**[Cite as *Diamond v. TA Operating L.L.C.*, 2013-Ohio-3951.]**

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

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| Donald Diamond, et al. | Court of Appeals No. WD-12-068 |
| Appellants | Trial Court No. 2011CV0904 |
| v. | |
| TA Operating LLC d.b.a. Petro Shopping Center, et al. | **DECISION AND JUDGMENT** |
| Appellees | Decided: September 13, 2013 |

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Konrad Kuczak, for appellants.

Laurie Avery and Michelle J. Sheehan, for appellees.

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**SINGER, P.J.**

**{¶ 1}** Appellants, Donald and Carolyn Jane Diamond, appeal an award of summary judgment issued by the Wood County Court of Common Pleas to appellees, TA Operating, d.b.a. Petro Shopping Center and Travel Centers of America, in a slip and fall negligence suit. Because there was no evidence that the snow and ice upon which

appellant fell was a result of an unnatural accumulation or unusually dangerous, we affirm the trial court's ruling.

**{¶ 2}** On February 21, 2011, appellant Donald Diamond, an over-the-road truck driver, stopped at the Petro Shopping Center. As he walked to the entrance, he stepped on some ice. As he did, his right leg broke through less than two inches of ice, causing him to fall. He consequently suffered severe injuries to his leg. On October 27, 2011, appellants filed a complaint against appellees alleging they were negligent in removing ice and snow from their premises. On November 15, 2012, the trial court granted summary judgment to appellees. Appellants now appeal setting forth the following assignment of error:

> The trial court erroneously granted summary judgment.

**{¶ 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's injury occurred when he stepped on the sidewalk in front of the entrance. A curb borders the sidewalk. The portion of the sidewalk he stepped on is uneven with the curb. According to appellant's own witness, the sidewalk was indented from 1.2 inches to 1.68 inches below the top surface of the curb. Because of the difference in elevation, a small dam was formed which prevented water from running off the surface of the sidewalk. Ice formed on this portion of the sidewalk. When appellant stepped on the "dam" area, his foot went through the ice, causing him to lose his balance and fall.

**{¶ 5}** The evidence shows there had been a small snowstorm the night before. During that time, appellees' custodian testified that he shoveled and salted the sidewalk twice. When appellees' manager came on duty in the morning, he testified that it was snowing. He also testified that he twice applied a product called "Ice Melt" to the sidewalk to melt the ice.

**{¶ 6}** In granting summary judgment, the trial court held that the sidewalk was an open and obvious danger and that appellees "cannot be held liable as there is no duty to protect against an open and obvious danger, natural accumulation of ice or snow, or minimal defects in the curb."

**{¶ 7}** In *Miller v. Tractor Supply Co.*, 6th Dist. Huron No. H-11-001, 2011-Ohio-5906, ¶ 8-9, this court discussed the duty of a business owner to remove ice and snow from their premises:

> 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*, 68 Ohio St.3d 82, 83-84, 623 N.E.2d 1175 (1993); *Jeswald v. Hutt*, 15 Ohio St.2d 224, 239 N.E.2d 37 (1968), paragraph one of the syllabus; *Abercrombie v. Byrne-Hill Co., Ltd.*, 6th Dist. Lucas 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. Franklin No.07AP-108, 2008-Ohio-763, ¶ 11.

**{¶ 8}** 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, 623 N.E.2d 1175. 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*., 10th Dist. Franklin No. 06AP-303, 2007-Ohio-4522, ¶ 22. Thus, the issue of which party has superior knowledge or a better appreciation of a natural accumulation 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, supra*. Absent a duty to the injured party, there can be no actionable negligence. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

**{¶ 9}** There are two exceptions to the winter rule: when the accumulation of ice and snow is unnatural because of the owner's active negligence, *Miller* at ¶ 10, and when "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." *Id.* at ¶ 11, quoting *Debie v. Cochran Pharmacy-Berwick, Inc*., 11 Ohio St.2d 38, 227 N.E.2d 603 (1967), paragraph one of the syllabus.

**{¶ 10}** Appellants contend that the trial court misapplied the so called "two-inch rule" which was aptly explained in *Stockhauser v. Archdiocese of Cincinnati*, 97 Ohio App.3d 29, 33, 646 N.E.2d 198 (2d Dist.1994).

> Courts developed the rule that a difference in elevation between adjoining portions of a sidewalk or walkway that is two inches or less in height is considered insubstantial as a matter of law and thus does not present a jury question on the issue of negligence. In *Cash v. Cincinnati*, 66 Ohio St.2d

319, 421 N.E.2d 1275 (1981), the court clarified the "two-inch" rule, stating that courts must also consider any attendant circumstances in determining liability for defects in the walkway. *Id*. Thus, *Cash* established a rebuttable presumption that height differences of two inches or less are insubstantial as a matter of law. The presumption may be rebutted by showing attendant circumstances sufficient to render the defect substantial. *Id.; Turner v. Burndale Gardens Co*., 2d Dist. Montgomery App. No. 12807, 1991 WL 270662 (Dec. 18, 1991).

**{¶ 11}** Appellants argue that the above rule only applies when pavement is clean and dry and that the size of the indentation is irrelevant. Appellants contend that regardless of the size of the indentation in this case, the ice would never have accumulated had the sidewalk been in proper repair. Thus, appellees' neglect of the sidewalk amounts to negligence.

**{¶ 12}** We disagree with appellants' limited interpretation of the two-inch rule. If we were to follow appellants' reasoning, the winter rule would not apply because of appellees' "active negligence" in maintaining the sidewalk. However, the cases applying the two-inch rule stand for the proposition that deviations two inches or less in height are insubstantial as a matter of law and thus do not present a jury question on the issue of negligence. As the deviation in this case is less than two inches, appellees cannot be said to be "actively negligent" in maintaining their sidewalk, regardless of the weather conditions. Therefore, the first exception to the no-duty winter rule does not apply.

**{¶ 13}** As to the second exception, appellant testified it was snowing the day he fell. He knew that the parking lot was wet and slushy and that the sidewalk surface was frozen. He testified he knew he was stepping on ice before he fell but that he did not expect the ice to break. "[E]veryone is on notice that a winter in Ohio is likely to contain cold, snow, and ice." *Weese v. DKD, Inc*., 6th Dist. Huron No. H-12-026, 2013-Ohio-2814. Given appellant's awareness of the weather conditions, we cannot say that the conditions leading to his fall were more dangerous than one may expect. Therefore we find that the second exception does not apply.

**{¶ 14}** Accordingly, we find the ice upon which appellant fell was a natural accumulation. Construing the facts most favorably to appellants, appellees were entitled to judgment as a matter of law. Appellants' sole assignment of error is not well-taken.

**{¶ 15}** On consideration whereof, the judgment of the Wood County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal 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.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE