[Cite as *Mitchell v. White Castle Mgt. Co.*, 2009-Ohio-3246.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Arlene E. Mitchell et al.,	:	
Plaintiffs-Appellants,	:	
		No. 09AP-88
v.	:	(C.P.C. No. 07CVC-10-13494)
White Castle Management Co. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 30, 2009

Stanlee E. Culbreath, for appellants.

Earl Warburton Adams & Davis, and *Dick M. Warburton Jr.*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} In December 2006, appellant, Arlene E. Mitchell, slipped and fell while stepping up from the parking lot onto the entry sidewalk at a local White Castle restaurant. She sustained injuries to her left shoulder, which required surgery. She filed suit against the restaurant chain for negligence, claiming that it failed to keep the premises in a reasonably safe condition. Appellee, White Castle, moved for summary judgment, alleging that it breached no duty to appellant, because whatever snow or ice

may have been on the sidewalk was a natural accumulation. The trial court granted appellee's motion for summary judgment, and this appeal ensued.

{¶2} Despite the fact that shopkeepers are under a duty to provide a reasonably safe entryway for their patrons, under Ohio law, shopkeepers are under no duty to remove natural accumulations of snow or ice from their sidewalks, and have no special duty to warn their patrons of the same. The only evidence in the record that supports appellant's theory of the case is her own deposition, and even viewing that evidence in a light most favorable to appellant, it is still insufficient to demonstrate that appellee breached any duty to her.

{¶3} Counsel for appellant lists ten assignments of error in his brief, however, counsel fails to state what those assignments of error are. Taken in its entirety, it appears that counsel intended to assign error relating to the trial court's granting of summary judgment for appellee. Accordingly, we will review the record and evidence to determine whether summary judgment was proper.

{¶4} We review the appropriateness of granting a motion for summary judgment de novo, using the same standard used by the trial court. *Boroff v. Meijer Stores Ltd. Partnership,* 10th Dist. No. 06AP-1150, 2007-Ohio-1495, ¶7; *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35. Under Civ.R. 56(C), summary judgment is appropriate when, after construing the evidence most strongly in favor of the nonmoving party: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion—that conclusion being adverse to the nonmoving party. *Boroff* at ¶6 (citing *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 369–70, 1998-Ohio-389).

{¶5} On summary judgment, it is the movant's burden to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the non-movant has no evidence to support their claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party meets that burden, the burden shifts to the non-moving party, to produce an affidavit "made on personal knowledge" setting forth "such facts as would be admissible in evidence" that demonstrates that a genuine issue of fact exists for trial. See id.; see also Civ.R. 56(E). If the non-moving party fails to present such an affidavit, or other evidence demonstrating that a genuine issue of fact exists for trial, summary judgment may be appropriate.

{¶6} The evidence in this case consists mainly of appellant's own deposition. She stated that she fell while stepping up onto the sidewalk from the parking lot at the White Castle. She also stated that, although she could not see ice on the sidewalk, it was slippery, and that she believed it was icy. This evidence was contradicted by the restaurant manager, who stated in her affidavit that there was no ice. The trial court resolved this discrepancy in favor of appellant, and therefore assumed that there was ice on the sidewalk. (Decision, at 5.) We will not entertain in detail appellant's counsel's argument that the White Castle manager's affidavit should be excluded because the manager is not an expert on snow/ice removal. The trial court properly resolved this issue. (See Decision, at 5, fn. 1.)

{¶7} To establish a prima facie case of negligence, the plaintiff must show that (1) the defendant owed her a duty of care; (2) defendant breached that duty; and (3) damages proximately caused by the defendant's breach of duty. *Boroff* at ¶8 (citing *Lydic v. Lowe's Companies, Inc.,* 10th Dist. No. 01AP-1432, 2002-Ohio-5001, ¶7;

Menifee v. Ohio Welding Prods., Inc. (1984), 15 Ohio St.3d 75, 77). Appellant argues that appellee breached the duty of care it owed her by failing to inspect the premises, and remove the ice from the entry sidewalk, or by failing to warn her of its existence. (Complaint, at ¶6, 7.) Her position is incorrect as a matter of Ohio law.

{¶8} In Ohio, shopkeepers owe their patrons a duty of ordinary care in maintaining their premises in a reasonably safe condition. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203; *Eller v. Wendy's Internatl., Inc.* (2000), 142 Ohio App.3d 321, 333–34. But the mere fact that a customer slips and falls at a business establishment does, not of itself, create a presumption that the floor was unsafe. Id. (citing *J. C. Penny Co., Inc. v. Robison* (1934), 128 Ohio St. 626, paragraph four of the syllabus). There must be evidence demonstrating that some negligent act or omission of the business owner caused the fall.

{¶9} Similarly, shopkeepers are not absolute insurers of their customers' safety, and they have no duty to warn customers of dangers that are open and obvious. See id; see also *Mikula v. Tailors* (1970), 24 Ohio St.2d 48, 57; *Boroff*, supra; *Flowers v. Penn Traffic Co.* (Aug. 16, 2001), 10th Dist. No. 01AP-82. Business owners are generally under no duty to remove natural accumulations of snow or ice from their premises, and they are under no duty to warn patrons of their existence. *Lawson*, supra (citing *Brinkman v. Ross*, 68 Ohio St.3d 82, 83, 1993-Ohio-72; *Bowen* at ¶14. This is because people are presumed to appreciate the risks associated with walking on surfaces during cold weather months, when slippery conditions are likely because of snow, ice, or other freezing precipitation. *Brinkman* at 84.

{¶10} To establish a business owner's negligence, a plaintiff must show that: (1) the landowner or occupier, through its officers or employees, was responsible for creating the hazard; or (2) that at least one employee or officer had actual knowledge of the hazard, but failed to eliminate it or warn of its existence; or (3) the danger existed for such a length of time that it is reasonable to infer that the business owner's failure to warn of it or eliminate it constitutes a breach of the duty of care. See *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, paragraph three of the syllabus. The plaintiff must also identify the cause of her slip and fall. *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 67-68.

{¶11} The facts here are fairly straightforward. The accident happened on a December morning. There had been snowfall either the night before, or earlier that morning. Although appellant's counsel tries to make an issue of fact out of this minor discrepancy in when the most recent snow had fallen, because we are dealing with natural accumulation(s) of snow/ice, the exact time of the last snowfall is irrelevant. The point is that there was a recent snowfall, and reasonable people understand that when they are walking around, outside in Central Ohio in December after it has been snowing, the walkways can become slippery. The evidence establishes that these were the conditions, and that appellant slipped and fell.

{¶12} What the evidence does not establish is that either appellee: (1) created the hazard that caused appellant's fall; or (2) appellee knew that the entryway was slippery or hazardous.

{¶13} What happened to appellant that December morning is unfortunate. Misfortune, however, does not per se create liability. As we have said before, the law

cannot impose a duty on landowners or shopkeepers that makes them responsible for dealing with Mother Nature's deeds.

{¶14} Because there is no evidence to show that appellee breached a duty to appellant, we overrule the assignments of error, and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.