant enough fingerprint of human intervention to render it an unnatural accumulation. That snow and ice may collect in areas of a parking lot and sidewalk because it has been shifted underfoot or under a tire must be anticipated by those who live in a region frequented by snow, ice, and low temperatures. See *Baldwin v. L & K Motels, Inc.* (Dec. 30, 1994), 4th Dist. No. 94CA06 (natural accumulation of snow in a parking lot is not transformed into an unnatural accumulation merely because it was formed by the vehicular traffic, given the compacting of snow is a common occurrence in Ohio against which a reasonable person would protect herself against), citing *Hoenigman* (an alteration of the natural accumulation of ice and snow by cars travelling on the

driveway does not render the natural accumulation of ice and snow an artificial condition), and *Owens v. Kemp* (Sept. 5, 1986), 6th Dist. No. L-85-341 (the status of snow and ice as naturally accumulated on a driveway was not altered by the imprint of tire tracks). See also *Cox v. Kroger Co.* (June 24, 1981), 1st Dist. No. C-800523 (a natural accumulation of ice and snow means nothing more than the elements produced it; it does not become unnatural because it has been packed down by footsteps or made slick by the vehicular traffic). As the court in *Hoenigman* explained, "[s]lush is a natural phenomenon of changing weather conditions. The fact that vehicles contributed to the movement of the slush does not create a duty on the part of the property owner to remove it." The same sentiment was echoed by the court in *Brinkman v. Moore* (Aug. 31, 1988), 3d Dist. No. 12-87-4:

> It is equally true that life continues after a snow fall. The normal and usual activities of man causes foot prints and since the automobile, creates tracks and ruts of ice in accumulated snow. Such activities do not increase the depth of the snow nor heap or pile it up in an unnatural manner. With the frequency of travel experienced today, it is not practical or necessary to exclude footprints or ruts caused by vehicles from the law applicable to the effects of a natural accumulation of snow. They are the natural, foreseeable, and visible result of the presence of snow and in no sense may be construed as an unnatural accumulation as against one who had no part in its creation or normal change.
>
> Prints, tracks and ruts in the snow are as natural as the change of white crystals into water and ice. Neither change is unnatural or an accumulation within the meaning of the rule of non-liability for the gifts of nature.

{¶16} Furthermore, that the natural accumulation of snow displaced by common foot and vehicular traffic was then deposited in another area bearing no uncommon or extraordinary characteristics does not transmute the snow into an unnatural

accumulation. The points raised by appellant's expert, Scott-Emaukpor, are of no consequence to the issues at hand. Snow that is moved against and on top of a standard speed bump by foot and vehicular traffic is normal and must be anticipated by pedestrians. That a speed bump is arched and not level to the ground is an inherent quality of a speed bump, as is its customary location near the entrance of a store. Both of these characteristics are easily anticipated by the general public. Likewise, paint covering a speed bump is a standard attribute of speed bumps to assure the safety of both pedestrian and vehicle traffic. Although it might be true that the paint slows down the rate at which snow upon it melts, the use of the standard paint on a typical speed bump cannot be said to be extraordinary or improper in and of itself. See, e.g., *Community Ins. Co.* (even if a brick walkway is more susceptible to ice accumulations than concrete or blacktop, the accumulations would not be improper or unnatural because a pedestrian could reasonably anticipate any dangerous condition). There was no testimony that the height or length of the speed bump, or the paint used to mark the speed bump, were unusual or outside the normal realm for such things. In fact, Walker testified that the speed bump in question was flatter than the usual speed bump.

{¶17} Clearly, not only virgin snow is considered a natural accumulation by the law. Snow and ice move and accumulate regularly and without any human intent or negligent human intervention. Snow that is stepped on or driven upon is displaced and must move somewhere else. The law must draw a line somewhere as to what degree of human interaction with snow is normal so as not to render all snow that has been touched or altered by a person an unnatural accumulation. Furthermore, many man-made objects and man-placed objects may alter the landscape and how the snow accumulates thereon.

It has never been the law that merely because snow accumulated on a man-made surface, a question of fact exists whether the accumulation was unnatural. See, e.g., *Debie* at 39 (sidewalk); *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 46 (steps); *DeAmiches v. Popczun* (1973), 35 Ohio St.2d 180, 181 (driveway). Grass is planted where there was once dirt, asphalt is laid where there was once grass, and steps are placed where there were once none. All of these man-made and man-placed objects change the way snow collects, blows, and melts. It is only when these objects or their placement is unreasonable, improper or exceptionally unusual that negligence may arise. Here, there was no evidence that the speed bump was abnormal in its characteristics or caused any snow accumulations that are not expected to be encountered under these circumstances. Therefore, we agree with the trial court that the snow that accumulated around the speed bump was a natural accumulation.

{¶18} Appellant argues that, if the snow is deemed a natural accumulation, Kroger had actual and implied notice that the natural accumulation over and around the speed bump created a condition substantially more dangerous than she should have anticipated. In support, appellant relies on two cases, *Mikula v. Tailors* (1970), 24 Ohio St.2d 48, and *Koss v. Cleveland Holding Corp.* (July 10, 1975), 8th Dist. No. 34111. In *Mikula*, a woman fell when she stepped into a seven-inch hole covered in snow while traversing a snow covered parking lot. The Supreme Court of Ohio found that "a natural accumulation of snow which fills or covers [a deep] hole [in a parking lot] is a condition substantially more dangerous than that normally associated with snow." Id. at 57. Moreover, the court held that an invitee is not bound to anticipate a covered hole as an ordinary hazard resulting from the snow. Id. The Supreme Court held that "[w]here an

owner in control of a business parking area has notice, actual or constructive, that a natural accumulation of snow thereon has, by reason of covering a hole in the surface thereof, created a condition substantially more dangerous to a business invitee than that normally associated with snow, such owner's failure to correct the condition constitutes actionable negligence." Id. at paragraph five of the syllabus.

{¶19} In *Koss*, a woman was walking through a parking lot toward a sporting venue and observed a pile of snow, but was unaware that it covered concrete parking bumpers. The woman stepped into the snow and fell when her foot struck the parking bumper. The snow covering the bumper might have been placed there by plowing or might have been a natural accumulation. The appellate court reversed the trial court's directed verdict in favor of the defendant and remanded the matter for trial, finding that reasonable minds could find either (1) the accumulation was not natural, but was the result of the parking area having been plowed, and the landowner was actively negligent in concealing the bumpers; or (2) the accumulation was natural, but was an improper accumulation, thereby creating a condition substantially more dangerous than that normally associated with snow.

{¶20} Appellant argues the facts in *Mikula* and *Koss* are analogous to those in the present case. We disagree and find they each involve different facts that distinguish them from the present circumstances. In *Mikula*, the court found that the plaintiff could not anticipate a hole as an "ordinary" hazard resulting from the snow. To the contrary, an invitee should anticipate a speed bump may be in a parking lot near a store entrance. A speed bump buried by a natural accumulation of snow is an "ordinary" condition, while a deep hole in a parking lot is not "ordinary." Also, a speed bump is not a "hazard" or

"defect," as the court described the hole at issue in *Mikula*. Furthermore, appellant in the present case knew there were speed bumps in the vicinity and had been shopping at that same store since she was a child; therefore, she should have anticipated the danger that may be associated with the speed bumps and displaced snow in the parking lot. There was no evidence that the plaintiff in *Mikula* had prior knowledge of the hole so that she could have reasonably been expected to protect herself from the danger. For these reasons, we find *Mikula* inapposite.

{¶21} With regard to *Koss*, we also find it distinguishable. As the trial court found here, there was no evidence in *Koss* that the plaintiff had any prior knowledge of the snow covered parking bumpers she tripped on. To the contrary, in the present case, appellant knew there were speed bumps in front of the store and had been shopping at the same store since she was a child. Appellant argues that this is not a valid distinction because her prior knowledge of the speed bumps does not mean she had a photographic memory of the layout of the parking lot or the exact location of the speed bumps. However, having a photographic memory of the parking lot and exact location of the speed bumps is not the proper standard. What is relevant is whether the natural accumulation of snow on Kroger's premises created a condition substantially more dangerous to appellant than she should have anticipated by reason of her knowledge of conditions prevailing generally in the area. See *Debie* at paragraph one of the syllabus. Appellant's prior knowledge of the general location of the speed bumps is relevant to this determination. See, e.g., *Murphy v. McDonald's Restaurants of Ohio, Inc.*, 2d Dist. No. 2010 CA 4, 2010-Ohio-4761 (noting prior to his fall on snow and ice, the plaintiff had been to the restaurant many times before, approximately three times per week). Appellant should have anticipated any

danger caused by the speed bump based upon her prior knowledge of its existence and the inclement weather conditions on the day in question. Given this determination, the actual and implied notice portion of this exception to the natural accumulation rule is not applicable. For all the above reasons, we find any snow and ice around and atop the speed bump upon which appellant slipped was a natural accumulation that was not substantially more dangerous than appellant should have anticipated. Therefore, appellants' first assignment of error is overruled.

{¶22} Appellants argue in their second assignment of error that the trial court erred when it impliedly denied their motion to compel discovery with regard to the Kroger incident report by not ruling on it before granting Kroger summary judgment. Appellants contend that they requested the incident report in its discovery request, but Kroger refused to produce it based upon claims that it was work product and subject to attorney-client privilege. Civ.R. 56(F) provides:

> Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

{¶23} The remedy for a party that must respond to a motion for summary judgment prior to completion of adequate discovery is to file a motion, pursuant to Civ.R. 56(F), seeking to have the trial court stay ruling on the motion pending completion of the required discovery. *Morantz v. Ortiz*, 10th Dist. No. 07AP-597, 2008-Ohio-1046. When a party fails to file a motion, pursuant to Civ.R. 56(F), that party has failed to preserve his rights on appeal, and it is not error for the trial court to rule on the motion for summary

judgment. *Taylor v. XRG, Inc.*, 10th Dist. No. 06AP-839, 2007-Ohio-3209. Even if a party files a motion to compel discovery, a trial court does not err when it rules on the motion for summary judgment without ruling on the motion to compel when the party has failed to file a Civ.R. 56(F) motion. *Wells Fargo Bank, N.A. v. Sessley*, 10th Dist. No. 09AP-178, 2010-Ohio-2902. Here, because appellants failed to file a Civ.R. 56(F) motion asking the trial court to delay ruling on Kroger's motion for summary judgment pending completion of the outstanding discovery requests, appellants cannot argue on appeal that the trial court erred by ruling on the motion for summary judgment when it did. Therefore, appellants' second assignment of error is overruled.

{¶24} Accordingly, appellants' first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.

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