[Cite as *Lobas v. FC Midtown, L.L.C.*, 2015-Ohio-2399.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102063

DEAN LOBAS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

FC MIDTOWN L.L.C., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-806280

BEFORE: Stewart, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 18, 2015

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MELODY J. STEWART, J.:

{¶1} Plaintiff-appellant Dean Lobas, a flooring contractor hired by defendant-appellee FC Midtown, L.L.C. to install sheet vinyl flooring at Midtown Towers Apartments, sued Midtown after slipping and falling on accumulated snow and ice on a walkway leading to a Midtown apartment building, injuring his shoulder. Lobas's wife, Belinda, filed a claim for loss of consortium. Midtown filed a motion for summary judgment arguing that it did not create an unnatural hazard and that Lobas in any event had actual or constructive knowledge of the hazard. Lobas responded with an expert's opinion that Midtown not only allowed an unnatural accumulation of snow and ice, but that it had knowledge that the accumulation existed. The court granted summary judgment without opinion. The sole assignment of error contests that ruling.

{¶2} Viewing the relevant evidence most favorably to Lobas shows that he was at the Midtown apartments to install vinyl flooring in late February 2010. Lobas, a long-time resident of Cuyahoga County, conceded that he knew that winter weather often caused hazardous conditions. In addition, Lobas was very familiar with Midtown apartments, having done so many jobs there that he described them as his best customer.

{¶3} Lobas said a "light covering" of snow had fallen — enough snow that he decided to wear snow boots over his work shoes. Lobas parked his work van in a parking space and decided to carry a 12' x 8' sheet of vinyl flooring without assistance from his work van to the building. As Lobas walked from the driveway onto a sidewalk, his feet slipped from beneath him, causing him to fall and injure his shoulder. He claimed that ice had accumulated near a drain, but had been covered by the fresh snow, preventing him from seeing the hazard.

{¶4} Lobas called the building operations manager to report that he had slipped and fallen on the sidewalk. The operations manager told him that the sidewalk "should have been salted." Lobas told the operations manager that "[h]e shouldn't have been carrying 12-foot goods on his own."

{¶5} A negligence claim contains the following elements: the existence of a duty, breach of that duty, and an injury proximately caused by the breach. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998). The existence of a duty is the foundation on which all negligence actions are based; the failure to establish a duty is fatal to a negligence claim.

{¶6} It has long been understood that

> [t]he owner or operator of a [business] who invites the public into his premises to transact business is not an insurer of the public's safety, but owes the duty to exercise ordinary care to maintain his premises in a reasonably safe condition for the protection of such invitees.

Boles v. Montgomery Ward & Co., 153 Ohio St. 381, 92 N.E.2d 9 (1950), paragraph one of the syllabus. The parties agree that Lobas was a business invitee, so Midtown owed him, and all other business invitees, a duty of ordinary care in maintaining the premises in a "reasonably safe condition" so that its invitees are not exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203, 480 N.E.2d 474 (1985).

{¶7} An owner or occupier of land does not, however, owe a duty to business invitees to remove natural accumulations of snow and ice or to warn invitees of the dangers inherent to such accumulations. *Brinkman v. Ross*, 68 Ohio St.3d 82, 83, 623 N.E.2d 1175 (1993). This is because the dangers associated with natural accumulations of snow and ice are considered to be so open and obvious that an owner or occupier may reasonably expect that a business invitee will safeguard himself against those dangers. *Sidle v. Humphrey*, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraph two of the syllabus. But, if the owner or occupier of the premises has actual or constructive notice that a natural accumulation of snow or ice has created a condition "substantially more dangerous" than what would normally be associated with snow and ice, a duty to exercise reasonable care to protect business invitees arises. *Mikula v. Tailors*, 24 Ohio St.2d 48, 263 N.E.2d 316 (1970), paragraph five of the syllabus. And a duty to exercise reasonable care to protect business invitees arises if the owner or occupier of the premises actively permitted or created the a dangerous or unnatural accumulation of snow or ice. *Lopatkovich v. Tiffen*, 28 Ohio St.3d 204, 207, 503 N.E.2d 154 (1986). An unnatural accumulation of ice and snow is one that results from an act of a person. *Porter v. Miller*, 13 Ohio App.3d 93, 95, 468 N.E.2d 134 (6th Dist.1983).

{¶8} In its motion for summary judgment, Midtown argued that Lobas slipped and fell on a natural accumulation of ice and snow, the existence of which was so obvious that it was not required to warn Lobas. It further argued that even if the patch of ice that Lobas slipped on could be considered an "unnatural" accumulation, there was no evidence that Midtown knew about it, nor could such knowledge be imputed to it.

{¶9} Lobas opposed summary judgment on grounds that an improperly designed or installed drain allowed water to accumulate, that the water turned to ice in cold temperatures, and that Midtown failed to identify this drain and fix it. He maintained that because the area around the drain was covered by snow, the accumulation of ice was not open and obvious to him. Lobas also argued that Midtown had actual knowledge of the hazard and that it had been concealed by snow in light of the building operations manager's statement that the sidewalk should have been salted. Finally, Lobas argued that Midtown had constructive notice of the defective drain because the drain was not constructed to building code standards, as opined by his expert.

{¶10} Lobas misconstrues what constitutes "open and obvious" in the context of cases involving snow. It is true that ice that is covered by snow may not be "open" to immediate observation. But this is why a covering of snow puts a person on notice of potential danger. Snow conceals. When one walks on a snow-covered pavement, that person does so charged with the knowledge that every step may be uncertain precisely because one cannot always know what danger may lurk beneath the snow. In a sense, this case is akin to the so-called "step in the dark" cases where darkness is said to "cover" any obstacles that might otherwise be observable. *McDonald v. Marbella Restaurant*, 8th Dist. Cuyahoga No. 89810, 2008-Ohio-3667, ¶ 2 (the hazardous condition was the darkness and, therefore, the defendant owed no duty to the plaintiff before her fall down completely unlighted stairs).

{¶11} Lobas knew that it was snowing on the day of his fall. And although there does not appear to be any estimate of how much snow had fallen at the time of his fall, Lobas testified at deposition that the sidewalk was "covered" with snow and that he wore boots for that very reason. Under those conditions, every step he took was one of potential peril because the snow covered the pavement. As a life-long resident of Northeastern Ohio, Lobas knew the danger posed by the snow is that it might cover potentially dangerous conditions beneath it. Midtown was not required to warn him that snow might cover those conditions.

{¶12} Lobas next argues that he should not be charged with knowledge of the accumulation of ice beneath the covering of snow because it was an unnatural accumulation of ice that he would not be expected to anticipate. As evidence that ice was unnatural, he cites a report prepared by his expert to the effect that the drain was poorly designed because it allowed water to accumulate without draining, thus causing the water to ice over.

{¶13} An "unnatural" accumulation of snow or ice is said to be "one that has been created by causes and factors other than meteorological forces of nature such as the inclement weather conditions of low temperature, strong winds and drifting snow." *Flint v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga Nos. 80177 and 80478, 2002-Ohio-2747, ¶ 18; *Porter*, 13 Ohio App.3d at 95, 468 N.E.2d 134. Ice formed by a "freeze/thaw" cycle is not considered an unnatural accumulation. *Bailey v. St. Vincent DePaul Church*, 8th Dist. Cuyahoga No. 71629, 1997 Ohio App. LEXIS 1884 (May 8, 1997), citing *Hoenigman v. McDonald's Corp.*, 8th Dist. Cuyahoga No. 56010, 1990 Ohio App. LEXIS 131 (Jan. 11, 1990).

{¶14} Lobas's expert offered his opinion that Lobas slipped on an unnatural accumulation of ice created by "the manner in which the incident site was designed, configured, graded and drained" and "the manner in which the snow was plowed." We can easily reject the expert's contention that Midtown caused an unnatural accumulation of ice to exist due to the manner in which the area in question was plowed because it conflicted with Lobas's deposition testimony that the area had not yet been shoveled. What is more, Lobas's deposition testimony in that regard was consistent with that of Midtown's building manager, who testified at deposition that not enough snow had fallen to require building maintenance staff to be summoned early for snow removal.

{¶15} The expert's opinion that the drain was poorly designed can be discounted because the expert relied on irrelevant factors. For example, the expert believed that Midtown violated Section 1009.6.2 of the Ohio Building Code. That section requires outdoor stairways and outdoor approaches to stairways to be designed "so that water will not accumulate on walking surfaces." Likewise, the expert cited Section 4.9.6 of the Americans with Disabilities Act Architectural Guidelines for the proposition that "[o]utdoor stairs and outdoor approaches to stairways shall be designed so that water will not accumulate on walking surfaces."

{¶16} The expert appeared to ignore his own photographic evidence that the walkway on which Lobas slipped and fell did not approach an outdoor stairway (it led to a ground-level entrance to the building). The best the expert could do was suggest that the walkway approached indoor "elevators and suites," but that assertion was irrelevant to the question of whether the walkway approached outdoor stairs or outdoor approaches to stairways. The expert did concede that for purposes of Section 4.9.6 of the Americans with Disabilities Act Architectural Guidelines "the subject walkway did not approach outdoor stairs * * *." The expert's attempt to circumvent that fact by claiming that the walkway was an outdoor approach to a building with "various stairs" was particularly specious given that he was attempting to find fault for something that the guidelines did not require.

{¶17} In any event, the Ohio Supreme Court has held that the open and obvious doctrine is a defense to a claim of liability arising from a violation of the Ohio Basic Building Code because administrative rule violations do not constitute negligence per se. *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, syllabus.

{¶18} The court could find that other aspects of the expert's report did not contribute to Lobas's negligence claim. For example, the expert believed that the drain was poorly designed to handle the amount of water it might be expected to encounter given the slope and drainage of the surrounding land. But the expert did not suggest that excess water flow was the reason why ice accumulated near the drain at the time Lobas slipped and fell. And even though the expert believed that the ground surrounding the drain was sloped too much, creating a hazard should it ice over, there was no connection between the excessive slope and the unnatural accumulation of water — if the area by the drain was sloped more than necessary, it would suggest better drainage of water and no unnatural accumulation of ice.

{¶19} Finally, there is no basis for Lobas's claim that Midtown had actual notice of the ice accumulated near the drain when its operations manager told Lobas that the area should have been salted prior to his fall. The operations manager was speaking in terms of Midtown's policy to call snow crews in when more than two inches of snow fell. Knowledge of falling snow is not actual knowledge that ice exists beneath the snow. There is no evidence of any kind to show that Midtown had actual or constructive notice of the ice on which Lobas slipped and fell.

{¶20} Civ.R. 56(C) states that summary judgment may be granted when there is no genuine issue of material fact and reasonable minds could only conclude in favor of the non-moving party. Having construed the facts more favorable to Lobas, we find no genuine issue of material fact exists on his negligence claim against Midtown. Lobas slipped and fell on a natural accumulation of ice buried beneath a layer of snow; the snow was open and obvious to him; and there was no evidence that Midtown had any actual or constructive notice that ice accumulated beneath the snow. The court did not err by granting summary judgment in Midtown's favor.

{¶21} Judgment affirmed.

It is ordered that appellees recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR