IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

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CUYAHOGA COUNTY

ADRIENNE WORKMAN,	)	CASE NO. CV 14 821846
	)	
Plaintiff	)	JUDGE PAMELA A. BARKER
	)	
v.	)	
	)	**OPINION AND JOURNAL ENTRY ON**
WILLIAM LINSZ,	)	**DEFENDANT'S MOTION FOR**
	)	**SUMMARY JUDGMENT**
Defendant	)	
	)	

This matter is before the Court on the Motion For Summary Judgment Of Defendant William Linsz filed on October 20, 2014 ("Defendant's Motion"), Plaintiff Adrienne Workman's Brief In Opposition To Defendant's Motion filed on November 14, 2014 ("Plaintiff's Brief"), and Defendant's Reply Brief filed on November 21, 2014 ("Defendant's Brief").

Civ. R. 56(C) provides in relevant part as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: '*** (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence

that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

In order to defeat a motion for summary judgment on a negligence claim, a plaintiff must establish that a genuine issue of material fact remains as to whether: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; and (3) the breach of duty proximately caused the plaintiff's injury. *Texler v. D.O. Summers Cleaners & Shirt Laundry*

Co. (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 271. Whether a duty exists is a question of law for the court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265. The existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. If no duty exists, the legal analysis ends and no further inquiry is necessary. *Gedeon v. East Ohio Gas. Co.* (1934), 128 Ohio St. 335, 338, 190 N.E. 924.

Plaintiff's testimony, via deposition and Affidavit submitted with Plaintiff's Brief, demonstrates the following undisputed facts. On February 15, 2012, Plaintiff arrived at the Defendant's home to perform cleaning services, and walked up the driveway to the back door of the residence.[1] According to Plaintiff, it was a very cold day but the driveway was clear of snow.[2] After coming up the driveway Plaintiff "turned like on [an] angle" and her "right foot caught the ice, which [she] was unaware of and [she] went down."[3] After falling, she looked where the snow pile was and saw "like a rim of black ice, which [her] right foot caught and took her down."[4] According to Plaintiff, "the ice was formed around a crack in the driveway and also gathered near the driveway's drain"; and as she was "laying on the ground and also immediately following the incident, [Plaintiff] observed that there were no other areas or patches of ice on the driveway, except in and around the location where she fell."[5] There is no dispute between the parties that Plaintiff was a business invitee of Defendant, having arrived at the Defendant's home to provide cleaning services for him.[6]

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[1] Deposition of Adrienne Workman ("Plaintiff's Deposition), at page 16.
[2] *Id.*
[3] *Id.* at page 20.
[4] *Id.* at page 20.
[5] Affidavit of Adrienne Workman, attached to Plaintiff's Motion, ¶ 5 and 7.
[6] Defendant's Motion, at page 3; Plaintiff's Brief, at page 2.

Since Plaintiff was a business invitee of Defendant, he owed Plaintiff a duty to exercise reasonable care in making the premises safe for her use. *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 52-53, 372 N.E.2d 335; *Busse v. Grand Finale, Inc.* (1981), 3 Ohio App.3d 65, 443 N.E.2d 1011; *Hoenigman, et al. v. McDonald's Corporation, et al.* (January 11, 1990), Cuyahoga App. No. 56010, at *1.

However, Defendant's duty does not extend to protection against hazards from natural accumulations of ice and snow which are similar to surrounding conditions. *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 227 N.E.2d 603; *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, paragraphs two and three of the syllabus, 233 N.E.2d 589; *Hoenigman v. McDonald's, supra* at *2.

In Ohio, as a general rule, no duty is owed, even to an invitee, to remove natural accumulations of ice and snow. *Porter v. Miller* (1983), 13 Ohio App.3d 93, 468 N.E.2d 134; *Kingkey v. Jewish Hospital Association* (1968), 16 Ohio App.2d 93, 242 N.E.2d 352; *Hoenigman v. McDonald's , supra* at *2; *Bailey v. St. Vincent DePaul Church* (May 8, 1997), Cuyahoga App. No. 71629, 1997 WL 232685 at *2, citing *Simmers v. Bentley Constr. Co.* (1991), 64 Ohio St.3d 642, syllabus at three.

Exceptions to the general rule stated above do exist. As explained by the Eighth District Court of Appeals in *Bailey v. St. Vincent DePaul Church, supra* at *2:

> If an occupier is shown to have had notice, actual or implied, that a natural accumulation of snow and ice on his or her premises has created a condition substantially more dangerous than a business invitee should have anticipated by reason of the knowledge of the conditions prevailing generally in the area, negligence may be proved. *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38. A second exception to the no-duty rule exists where the owner is actively negligent in permitting or creating an unnatural accumulation of ice and snow. *Lopatkovich v. City of Tiffin* (1986), 28 Ohio St.3d 204.

In order to prevail on her claim, Plaintiff must produce evidence that either: 1.) the natural accumulation of snow and ice was substantially more dangerous than she could have appreciated and that Defendant knew of this or should have known this (the owner had superior knowledge of the existing danger or peril); or 2.) the defendant was actively negligent in permitting or creating an unnatural accumulation of ice and snow. *Bailey v. St. Vincent DePaul Church, supra* at *2; *Mubarak v. Giant Eagle, Inc.* (Nov. 10, 2004), Cuyahoga App. No. 84179, 2004 WL 2578894, at *3-4, citing *LaCourse v. Fleitz* (1986), 28 Ohio St.3d 209, 210, 503 N.E. 2d 159, and *Lopatkovich v. City of Tiffin* (1986), 28 Ohio St.3d 204, 503 N.E.2d 154. It is the second of these two assertions or arguments that Plaintiff relies upon to urge this Court to deny Defendant's Motion.

Succinctly stated, Plaintiff's argument as to why Defendant's Motion should be denied is that she has presented evidence to demonstrate that there is a genuine issue of material fact as to whether or not Defendant's improper maintenance of the driveway's cracks and drain resulted in an unnatural accumulation of precipitation so as to deem the accumulation unnatural for determining liability.[7] Plaintiff explained more fully at page 5 of Plaintiff's Brief:

> Here, the unnatural accumulation of black ice on the Linsz' driveway was a result of human action, not natural meteorological forces. Workman asserts that the drain's defective condition and the driveway crack depression caused an unnatural accumulation of ice. Affidavit ¶5. Where a construction defect in the premises, existing for sufficient time, causes injury to a pedestrian by creating an artificial condition such as an unreasonable accumulation of ice on a walkway, the *owners incurs* liability. *Harden [v. Villas of Cortland Creek, LLC]*, 2013 Ohio 4629 (Ohio Ct. App. 11th Dist. 2013) at ¶24, citing *Marshal v. Plainville IGA*, 98 Ohio app.3d 472, 475 (Ohio Ct. App. 1stDist. 2013)(*emphasis added*).

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[7] Plaintiff's Brief, at page 7, citing *Nawal v. Clearview Inn, Inc.*, 1994 WL 407998 *4 (Ohio Ct. App. 8th Dist. 1994).

In Defendant's Brief, Defendant sets forth the following responsive arguments: Plaintiff's deposition did not include any testimony concerning a defective drain or driveway crack depression; her deposition testimony and photographs of the area marked as Exhibits D and E at Plaintiff's deposition demonstrate that Plaintiff's fall occurred a considerable distance from the drain; Plaintiff's Affidavit submitted with Plaintiff's Brief is self-serving; there is no evidence or professional opinion, as required under Ohio law, to substantiate any allegation that a defective drain or driveway crack depression caused an unnatural accumulation of ice[8]; the fact that Plaintiff admitted that the black ice was visible after she fell removes the duty of the owner to warn business invitees of any known or unknown defect since she could have seen the alleged defect had she looked[9]; and assuming arguendo that a defect did exist, Plaintiff has not produced any evidence or testimony that Defendant had actual or constructive knowledge of the defect.[10]

This Court is persuaded by Defendant's argument that under applicable Ohio case law cited and discussed by him, to include the Eighth District Court of Appeals' decision in *Roth v. Ponderosa Steakhouse*, *supra*, an accumulation of ice does not become unnatural merely because of a party's assertion; and without more evidence than what has been submitted by Plaintiff, this Court cannot conclude that the allegedly defective drain and driveway crack created an unnatural accumulation of ice. Indeed, as Defendant points out, in *Harden*, the case Plaintiff heavily relied upon to support her argument, Harden retained an expert to opine as to

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[8] Page 3 of Defendant's Brief, citing *Roth v. Ponderosa Steakhouse*, 2003-Ohio-6336, ¶14 (Ohio Ct. App., Cuyahoga County Nov. 26, 2003).

[9] Page 3 of Defendant's Brief, citing *Haymond v. BP America* (8th Dist. 2006), 8th Dist. No. 86733, 2006-Ohio-2732, at ¶16.

[10] Page 3 of Defendant's Brief, citing *Watts v. Richmond Run #1 Condo. Unit Owners Ass'n*, 2013-Ohio-2695, ¶¶14-15 (Ohio Ct.App., Cuyahoga County June 27, 2013).

the alleged defect and the court concluded that the expert's report was sufficient to raise a genuine issue of material fact as to whether the ice was an unnatural accumulation resulting from a construction defect and therefore, potentially actionable under Ohio law.

Accordingly, the Court finds that there are no genuine issues of material fact and that the material facts presented demonstrate that as a matter of law, Defendant is entitled to judgment in his favor. Therefore, Defendant's Motion is **GRANTED**.

Pamela A. Barker 12-10-2014
Judge Pamela A. Barker

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Accordingly, the Court finds that there are no genuine issues of material fact and that the material facts presented demonstrate that as a matter of law, Defendant is entitled to judgment in his favor. Therefore, Defendant's Motion is **GRANTED**.

Pamela A. Barker

Judge Pamela A. Barker

IT IS SO ORDERED.