[Cite as *Murphy v. McDonald's Restaurants of Ohio, Inc.*, 2010-Ohio-4761.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

ELIJAH H. MURPHY :

Plaintiff-Appellant : C.A. CASE NO. 2010 CA 4

v. : T.C. NO. 09CV223

McDONALD'S RESTAURANTS OF OHIO, INC. : (Civil appeal from Common Pleas Court)

Defendant-Appellee :

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OPINION

Rendered on the 1st day of October, 2010.

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FROELICH, J.

{¶ 1} Elijah H. Murphy appeals from a judgment of the Clark County Court of Common Pleas, which granted summary judgment to McDonald's Restaurants of Ohio, Inc., on Murphy's "slip and fall" claim against it. For the following reasons, the trial court's

judgment will be affirmed.

I

{¶ 2} At approximately 5:30 a.m. on the morning of February 22, 2007, Elijah Murphy drove to the McDonald's restaurant at 2133 South Dayton Lakeview Road (State Route 235) in New Carlisle, Ohio, to meet several friends for coffee and conversation. Murphy parked his vehicle in the parking area on the north side of the restaurant. The front of his vehicle faced a concrete median, approximately 4 inches high by 30 inches wide, which divided the parking area from the restaurant's drive-thru lane.

{¶ 3} In the preceding days, there had been "a lot of snow." (Murphy Dep., p.15.) When Murphy arrived at the McDonald's on February 22, the median was covered with snow that had been plowed from the drive-thru lane and parking area. In addition, as Murphy states in his appellate brief, "the piled up snow on the median had already been subjected to a thawing and re-freeze cycle because it was cold enough, in the preceding hours, for anything that might have melted, to refreeze."

{¶ 4} To enter the restaurant, Murphy traversed the snow-covered median, walked through the drive-thru lane, stepped onto the sidewalk along the building, and entered the doors at the vestibule on the north side of the restaurant. Upon leaving the restaurant approximately an hour later, Murphy again crossed the drive-thru lane and the median. As he stepped down from the median onto the asphalt pavement next to his vehicle, Murphy's foot slipped on the icy pavement and he fell. Murphy's left foot ended up underneath the front wheel of a red pick-up truck, which had parked in the neighboring parking space while Murphy was inside the McDonald's restaurant. Murphy suffered a severe left ankle

dislocation that required surgery and extensive follow-up medical treatment.

{¶ 5} On February 19, 2009, Murphy brought a negligence action against McDonald's, alleging that McDonald's had negligently failed to provide a safe means of egress; had created or maintained an unreasonably dangerous and hazardous condition as a result of its plowing activities, which in turn had caused the naturally accumulated snow and ice to be more dangerous than would normally be encountered; and had failed to reasonably inspect, remove, or warn him of the existence of this dangerous condition. Murphy alleged that, as a result of McDonald's negligence, he has incurred medical expenses, experienced great pain and suffering, and lost the enjoyment of usual and ordinary life activities. McDonald's filed an Answer, denying liability.

{¶ 6} After several depositions were taken, McDonald's moved for summary judgment on Murphy's claims. McDonald's argued that it did not create an unnatural accumulation of snow and ice on its property and that the danger posed by the snow and ice was open and obvious. Murphy opposed the motion, arguing that McDonald's "plowed snow in a negligent manner, *i.e.* on a graded incline/slope, which due to the thaw and freeze cycle created an unnatural accumulation of ice." Murphy further argued that the open and obvious doctrine did not apply, because the dangerous accumulation of snow and ice was located in the only means of ingress and egress to the restaurant.

{¶ 7} On December 21, 2009, the trial court granted McDonald's motion for summary judgment, adopting the arguments in McDonald's motion. The court held:

{¶ 8} "*** Mr. Murphy cannot demonstrate that McDonald's created an unnatural condition through its plowing activities. Further, even if Mr. Murphy somehow could

demonstrate that he fell on an unnatural accumulation, Mr. Murphy was clearly aware of the ice and snow on the premises, but failed to take reasonable precautions to avoid them. Mr. Murphy possessed specific knowledge of the conditions of the parking lot that morning because he observed them as he entered the restaurant. The decision to walk across, not around the median was Mr. Murphy's alone. As such, the open and obvious doctrine bars him from recovery against McDonald's for any alleged negligence in the way they removed the ice and snow from the parking lot.

{¶ 9} "Snow and ice are part of wintertime life in Ohio. It is well-established in Ohio that the dangers from natural accumulation of ice and snow are obvious enough that any landowner may reasonably expect individuals on the premises to protect themselves against such conditions. Therefore, an owner or occupier owes no duty, even to a business invitee, to remove natural accumulations of ice or snow. Therefore, McDonald's is entitled to judgment in its favor as a matter of law. ***"

{¶ 10} Murphy appeals, raising one assignment of error.

II

{¶ 11} In his sole assignment of error, Murphy claims that the trial court erred in granting McDonald's motion for summary judgment.

{¶ 12} Summary judgment should be granted only if no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. Civ.R. 56; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. An appellate court reviews summary judgments de novo, meaning that we review such judgments

independently and without deference to the trial court's determinations. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588.

{¶ 13} Upon a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue of material fact exists for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings. Id.; Civ.R. 56(E). Rather, the burden then shifts to the non-moving party to respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts which show that there is a genuine issue of material fact for trial. Id. Throughout, the evidence must be construed in favor of the non-moving party. Id.

{¶ 14} "[I]n order to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom." *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285. 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 Reg. Transit Auth.,* 75 Ohio St.3d 312, 315, 1996-Ohio-137.

{¶ 15} The parties agree that Murphy 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. *James v. Cincinnati,* Hamilton App. No. C-070367, 2008-Ohio-2708, ¶24, citing *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." *Uhl v. Thomas,* Butler App. No. CA2008-06-131, ¶13, citing *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 210.

{¶ 16} "But if a danger is open and obvious, a property 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, ¶14. To be open and obvious, a hazard must not be concealed and must be discoverable by ordinary inspection. *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51. The relevant issue is not whether an individual observes the condition, but whether the condition is capable of being observed. *Lydic v. Lowe's Cos., Inc.,* Franklin App. No. 01AP-1432, 2002-Ohio-5001, ¶10." *Larrick v. J.B.T., Ltd.*, Montgomery App. No. 21692, 2007-Ohio-1509, ¶11.

{¶ 17} Further, in Ohio, a business owner has no duty to remove natural accumulations of ice and snow. *Lopatkovich v. Tiffin* (1986), 28 Ohio St.3d 204, 206-207; *Larrick* at ¶11. The Supreme Court of Ohio has held that "[t]he dangers from natural accumulations of ice and snow are ordinarily so obvious and apparent that an occupier of premises may reasonably expect that a business invitee on his premises will discover those dangers and protect himself against them." *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraph two of the syllabus.

{¶ 18} A business owner may have a duty to remove "unnatural" or "improper" accumulations of snow and ice, which exist when the accumulation creates a hazard "substantially more dangerous to a business invitee than that normally associated with snow." *Community Ins. Co. v. McDonalds Restaurants of*

Ohio, Inc. (Dec. 11, 1998), Montgomery App. Nos. 17051, 17053. However, whether ice was a natural accumulation is an issue bearing on proximate cause. *Scholz v. Revco Discount Drug Center, Inc.*, Montgomery App. No. 20825, 2005-Ohio-5916, ¶16. Regardless of whether the accumulation was natural or unnatural, if the hazard is open and obvious, no duty of care exists. See id.; *Armstrong*, supra (clarifying that the open and obvious doctrine is concerned with the landowner's duty, not with causation).

{¶ 19} Murphy argues that the manner in which McDonald's instructed that its premises be plowed was an intervening negligent act which, combined with other circumstances, created an "improper" accumulation of ice that was substantially more dangerous than that normally associated with natural run-off from melting and refreezing snow. Murphy contends that McDonald's should have known that there would be a greater flow of water near where Murphy parked due to the presence of a surface drain in the parking space next to where Murphy parked, a curb cut-out for water to drain from the drive-thru lane, and a greater grade in the parking area near the drain. Murphy argues that the snow could have been deposited on the periphery of the property where, Murphy argues, it would pose "virtually no hazard for the vast majority of its customers attempting to ingress/egress out of their restaurant."

{¶ 20} We have held that snow placed on elevated islands causing a natural runoff of water that later froze into ice was not rendered an unnatural accumulation. *McDonald v. Koger*, 150 Ohio App.3d 191, 2002-Ohio-6195. In *McDonald*, we approved of the holding in *Hoenigman v. McDonald's Corp.* (Jan. 11, 1990),

Cuyahoga App. No. 56010, which held that the defendant-restaurant should have been granted a directed verdict on a claim that the plaintiff had fallen on ice near an island on which snow had been plowed. The court stated:

{¶ 21} "*** [T]he existence of snow deposited on an elevated island situated in defendants' parking lot/drive-through does not constitute negligence. After snow is removed from the surface of the parking lot, it must be disposed of. Snow must be placed somewhere. In this case, that place was the elevated island in the parking lot. This court has stated:

{¶ 22} "'The accumulation of ice and snow is a condition created by the elements, a natural hazard faced by anyone who would venture about the streets while such conditions exist. *** Snow cannot be removed from the sidewalks without being put somewhere. *A certain natural run-off of water is to be expected.* Water freezes if the temperature drops too low. The removal of snow is not an act of negligence, *per se,* but an act of consideration for the safety of the public, generally, and of one's customers, in particular ***. To create liability it must appear that negligence intervened, that the snow was disposed of in a negligent manner, or that the removal was negligently done, but it also must appear that the resulting risk of injury was substantially increased or a violation of the duty of due care, if not proximate cause, is not established.'" (Emphasis in original). See, also, *McGowen v. Crossroads Land Co.*, Summit App. No. 22222, 2005-Ohio-598 (affirming summary judgment where plaintiff slipped on ice resulting from run-off from snow piled on top of concrete wheel stops, which subsequently refroze in a shallow depression in the parking lot).

{¶ 23} In *Simpson v. Concord United Methodist Church*, Montgomery App. No. 20382, 2005-Ohio-4534, the plaintiff brought suit against the church which housed her son's daycare facility after she slipped on black ice that she did not see on the parking lot and fell to the ground, suffering head injuries. The plaintiff argued that the church owed her a duty to protect her from the black ice, because (1) black ice is very difficult to see, (2) the slope of the driveway made it more hazardous to negotiate than one which is flat, and (3) the plowing that a contractor had performed increased the risk of unnatural run-off and refreezing. We rejected the plaintiff's arguments, stating:

{¶ 24} "*** [A]s subsidiary conditions which commonly occur along with natural accumulation of snow and ice, invitees are likewise charged with knowledge of the hazards those conditions involve and the risks of injury they present. *Community Insurance Co. v. McDonald's Restaurants of Ohio, Inc.* (Dec. 11, 1998), Montgomery App. Nos. 17051, 17053. Unlike the concealed pot hole in *Mikula [v. Salvin Tailors* (1970), 24 Ohio St.2d 48], reasonable minds could not find that Concord was in any better position to know of these conditions, imposing a duty on Concord to cure them or warn of their existence. Further, as conditions commonly associated with accumulations of snow and ice, they present no risk of injury substantially more dangerous that the risk presented by snow and ice. *Hoenigman v. McDonald's Corp* (Jan. 11, 1990), Cuyahoga App. No. 56010." *Simpson* at ¶27.

{¶ 25} Upon review of the record before us, we find no evidence that the placement of the snow on the McDonald's median created an increased hazard, i.e., an "unnatural" accumulation of ice and, regardless, we find no genuine issue of

material fact that the presence of the ice where Murphy fell was an open and obvious hazard.

{¶ 26} Murphy had been to this McDonald's restaurant many times before; prior to his fall, he went to that restaurant approximately three times per week. On the day of his fall, it was the middle of winter, and there had been "lots of snow" in the days preceding February 22, 2007. Murphy observed that the restaurant had plowed the drive-thru lane and that the snow had been piled up on the concrete median between the parking area and the drive-thru. Murphy acknowledges on appeal that the snow had been subjected to a freeze/thaw cycle, and he testified during his deposition that the temperature was below freezing when he arrived at the McDonald's restaurant. The parties dispute whether McDonald's had shoveled a path on the snow-covered median or whether Murphy walked across packed-down snow. However, Murphy acknowledged that he fell when he stepped off of the snow-covered median onto the icy pavement; he did not fall on the median.

{¶ 27} Murphy argues that the run-off from the median flowed toward the drain in the parking space located next to where he had parked and constituted an unnatural accumulation. As stated above, when snow is plowed, it must be placed somewhere. We find nothing inherently negligent about placing the plowed snow on the median between the parking area and the drive-thru, and there is no evidence that the placement of the snow on the median – and the resulting ice from the thawing and refreezing of the snow – made the icy pavement more dangerous than icy pavement typically is. In other words, there is no evidence that

McDonald's had done anything that would have made Murphy unable to observe the ice and to protect himself from the hazard that ice on asphalt naturally presents. Accordingly, Murphy failed to create a genuine issue of material fact that the plowed snow did not constitute an unnatural accumulation.

{¶ 28} Regardless, we find no genuine issue of material fact that the presence of the ice where Murphy fell was an open and obvious hazard. Customers to the McDonald's restaurant should have naturally expected there to be some run-off from snow as a result of the freeze/thaw cycle that is typical of Ohio winters. Murphy knew that it had recently snowed and that the snow would be subject to thawing and refreezing. Upon arriving and entering the McDonald's restaurant on February 22, Murphy saw that the snow had been plowed onto the median, and he testified that it was below freezing. Although Murphy testified that it was still dark outside when he fell and that he did not see the ice prior to falling, whether Murphy saw the ice is not controlling. Murphy should have reasonably anticipated the presence of ice next to the snow-covered median, and McDonald's did nothing that concealed the danger from him.

{¶ 29} The trial court properly granted summary judgment to McDonald's.

{¶ 30} The assignment of error is overruled.

III

{¶ 31} The trial court's judgment will be affirmed.

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FAIN, J. and OSOWIK, J., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of

the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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