[Cite as *Dailey v. CA New Plan Acquisition Fund, L.L.C.*, 2012-Ohio-5984.]

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

Tracey L. Dailey

Appellant

v.

CA New Plan Acquisition Fund, LLC, et al.

Appellee

Court of Appeals No. L-12-1008

Trial Court No. CI0201006352

DECISION AND JUDGMENT

Decided: December 14, 2012

* * * * *

Jonathan M. Ashton and Kevin J. Boissoneault, for appellant.

Robert J. Bahret and Paul R. Bonfiglio, for appellee Independent Services Group.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Tracey L. Dailey, appeals from a judgment of the Lucas County Court of Common Pleas granting summary judgment to defendants, Independent Services Group, Inc., Mattress Matters GP d.b.a. The Mattress Firm, The Mattress Firm Inc. and CA New Plan Acquisition Fund, LLC. For the reasons that follow, we affirm.

{¶ 2} On February 2, 2009, appellant went to a Toledo shopping mall. She slipped and fell on the sidewalk, outside, resulting in a fracture to her right ankle. On September 9, 2010, she filed a complaint against defendants, the owners and lessees of the shopping mall, as well as the company in charge of clearing ice and snow from the mall. She alleged they were negligent in removing ice and snow from the sidewalk. On December 15, 2011, the trial court granted summary judgment to all defendants. Appellant now appeals the decision granting summary judgment to appellee Independent Services Group Inc., the company hired by the mall for ice and snow removal. She sets forth the following assignments of error:

I. The trial court erred where it determined that Independent Services Group, Inc. did not owe a duty of care to appellant, Tracey L. Dailey.

II. The trial court erred where it granted summary judgment in favor of Independent Services Group, Inc.

{¶ 3} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). 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.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 4} Appellant first contends that the court erred in determining that appellee, as an independent contractor, did not owe a duty of care to appellant in her capacity as a business invitee to the shopping mall. However, the court in this case made no such finding.

{¶ 5} The court, quoting this court's decision in *Jackson v. J-F Ents., Inc.*, 6th Dist. No. L-10-1285, 2011-Ohio-1543, stated:

> 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.

The court went on to conclude that, in the present case, there was no evidence that appellant slipped as a result of an unnatural accumulation of ice of snow. In other words, the court clearly recognized appellee's duty but failed to agree with appellant that appellee had breached that duty. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 6} In her second assignment of error, appellant contends that the court erred in focusing on the concept of "unnatural accumulation" when, in fact, appellee's real breach of duty was in failing to perform snow and ice removal, the day of the accident, pursuant to their contract with the shopping mall.

{¶ 7} The contract states in pertinent part:

> [W]ithin one (1) hour after the accumulation of two (2) inches or more of snow or ice, Contractor shall plow and salt all designated areas in the Shopping Center so that same are safely passable. * * * It is the contractor's responsibility to keep the center free from ice and snow. Inspections to insure this should be covered by the snowplow cost.

{¶ 8} In depositional testimony, the property manager for the mall explained his understanding of the contract with appellee. He agreed that while it was appellee's responsibility to keep the area free from ice and snow, he did not expect appellee to be present 24 hours a day to make sure that no ice whatsoever forms on the sidewalk. He stated: "It would be virtually impossible to remove all snow and ice in the Midwest at any time during the winter. That's my opinion."

{¶ 9} Whether or not appellee breached his contract is irrelevant for our purposes. The law in Ohio, as cited above, is well settled and is indeed focused on whether or not appellee created an unnatural accumulation of ice and snow.

> The 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. * * * The underlying rationale * * * 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 v. Ross*, 68 Ohio St.3d 82, 84, 623 N.E.2d 1175 (1993).

"Unnatural" accumulation must refer to causes and factors other than the inclement weather conditions of low temperature, strong winds and drifting snow, i.e., to causes other than the meteorological forces of nature. By definition, then, the "unnatural" is the man-made, the man-caused. *Porter v. Miller*, 13 Ohio App.3d 93, 95, 468 N.E.2d 134 (6th Dist.1983).

{¶ 10} Appellant testified that on the day of her injury, it did not snow. Nor had it snowed the day before. She described the weather as calm and the temperature above freezing. As she approached the sidewalk, she noticed an icy area. In her attempt to avoid the icy area, she stepped on a spot she believed to be water. It was then that she fell. Appellant testified that the "water" which caused her to fall was actually ice which she mistakenly identified. However, appellant acknowledged that she never touched the area to confirm it was ice.

{¶ 11} In this case, there was no evidence presented to show that appellant's injuries were the result of an unnatural accumulation of ice and snow caused by appellee. There is no evidence even confirming appellant's suspicions that she stepped on ice. Photographs, taken of the area after appellant fell and submitted on behalf of her claim, do not confirm her suspicions. Accordingly, the trial court correctly found that appellee

did not breach a duty of care owed to appellant in this case. Appellant's second assignment of error is found not well-taken.

{¶ 12} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE