IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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| MICHAEL LAINE, | : | |
| | : | C.A. No. K15C-12-008 WLW |
| Plaintiff, | : | Kent County |
| | : | |
| v. | : | |
| | : | |
| SPEEDWAY, LLC, | : | |
| | : | |
| Defendant. | : | |

Submitted: March 10, 2017
Decided: March 21, 2017

**ORDER**

Upon Defendant's Renewed Motion for Summary Judgment.
*Granted.*

Nicholas H. Rodriguez, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware, attorney for Plaintiff.

Jessica T. Tyler, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorney for Defendant.

Eric S. Thompson, Esquire and William A. Crawford, Esquire of Franklin & Prokopik, Wilmington, Delaware; attorney for Intervenor, Cincinnati Insurance Co.

WITHAM, R.J.

Upon consideration of Defendant Speedway LLC ("Speedway")'s Renewed Motion for Summary Judgment, Plaintiff Michael Laine's Opposition, Intervenor The Cincinnati Insurance Companies ("Cincinnati")'s Opposition, and Speedway's Response, it appears to the Court that:

1. The facts and evidence remain essentially unchanged from the Court's ruling on Speedway's earlier motion.[1] Mr. Laine slipped and fell on ice on the premises of Speedway's predecessor around 7:15 a.m. on January 10, 2014. The only evidence is that the ice Mr. Laine fell upon was formed during a rain event that began several minutes before 7:00 a.m.

2. Earlier in this case, Speedway moved for summary judgment based on the application of the continuing storm doctrine. The Court denied that motion with leave to re-file at the close of discovery, allowing the parties additional time to discover evidence relating to whether a storm event was ongoing at the time of Mr. Laine's fall.

3. Discovery has now closed, and Speedway has filed a renewed motion for summary judgment which is opposed by Plaintiff.

4. Cincinnati Insurance Company, the personal injury protection carrier that covered the vehicle Mr. Laine was operating before his fall, moved to intervene, which was granted, and Cincinnati filed its opposition to Speedway's motion. Speedway filed a response to that opposition.

5. Speedway argues that, as a matter of law, it acted reasonably by waiting until the storm ended to clear the accumulated snow and ice. It bases this argument

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[1] *Laine v. Speedway, LLC*, No. K15C-12-008, 2016 WL 5946491 (Del. Super. Oct. 13, 2016).

on both the continuing storm doctrine and its contention that "[i]t is undisputed that Plaintiff . . . slipped and fell on ice that accumulated during an ongoing weather event."[2]

6. Mr. Laine responds that there was no "storm" at the time of his fall because the climatological data shows that precipitation did not start until 6:58 a.m. He urges the Court to depart from earlier continuing storm doctrine cases because in this case Speedway had two employees available to clear any accumulation.

7. Cincinnati intervenes to provide expert evidence and argue that the continuing storm doctrine was inapplicable here because the doctrine does not apply to rain events.

8. Summary judgment will be granted when, viewing all of the evidence in a light most favorable to the nonmoving party, the moving party demonstrates that "there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[3] This Court shall consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in determining whether to grant summary judgment.[4] When material facts are in dispute, or "it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances," summary judgment will not be appropriate.[5]

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[2] Def. Speedway LLC's Mot. for Summ. J. ¶ 5.

[3] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (citing *Benge v. Davis*, 553 A.2d 1180, 1182 (Del. 1989)); *see also* Super. Ct. Civ. R. 56(c).

[4] Super. Ct. Civ. R. 56(c).

[5] *Ebersole v. Lowengrub*, 180 A.2d 467, 468–69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797, 802 (6th Cir. 1957)).

9. There is no dispute that precipitation was ongoing at the time of the fall. The parties do not dispute that the ice was caused by that precipitation. As a matter of law, the falling precipitation was sufficient to invoke the continuing storm doctrine. Summary judgment is thus appropriate.

10. The continuing storm doctrine was first announced in Delaware by the Superior Court in *Young v. Saroukos*.[6] While landowners have an affirmative duty to keep premises safe from the hazards of ice- and snow-related accumulation, "a business establishment, landlord, carrier, or other inviter . . . is permitted to await the end of a storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps."[7]

11. In deciding, at summary judgment, whether the continuing storm doctrine is applicable, a court need not engage in a fact-intensive consideration of "the type, length, and intensity of the storm."[8]

12. Weather data and deposition testimony have been presented from both Mr. Laine and Speedway showing that there was an ongoing precipitation event that began before Mr. Laine fell and continued through the rest of the day.

13. Mr. Laine alleges the existence of a material issue of fact. With the benefit of additional time for discovery, though, he can only point to his reading of the records, by which he argues that rain (with no measured accumulation) did not begin

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[6] 185 A.2d 274, 282 (Del. Super. 1962), *aff'd*, 189 A.2d 437 (Del. 1963).

[7] *Cash v. E. Coast Prop. Mgmt., Inc.*, 7 A.3d 484 (Table), 2010 WL 4272925, at *2 (Del. Oct. 29, 2010) (quoting *Young*, 185 A.2d at 282).

[8] *Id.* at *3.

until 6:58 a.m. the morning of the incident.[9] Contrary to Mr. Laine's position; if it was indeed raining at the time of the incident, it suggests that the continuing storm doctrine is applicable.

14. Cincinnati's eleventh-hour intervention does not assist the Court in resolving the motion. Cincinnati provides an affidavit of an expert, who was not disclosed prior to the expert discovery cutoff in this case, to argue that "there was no measurable accumulation of ice at and in the vicinity of Dover Air Force Base."[10] It is unclear why Cincinnati believes that any party in this litigation would be able to admit evidence from a heretofore-undisclosed expert if the case went to trial. The Court has no choice but to disregard the expert affidavit that Cincinnati has proffered, because it would not be admissible at trial. Even if the Court did consider the affidavit, and accepted that the accumulation of ice was not "measurable" at the time of the storm, common sense suggests that even a trace amount of ice accumulation would render surfaces slippery.

15. Mr. Laine, for his part, urges the Court to follow two cases which can be distinguished from the facts here. In the first, *Woods v. Prices Corner Shopping Center Merchants Association*, the court found a question of fact where snow and ice accumulated over days and none had fallen recently.[11] Here, however, the precipitation had recently begun and was still ongoing at the time of the incident.

16. In the second case, *Schnares v. General Floor Industries, Inc.*, the court

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[9] Based on the exhibits, the rain at the Air Force Base appears to have started four minutes earlier, at 6:54 a.m.

[10] Opp'n of Intervenor to Def.'s Renewed Mot. for Summ. J. Ex. 1.

[11] 541 A.2d 574, 575 (Del. Super. 1988).

found a question of fact where the meteorological data showed no precipitation at the time of the fall but the plaintiff testified at his deposition that it was flurrying when he arrived.[12] Here, however, the meteorological data and the testimony align: precipitation was falling at the time of the incident.

17. The evidence in this case is uncontradicted: precipitation was falling and accumulating at the time of Mr. Laine's fall. Our Supreme Court and others have found even a misty drizzle to be sufficient as a matter of law to invoke the continuing storm doctrine.[13] Here, the falling precipitation and freezing temperatures throughout the morning created an ongoing storm that, as a matter of law, suspended Speedway's duty to keep surfaces clear of accumulation from the continuing storm until after the precipitation ended.

18. This Court has reviewed the record carefully and has concluded that because Speedway's duty to clear the accumulation was suspended at the time of the incident, it is entitled to judgment as a matter of law. Speedway's motion for summary judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

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[12] No. N14C-02-078, 2015 WL 5178403, at *2 (Del. Super. Sept. 3, 2015).

[13] *See generally Cash*, 2010 WL 4272925, at *3; *Rochford v. G.K. Dev., Inc.*, 845 N.W.2d 715, 718 (Iowa Ct. App. 2014) (collecting cases relating to, among other things, a "light drizzle").