[Cite as *Couture v. Oak Hills Rentals, Ltd.*, 2004-Ohio-5237.]

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

Lois J. Couture, et al.

Appellants

v.

Oak Hill Rentals, Ltd., et al.

Appellees

Court of Appeals No. OT-03-048

Trial Court No. 02-CVC-326

DECISION AND JUDGMENT ENTRY

Decided: September 24, 2004

* * * * *

Douglas L. Winston, for appellants.

Gregory A. Williams, for appellees.

* * * * *

KNEPPER, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas, in which the trial court granted summary judgment to appellees, Oak Hills Rentals, Ltd. and Beck Suppliers, Inc., and dismissed the complaint filed by appellants, Lois and Eugene Couture, in a slip and fall case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On appeal, appellants set forth the following two assignments of error:

{¶ 3} "Assignment of error number 1. The lower court erred in dismissing appellants' complaint as the black ice upon which appellant slipped was not obvious, and triable issues exist that it was unnaturally created. Accordingly, a jury could determine

that appellees had a duty to ameliorate the ice and/or take precautions to protect their customers.

{¶ 4} "Assignment of error number 2. The lower court erred in dismissing appellants' complaint as there were triable issues of fact that appellees had breached their duties."

{¶ 5} The undisputed relevant facts are as follows. On December 30, 2001, appellant, Lois Couture, slipped and fell outside a drive-through car wash located at the Friendship Citgo service station in Port Clinton, Ohio. As a result of the fall, Couture suffered injuries to her back, chest, and right knee. On October 18, 2002, Couture filed a complaint against appellees, Oak Hill Rentals, Ltd. and Beck Suppliers, Inc., the owners and operators of the car wash, in which she alleged that her injuries were the direct result of appellees' failure to properly maintain and/or monitor the car wash. The complaint further alleged that appellees failed to protect her from the danger posed by frozen water that had escaped from the car wash and accumulated on a concrete entrance pad that led into the car wash bay. Appellees filed an answer on October 31, 2002.[1]

{¶ 6} On September 23, 2003, appellees filed a motion for summary judgment and a memorandum in support, in which they asserted that they had no duty to protect business invitees from ice accumulations outside the car wash. Specifically, appellees argued that they had no notice of a dangerous icy condition on December 30, 2001, the

[1]On May 27, 2003, an amended complaint was filed, in which Mooney's Snow Plowing was named as an additional defendant; however, Mooney's was eventually dismissed as a defendant and is not a party to this appeal.

ice was a "natural accumulation" for which a premises owner has no liability, and the icy condition of the pavement was open and obvious.

{¶ 7} Attached to appellees' motion for summary judgment was Lois Couture's deposition testimony, in which she stated that weather conditions were clear, dry and cold[2] on December 30, 2001, when she drove her automobile to the car wash. Couture further stated that the entrance to the car wash, which was on the north side of the building, was partially covered by an accumulation of ice. Couture stated that she went into the adjacent service station and told the female attendant that she could not get into the car wash because of ice, after which she arranged to meet the attendant at the entrance to the car wash. The attendant then went through the building and into the car wash bay, while Couture went around the outside of the building to meet her at the concrete entrance pad. Couture stated that, after engaging in a brief conversation with the attendant about the location of the ice, Couture stepped onto the concrete entrance pad, slipped, and fell.

{¶ 8} Couture stated in her deposition that she knew there was ice at the point where her car was unable to proceed into the car wash. She further stated that she was walking toward that patch of ice when she fell in an area covered with invisible "black ice." Several photographs showing patches of ice on the concrete entrance pad were attached to Couture's deposition.

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[2]Although appellant testified initially that the temperature was above 50 degrees Fahrenheit, she later introduced undisputed evidence that the temperature in that area was between 12 and 26 degrees Fahrenheit on December 30, 2001.

{¶ 9} On October 9, 2003, appellants filed a motion in opposition to summary judgment, in which they argued that it was foreseeable that "black ice" would form outside the car wash in winter. Appellants further argued that appellees were negligent because they failed to warn customers of the dangers of "black ice" and did not properly salt the entrance to the car wash. Finally, appellants asserted that appellees had adequate notice of the icy condition of the entrance pad, because Couture informed the station attendant that she could not drive into the car wash because of the ice.

{¶ 10} Attached to appellants' motion in opposition was the deposition testimony of Brian Beck, owner of appellee, Beck Suppliers, Inc. Beck stated in his deposition that the car wash was designed so that customers could stay inside their vehicles during the washing process. He further stated that there was a heater underneath the car wash entrance pad to reduce ice buildup, and the Citgo station attendants had written instructions to spread salt outside the car wash "[a]t the * * * first sign of inclement weather or a snow fall * * *." Beck also stated that the air was cold enough on December 30, 2001, to allow ice to form; however, he was not aware of any "black ice" outside the car wash until after Couture fell.

{¶ 11} In addition to Brian Beck's deposition, appellants attached to their motion copies of photographs taken by Gary Robertson, a friend of appellee, Eugene Couture, on the same day that Lois Couture was injured. The photographs were accompanied by Robertson's sworn affidavit, in which he stated that they depict ice on the concrete entrance pad to the car wash. Robertson further stated that he only took pictures of the portions of the concrete pad that appeared to him to be icy.

{¶ 12} On November 14, 2003, the trial court filed a decision and judgment entry in which it found that the icy condition of the concrete entrance pad was "open and obvious." The trial court further found that Lois Couture was aware of the icy conditions, since she was unable to drive her vehicle into the car wash bay due to the accumulation of ice. The court concluded that Couture's decision to walk on the icy concrete entrance pad "obviates any duty to warn and acts as a complete bar to her negligence claims." Accordingly, the trial court granted appellees' motion for summary judgment and dismissed appellants' complaint. A timely appeal was filed.

{¶ 13} We note at the outset that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Nat'l. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 14} Generally, in order to establish negligence, a plaintiff has the burden to show the existence of a duty on the part of the defendant, a breach of that duty, and that the breach proximately caused the aggrieved party's injury. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680. The existence of a duty depends on the foreseeability of the injury. Id., citing *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. The issue of whether or not a duty exists in a

negligence action is one of law for the court to determine. *Gin v. Yachanin* (1991), 75 Ohio App.3d 802, 804, citing *Mussivand v. David* (1989), 45 Ohio St.3d 314.

{¶ 15} In this case, the duty owed to Couture was that which is owed to any business invitee. In Ohio, the 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 danger associated with natural accumulations of ice and snow. *Brinkman v. Ross* (1993), 68 Ohio St.3d 82, 83, citing *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, and *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45. Conversely, if the evidence presented demonstrates that an accumulation of ice was unnatural, the landlord is required "to either remove the ice or to warn of its existence." *Skinner v. North Mkt. Dev. Auth., Inc.* (July 10, 1997), 10th Dist. App. No. 96APE12-1655.

{¶ 16} Appellants argue on appeal that appellees breached their duty to Lois Couture because the ice that accumulated outside the car wash was "unnatural," in that was the result of freezing run-off from the car wash bay. However, in *Bevins v. Arledge*, 4th Dist. No. 03CA19, 2003-Ohio-7297, the Fourth District Court of Appeals found that the use of a car wash in subfreezing temperatures presents a danger of ice accumulation that is so open and "obvious" that no duty attaches to the land owner, absent evidence that the owner has somehow aggravated the inherent risk in that activity. Id., at ¶19. Similarly, Ohio courts have held that a landlord is not liable for an invitee's injuries if both landlord and invitee "are equally aware of the dangerous condition and the invitee

voluntarily exposes himself to the hazard * * *." *Skinner*, supra, quoting *Bowins v. Euclid General Hosp.* (1984), 24 Ohio App.3d 29, 31 (citation omitted).

{¶ 17} The record in this case contains evidence that appellees took reasonable steps to insure the safety of the car wash customers, which included installing a heater under the pavement outside the car wash, and instructing the attendant on duty to salt the concrete pad if ice and/or snow were present. No evidence was presented that the station attendant had knowledge of the ice accumulation before it was reported by Couture. The record further shows that Couture was aware of the icy condition of the concrete pad, since both her own vehicle and the vehicle that preceded her into the car wash bay had difficulty crossing it. Nevertheless, after leaving her vehicle and informing the attendant of the ice, she then stepped onto the same icy concrete pad a few minutes later.

{¶ 18} This court has reviewed the entire record of proceedings before the trial court and, upon consideration thereof, finds that the danger presented by the icy concrete entrance pad was open and obvious. No evidence was presented that appellees aggravated the risk encountered by Lois Couture. Accordingly, the trial court did not err by finding that appellant was not in a position to claim that appellees were negligent and dismissing the complaint on that basis.

{¶ 19} On consideration whereof, this court further finds that there remains no other genuine issue of material fact and, after construing the evidence most strongly in favor of appellants, reasonable minds can only conclude that appellees are entitled to judgment as a matter of law. The judgment of the Ottawa County Court of Common

Pleas is hereby affirmed. In accordance with App.R. 24, court costs of these proceedings are assessed to appellants, Lois and Eugene Couture.

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, amended 1/1/98.

Peter M. Handwork, P.J. _____
JUDGE

Richard W. Knepper, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE