[Cite as *Briggs v. Castle, Inc.*, 2016-Ohio-1548.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103795

DENNIS BRIGGS

PLAINTIFF-APPELLANT

vs.

CASTLE, L.L.C., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-837873

BEFORE: S. Gallagher, J., Stewart, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: April 14, 2016

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SEAN C. GALLAGHER, J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Plaintiff-appellant Dennis Briggs appeals the decision of the trial court that granted summary judgment in favor of defendants-appellees Castle, L.L.C., and NK Beverage, Inc. (collectively "the defendants"). Upon review, we affirm.

{¶3} Briggs filed a complaint claiming he suffered a slip and fall injury as a direct and proximate result of the defendants' negligence.[1] Following discovery in the matter, the defendants filed a motion for summary judgment. The trial court granted the motion, and this appeal followed.

{¶4} On December 31, 2012, Briggs went to a restaurant called Larry's Tavern to have lunch. He arrived just before noon and assumed it was open after noticing the televisions were on inside the building. He parked his car and began walking in the adjacent parking lot. He slipped and fell on what was "evidently * * * ice on the ground[.]" However, he never saw any ice. He described his fall as follows: "My leg, my left leg kicked out from underneath me, went to the right and it snapped and I landed." Briggs suffered a fractured tibia. His injuries required multiple surgeries.

{¶5} Briggs observed that it was a typical December day; there was a trace of snow on the ground, and the roads were clear. He was wearing his work boots. He noticed

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[1] Blazy Landscaping, L.L.C., was also named as a defendant in the complaint but was later voluntarily dismissed from the action and is not a party to this appeal.

that the parking lot had been cleared, and he did not notice any ice in the parking lot. His fall occurred near a billboard sign that hangs over the parking lot by a couple of feet. Briggs did not observe any ice buildup on the billboard sign or any moisture trickling down.

{¶6} At the time of Briggs's fall, NK Beverage, Inc., had operated Larry's Tavern for at least five years. Lubomyr Wasylow is the owner. The building and parking lot are rented from Castle, L.L.C. Under the commercial lease agreement, Larry's Tavern is specifically responsible for the maintenance of the parking lot, including snow and ice removal.

{¶7} Larry's Tavern engaged Blazy Landscaping, L.L.C., to conduct snow and ice removal. Daniel Blazy, the owner, testified to the service performed, which is dependent upon the conditions. In December 2012, there had been six snow removals and five "salt applications or de-ices." Service had been performed at 8:00 p.m. on the evening before Briggs's fall. Blazy had not noticed any areas of the parking lot more prone to ice or any ice buildup involving the billboard.

{¶8} Wasylow testified in his deposition that there had not been any falls in the parking lot during the five years that he operated the business prior to Briggs's fall. Wasylow did not know who owned the billboard sign and stated he has nothing to do with the sign. Wasylow stated he never noticed ice accumulating under the sign or water dripping from the sign. He also never noticed rust or corrosion on the supporting I-beams.

{¶9} Plaintiff's expert Marko Vovk performed a visual inspection of the property. He opined that the billboard sign permitted the "unnatural melting of snow and ice" that permitted water to drip down to the freezing cold asphalt pavement below and resulted in the slip and fall accident. He further opined that the condition had to be known by building management because it was "inevitable that water dripping onto a cold walk surface below would freeze" in the cold weather climate. Vovk included photographs in his report depicting the existence of rust stains.

{¶10} Under his sole assignment of error, Briggs claims the trial court erred in granting the defendants' motion for summary judgment. Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment is appropriate when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party." *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 7.

{¶11} Under Ohio law, an owner or occupier of a business has no legal duty with respect to dangers that are open and obvious. *Armstrong v. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5. Ordinarily, an owner or occupier has no duty with regard to the dangers associated with natural accumulations of ice and snow. *Brinkman v. Ross*, 68 Ohio St.3d 82, 83, 1993-Ohio-72, 623 N.E.2d 1175; *Sidle v.*

Humphrey, 13 Ohio St.2d 45, 233 N.E.2d 589 (1968), paragraphs two and three of the syllabus. The 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* at 84.

{¶12} Exceptions to the general rule exist. One exception is when an owner or occupier is shown to have notice, actual or implied, that a natural accumulation of snow and ice on the premises created a condition substantially more dangerous than what the business invitee should reasonably have anticipated in light of generally prevailing weather conditions. *Mikula v. Tailors*, 24 Ohio St.2d 48, 56, 263 N.E.2d 316 (1970); *Workman v. Linsz*, 8th Dist. Cuyahoga No. 102473, 2015-Ohio-2524, ¶ 11. Another exception is when it is shown that an owner or occupier was actively negligent in permitting or creating an unnatural accumulation of snow and ice. *See Lopatkovich v. Tiffin*, 28 Ohio St.3d 204, 207, 503 N.E.2d 154 (1986). "By definition, an unnatural condition is man-made or man-caused. Unnatural accumulations are caused by a person doing something that would cause ice and snow to accumulate in an unexpected place or way." *Mubarak v. Giant Eagle, Inc*., 8th Dist. Cuyahoga No. 84179, 2004-Ohio-6011, ¶ 19.

{¶13} In this case, there is no evidence to establish that the defendants had notice of a condition substantially more dangerous than what the business invitee should reasonably have anticipated in light of generally prevailing weather conditions. The

evidence here did not show that the defendants had notice of the condition or that the condition was substantially more dangerous than one should otherwise expect to form naturally during an Ohio winter. Further, the presence of rust stains in the area of the billboard does not establish the requisite knowledge. Wasylow testified that no prior falls had occurred in the parking lot and that he never saw any ice accumulating under the sign or water dripping from the sign. The parking lot was regularly serviced for ice and snow removal, and had been serviced the evening before Briggs's fall. The fall occurred on a typical winter day in December in Ohio.

{¶14} There also is no evidence that the defendants were actively negligent in permitting an unnatural accumulation of ice and snow to exist. Generally, "[s]now that melts and later refreezes is a natural accumulation." *Kaeppner v. Leading Mgt.*, 10th Dist. Franklin No. 05AP-1324, 2006-Ohio-3588, ¶ 17. "'[T]he melting of ice and snow and subsequent refreezing is insufficient, standing alone, to impose liability,' and instead, the owner must do something that causes the ice to accumulate in an unexpected location or manner in order for the accumulation to be considered unnatural." *Base-Smith v. Lautrec, Ltd.*, 12th Dist. Butler No. CA2013-07-115, 2014-Ohio-349, ¶ 12, quoting *Holbrook v. Kingsgate Condominium Assn.*, 12th Dist. Butler No. CA2009-07-193, 2010-Ohio-850, ¶ 17. Further, there may be circumstances "[w]here the freezing and thawing differs noticeably from surrounding circumstances due to the presence of a man-made structure" in which the accumulation will be deemed unnatural for purposes of determining liability. *See Kirschnick v. Estate of Helen T. Jilovec*, 8th Dist. Cuyahoga

No. 68037, 1995 Ohio App. LEXIS 3773, *7 (Aug. 31, 1995), citing *Tyrrell v. Invest. Assocs., Inc*., 16 Ohio App.3d 47, 474 N.E.2d 621 (8th Dist.1984) (in both cases, there was evidence of the owner's knowledge of the substantially more dangerous condition). However, "[i]n the absence of evidence presented regarding the land-owner's negligence, the freeze and thaw cycle accompanying the winter climate in northeastern Ohio remains a natural accumulation." *Bailey v. St. Vincent DePaul Church*, 8th Dist. Cuyahoga No. 71629, 1997 Ohio App. LEXIS 1884, *8 (May 8, 1997).

{¶15} Here, insofar as plaintiff's expert opined that the billboard sign permitted the "unnatural melting of snow and ice that permitted water to drip down" the billboard sign, there was no evidence showing that ice in fact was present or that the suspected ice on which appellant fell actually came from the billboard. Briggs testified that he did not observe any ice buildup on the billboard sign or any moisture trickling down. In fact, he never saw any ice on the ground. Neither the owner of Larry's Tavern nor the landscaper who removed snow and ice from the parking lot ever noticed a buildup of ice involving the billboard.

{¶16} Though never witnessing ice, plaintiff's expert opined that "[t]he sun hits the sign, melts the snow and ice, and water drips to the freezing pavement below where water refreezes, and turns to ice on cold days." That snow or ice may have formed on the billboard and dripped down and frozen on the ground is no different than snow or ice melting from a rooftop. *See generally Mubarak*; *Jones v. Malabar Farm State Park*, Ct. of Cl. No. 2011-02999-AD, 2011-Ohio-479; *Burskey v. Malabar Farm State Park*, Ct. of

Cl. No. 2011-02301-AD, 2011-Ohio-4787. Under the circumstances presented, any ice or snow that would have accumulated on the billboard would have been the result of natural weather conditions.

{¶17} Also, there is no evidence to establish the defendants were actively negligent. The evidence showed that the parking lot was serviced for snow and ice and that there was no knowledge of ice accumulating under the sign or water dripping from the sign.

{¶18} Finally, we recognize that Briggs has failed to establish a legal duty on the part of Castle, L.L.C. The record does not reflect that Castle was the owner of the billboard. A commercial landlord who is out of possession and control of a leased premises is not liable to third parties for injuries caused by conditions on the property. *Sabitov v. Graines*, 177 Ohio App.3d 451, 2008-Ohio-3795, 894 N.E.2d 1310, ¶ 47 (8th Dist.). In any event, the result is the same under the analysis herein.

{¶19} Upon our review, we find appellees were entitled to judgment as a matter of law. Accordingly, the sole assignment of error is overruled.

{¶20} Judgment affirmed.

It is ordered that appellees recover from appellant 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.

SEAN C. GALLAGHER, JUDGE

MELODY J. STEWART, P.J., and
ANITA LASTER MAYS, J., CONCUR