Anthony D. Castelli (0001201)
Attorney for Plaintiff

THE COURT OF COMMON PLEAS
CIVIL DIVISION
HAMILTON, COUNTY, OHIO

LORRAINE LAU et al.	*	CASE NO. A0904845
	*	
Plaintiffs		Judge: Ruehlman
		PLAINTIFF LORRAINE LAU'S MEMORANDUM IN OPPOSITION TO DEFENDANT, AED ENTERPRISES MOTION FOR SUMMARY JUDGMENT
vs	*	
AED ENTERPRISES LLC d/b/a DEWEY'S PIZZA, et al.	*	
Defendants		

The Defendant, AED Enterprises has filed a motion for summary judgment. Pursuant to Ohio Rule of Procedure 56(C), summary judgments shall not be rendered unless it appears from the evidence…, 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.

AED's sole argument is that no duty is owed to the Plaintiff because the area at issue was outside the scope of AED's possession and control.

The Defendant cites Beaney v. Carlson,[1] in support of its position.The syllabus of that case is factually distinguishable from the facts in the Lorraine Lau case. The syllabus stated:

> Even though a store keeper in a shopping center ordinarily has the duty to keep his premises in safe condition for his customers, such duty does not extend to the construction of a barrier on the parking lot to protect customers using the sidewalk in front of his store from cars parking in the shopping center parking lot which is in control of the lessor.

1 Beaney v. Carlson (1963), 174 Ohio St. 409, 189 NE2d 880

Thus, in Beaney, supra, the issue was constructing a barrier in a parking lot, a completely different issue than AED allowing the ingress egress walkway which they maintained, immediately adjacent to its business to become in disrepair. The alleged factual negligence in Beaney was that the storekeeper did not erect the construction barrier in the parking lot to prevent vehicles from coming up on the sidewalk.

In addition, in Beaney, supra, the language states that liability is based on possession or control of the premises.

In the Lorraine Lau case it is argued that the Defendants herein had a joint duty. The Defendant, AED had a common law duty to exercise reasonable care to provide a reasonably safe ingress and egress.

In Tyrell Investment Associates,2 the customer sought damages from a drugstore tenant and the building owner for injuries sustained in the fall while leaving the drugstore. The allegation was that the building owner had a roofing defect that caused water to be deposited on the sidewalk in front of the drugstore which turned to ice when it was cold and the Plaintiff slipped on it. The court directed a verdict in favor of the Defendant drugstore and the jury found the building owner liable. The appellate court reversed the directed verdict. The court found the drugstore's duty involved protection of its business invitee's using that common area for ingress or egress.

2 Tyrell et al. v. Investment Associates, Inc. 474 NE2d 621, 16 Ohio App. 3d 47

So, the Defendant, AED has a duty to the Plaintiff by virtue of its common law duty to provide safe ingress and egress and Defendant Towne Properties has liability as this was a common area by definition in the lease for which they assumed responsibility.

Furthermore, it is clear that the Defendant, AED maintained the area as well as exercised occupation over the area and therefore assumed a duty by affirmative conduct.3,4

Following are excerpts from the deposition of Chuck Lipp, the Director of Operations for AED dba Deweys. The manager of the Dewey's store, Dan Borchers, after Lorraine's fall, took an accident report and called Chuck Lipp.

(Mr. Borcher's memory is strangely gone as he does not recall much if anything correctly).

In Lipp's deposition he was asked what he had heard about how she was injured and his answer was:

A. Dan told me about it the night that it happened.

Q. Oh, Ok. So did he call you on the phone?

A. Yes.

Q. What did he tell you.

A. I don't remember what exactly he said.

3 McManes v. Kor Group 2003 Ohio 1763, Ct of Appeals, 2nd 2003

4 Doe v. Cub Foods (1990) 115 Ohio App.3d473

He was asked, did he agree that on the day that Lorraine fell the pavers had become depressed at the curb area such that there was a lip that needed to be taken care of and addressed?

A. I wasn't there that day, so I wouldn't be able to speak specifically about that day.

Q. Did you go there later?

A. Yes

Q. When did you go there?

A. I don't remember.

Q. Did you go there in conjunction with checking out Lorraine Lau's fall and the situation?

A. I don't remember why I would have gone there, but-

Q. But you did make an observation of that area at some point in time?

A. Yes.

Q. And what did you observe?

A. I can't recall exactly what I observed.

Q. Did you recall the pavers in disrepair and that they had sunk below the curb level such that there was a lip that was made where the pavers sunk below the curb?

A. Yes.

Q. You did observe that-

A. Yes.

Q.—correct? How did you happen to observe that? Just walking in, you happened to notice it, or walking out?

A. No

Q. What was it then?

A. To go out there and look at it.

Q. For what purpose?

A. To observe what Dan had told me.

Q. And what had Dan told you?

A. I don't recall.

Q. Well, he told you something about these pavers; otherwise you wouldn't have been looking at them, right?

A. Right.

Q. Okay. And you saw that there was a depressed area, and Dan told you about that depressed area, didn't he?

A. No, as far as I know—actually, I should say I don't remember what he told me.

Q. Well, he would have had to tell you something to narrow you in on that area, correct?

A. Yes.

Q. Okay, And if I said that he told you that he saw a lip there and those pavers ere depressed, would you say that's untrue or would you just say you can't remember what he told you?

A. I'm saying I don't remember exactly what he said.

Q. Okay, But words to the effect that someone had fallen out there, correct? Maybe you don't know exactly word for word, but he had called you and told you someone had fallen in the area of those pavers at the curb; is that fair enough?

A. Yes.

Q. Okay. And you can't remember if he told you there was a depressed area or not, correct?

A. Correct.

Q. Okay. And what you saw was that the pavers had sunk down and there was a lip created there at the curb?

A. Correct.

Q. Okay. Did you take any pictures of it?

A. No.

Q. You thought it was a tripping hazard, didn't you?

A. Okay. Possibly.

Q. And why was that?

A. Because it wasn't completely flush.

Q. It would be more of a tripping hazard for people leaving Dewey's then coming in—

A. Correct.

Q. Yes, because the lip was created in the direction that people would be leaving; if you understand what I'm saying?

A. Correct.

Q. Okay. And so when you saw that, I take it you called someone by the name of Outdoor Environments, Incorporated to get that fixed?

A. Correct.

Q. Why didn't you call Towne Management to have it fixed.

A. Because at the time, I didn't know. I assumed it was our responsibility.

Q. Okay. Why did you assume it was your responsibility at the time?

A. I wanted to get it fixed because it was in front of our restaurant.

Q. Okay. It's a place where people come and go, correct?

A. Correct.

Q. You didn't want that to happen again?

A. Correct.

At that point he was shown what was marked as Exhibit 3 which was a brick paver installation invoice for repairs at the e-n-t-r-w-a-y, per Chuck Lipp, roughly 33 man hours plus a few materials. It says, "Chuck, please send me gift certificates for this work. This was a pretty big job. Thanks for the work." Mr. Lipp knew the repair person because they had repaired pavers before on the patio where moles had gone under. We asked if there was any reason those repairs could not have been made before Lorraine fell. His answer was:

A. No

In fact, Dewey's would sweep the area and make sure it was clean because it is the entrance and exit to their store and to the parking lot and they wanted their customers to have safe passage into the store and out of the store (Lipp andBorchers Depositions).

Attached hereto is a copy of the pertinent parts of the deposition of Chuck Lipp and Dan Borchers.

In addition, it is also significant to note that in the Lease on Page 29, Section 17-5 it is stated that: If a Landlord fails to perform any of its obligations under this Sublease (a "Landord Default"), tenant shall give Landlord notice specifying the Landlord Default. If the Landlord Default is not cured with the Cure Period, then Tenant may upon the first and second occurrences of the Landlord Default, notify the Landlord of the cost of such correction and allow Landlord to reimburse Tenant.

In this case, apparently, the Tenant, thinking it was his responsibility to take care of this area, had the repairs made and did not notify Towne Properties. Thus, Towne Properties may be primarily liable and AED may have a separate claim for contribution by the lease. It is submitted that the evidence in this case is such that both parties had the right to possess or control the area or did in fact, take possession or control of the area. Towne Properties specifically by it's lease and AED by the common law duty it owes and also assumed to have safe ingress and egress for it's customers.

Accordingly, there are material issues of fact and the summary judgment should be overruled.

Respectfully submitted,

ANTHONY D. CASTELLI (OH 0001201)
Attorney for Plaintiff
11085 Montgomery Road, Suite 200
Cincinnati, OH 45249
(513) 621-2345

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition To Defendant, AED Enterprises Motion For Summary Judgment was served via U.S. First Class Mail to Katherine L. Hussey, Esq., 105 E. Fourth Street, Suite 1400, Cincinnati OH 45202 and to Joe Mordino, Esq., One West Fourth Street, Cincinnati, OH 45202-3606 this 4th day of February 2010.

_____
ANTHONY D. CASTELLI
Attorney for Plaintiffs