STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH R. BRAGG and MARY BRAGG,

Plaintiffs-Appellees,

v

DAIMLER CHRYSLER,

Defendant/Third-Party Plaintiff-Appellant,

and

TORRE & BRUGLIO LANDSCAPING, INC.,

Third-Party Defendant-Appellee.

UNPUBLISHED
September 16, 2010

No. 290371
Oakland Circuit Court
LC No. 07-081572-NO

Before: Talbot P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

In this premises liability case, defendant/third-party plaintiff ("defendant") appeals by leave granted an order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). Because defendant did not have notice of the hazardous condition, it is entitled to summary disposition, and we reverse.

This matter arises from plaintiff slipping and falling on black ice in defendant's parking lot on March 19, 2004. At the time of the incident, plaintiff was an employee with Modern Engineering, which contracted him to Cooper Tools, which provided tools to defendant. Plaintiff's position required him to report to work each day at defendant's facility in Auburn Hills, Michigan. Prior to the incident, plaintiff had parked in all areas of the parking lot at defendant's facility and had never made a complaint regarding snow removal or salting procedures.

Plaintiff's commute to work generally took between 30 and 45 minutes. Plaintiff testified that the weather was cold on the morning of the incident, but he did not recall any precipitation. Plaintiff, who has lived his entire life in Michigan, acknowledged that he was familiar with the fact that snow and ice occurred every winter in Michigan and that snow and ice could be slippery. According to plaintiff, there was some snow on the ground, but he did not remember how much. Plaintiff recalled that the roads were fairly clear on the morning of the incident, but

acknowledged that he was aware there might be slippery snow and ice conditions. It was still dark when plaintiff arrived at work around 6:00 a.m. in his pickup truck. Plaintiff did not recall seeing any snow or ice in the parking lot when he arrived. Plaintiff also did not recall whether it had snowed in the 24 hours before the incident.

Plaintiff parked his truck in the third row, third spot, which was not the only available spot, and got out of the vehicle by putting his right foot on the running bar of his truck. He looked down and did not see anything other than the dark asphalt pavement. When plaintiff stepped down on the ground, his left foot slipped out from under him as soon as it touched the ground. Plaintiff landed on his tailbone and lay on the ground for about 15 minutes. Plaintiff did not recall seeing any snow or ice in a ten-foot radius after he fell, but plaintiff felt a cold and slick area where he fell. When plaintiff then got up, he observed a patch of ice that was about four feet by four feet. Plaintiff did not see anyone spreading salt in the parking lot.

Defendant contracted with third-party defendant for snow and ice removal on its premises. Third-party defendant had a weather tracking setup to anticipate when it would need to remove snow and ice, as well as individuals who visually inspected the premises to determine if removal was necessary. Raymond Knight, who was employed by defendant, would discuss with third-party defendant what it was going to do in instances when the predicted weather was going to require snow and ice removal. Third-party defendant's records show that on March 16, 2004, an inch of snow fell after hours and, as a result, it cleared the entrance and roads for incoming morning traffic. On March 17, 2004, a half-inch of a snow/ice mix fell and third-party defendant de-iced the loop road and pedestrian entrances. On March 19, 2004, third-party defendant de-iced loop roads and decks because of icy conditions. According to its records, third-party defendant's personnel arrived at defendant's premises after plaintiff's fall at 6:30 a.m. on March 19, 2004.

Plaintiffs filed a complaint alleging that plaintiff slipped and fell on black ice in defendant's parking lot on March 19, 2004, sustaining injuries, including injuries that included his back and neck. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that the black ice on its premises constituted an open and obvious condition and the condition did not have any special aspects. Defendant also argued that summary disposition was appropriate because it did not have notice of the black ice. Third-party defendant filed a brief joining and concurring with defendant's motion for summary disposition against plaintiffs.

The trial court initially entered an opinion and order granting defendant's motion for summary disposition against plaintiffs holding as follows:

> Even applying the open and obvious doctrine and viewing the evidence in the light most favorable to plaintiff, it is clear that a reasonably prudent person with ordinary intelligence in plaintiff's position could have anticipated that ice would be present on the parking lot surface. Plaintiff admitted to cold temperatures and some snow on the ground on the morning of his accident. Plaintiff is a life-long Michigan resident and knew or should have known that ice and slippery conditions, along with temperature fluctuations are not an uncommon occurrence in Michigan, especially in the early morning hours during the month of March.

The trial court also found that the black ice did not have special aspects because it was not effectively unavoidable and did not create a substantial likelihood of serious harm

Subsequently, the trial court issued an opinion and order granting plaintiffs' motion for reconsideration and denying defendant's motion for summary disposition based on *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474; 760 NW2d 287 (2008), finding that a question of fact remained regarding whether the ice was open and obvious. The trial court entered an order denying defendant's motion for reconsideration of its grant of plaintiffs' motion for reconsideration. Defendant filed an application for leave to appeal with this Court, which this Court granted.[1] Accordingly, defendant now appeals on leave granted.

Defendant first argues that the trial court erred by denying its motion for summary disposition pursuant to MRC 2.116(C)(10). Defendant contends that summary disposition is proper because the black ice on which plaintiff[2] allegedly slipped and fell was an open and obvious condition. Our review of a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co. Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). The duty a landowner owes to those who

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[1] *Bragg v Daimler Chrysler*, unpublished order of the Court of Appeals, entered November 25, 2009 (Docket No. 290371).

[2] Because Mary Bragg asserts only a derivative claim for loss of consortium, the singular use of "plaintiff" refers to Joseph R. Bragg.

enter his or her land is determined by the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Michigan recognizes three traditional categories of visitors: trespassers, licensees, and invitees. *Id.* It is undisputed that plaintiff was an invitee while on defendant's premises.

A landowner has a duty to invitees to "inspect the premises and, depending on the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt*, 462 Mich at 597. However, this duty generally does not require a landowner to protect an invitee from dangers that are "open and obvious." *Benton v Dart Properties*, 270 Mich App 437, 440-441; 715 NW2d 335 (2006). The standard for determining whether a particular condition qualifies as open and obvious "is whether 'an average user with ordinary intelligence (would) have been able to discover the danger and the risk presented upon casual inspection.'" *Slaughter*, 281 Mich App at 478, quoting *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In *Slaughter*, this Court held that in order for black ice to be considered an open and obvious danger, there must be some "evidence that the black ice in question would have been visible on casual inspection before the fall," or some other "indicia of a potentially hazardous condition." *Slaughter*, 281 Mich App at 483. In *Slaughter*, it had not snowed during the week leading up to the plaintiff's slip and fall. *Id.* at 475. After midnight, as it had just begun to rain, the plaintiff stopped at a gas station and immediately lost her footing and fell on black ice when she got out of her vehicle. *Id.* at 475-476. The plaintiff never saw the ice before she fell, could not readily see it afterwards, and she did not see anyone else slip or fall. *Id.* at 483. This Court, in affirming the trial court's denial of the defendant's motion for summary disposition, reasoned that a hazard that is "either invisible or nearly invisible, transparent, or nearly transparent" is "inherently inconsistent with the open and obvious danger doctrine," and the weather conditions did not reveal the condition to the plaintiff. *Id.*

Most recently, our Supreme Court in *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934; 782 NW2d 201 (2010), peremptorily reversed a decision of this Court in *Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396, 399; 775 NW2d 148 (2009), reinstating the trial court's grant of summary disposition for the defendant in that case, which involved the plaintiff slipping and falling on black ice in the defendant's parking lot. Our Supreme Court stated:

> The Court of Appeals failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008), which renders alleged "black ice" conditions open and obvious when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall." Here, the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). [*Janson*, 486 Mich at 934.]

In the instant case, the evidence shows that plaintiff, who is a lifelong Michigan resident and familiar with Michigan winters, did not see the ice before falling in defendant's parking lot.

Plaintiff did not recall observing any snow or ice in defendant's parking lot, and specifically testified that there was no other snow or ice within a ten-foot radius of where he fell. Only after plaintiff got up after lying on the ground for about 15 minutes, did he observe the patch of black ice that he had slipped on.

However, defendant argues that there were indicia of a potentially hazardous condition. Plaintiff testified that it was "cold" and based on the meteorological records the temperature was below freezing at the time of plaintiff's fall. According to plaintiff, the roads were fairly clear on the day of his fall. Plaintiff did see some snow on the ground, but did not specify where, and he did not recall seeing any snow or ice in defendant's parking lot. In addition, in the days leading up to the incident, there was mild precipitation. In particular, three days before plaintiff's fall, an inch of snow fell and two days before plaintiff's fall, a half-inch of a snow/ice mix fell. However, there was no precipitation the day prior to the incident and there was also not any precipitation when plaintiff was commuting to work on the day of the incident or when he exited his truck in defendant's parking lot.

We conclude that, viewing the evidence in the light most favorable to plaintiff, there is a material question of fact regarding whether there were indicia of a potentially hazardous condition. Although like in *Janson*, plaintiff's fall occurred during the winter and the temperature was below freezing, the temperature had fluctuated above freezing in the days preceding plaintiff's fall. Further, unlike in *Janson*, there was not precipitation on the morning of plaintiff's fall or the day preceding plaintiff's fall. Although plaintiff acknowledged there was snow on the ground, there was no snow or ice visible in defendant's parking lot and the roads were fairly clear. Like in *Slaughter*, the facts of the instant case establish that merely because it is wintertime in Michigan is not enough to render any weather-related situation open and obvious because "reasonable Michigan winter residents know that each day can bring dramatically different weather conditions . . . ." *Slaughter*, 281 Mich App at 483. Thus, there exists a question of material fact regarding whether weather conditions in the instant case would have alerted an average user of ordinary intelligence to discover the danger.

Defendant also argues that summary disposition is appropriate because there is no evidence that defendant knew or should have known of the unsafe condition. Generally, an issue is not properly preserved for appeal if it has not been raised before, addressed, and decided by a lower court. *Miller-Davis Co v Ahrens Constr*, 285 Mich App 289, 298; 777 NW2d 437 (2009), citing *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Here, defendant raised the issue of notice as a basis for granting its motion for summary disposition before the trial court. However, the trial court denied defendant's motion without addressing this issue, and thus, the issue is unpreserved. Nevertheless, "'this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.'" *Miller-Davis Co*, 285 Mich App at 298, quoting *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Because consideration of this issue is necessary for a proper determination of the case, presents a question of law, and the parties have presented the necessary facts, we will consider the issue.

To sustain a premises liability action, a plaintiff, even an invitee, must show that the defendant or its employees caused the unsafe condition or that the defendant knew or should

have known of the unsafe condition. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 603-604; 601 NW2d 172 (1999). Constructive notice can be inferred from evidence that the condition is of such a character or existed a sufficient length of time that the landowner should have had knowledge of it. See *Clark*, 465 Mich at 419.

In this case, there is no evidence that defendant caused the ice in the parking lot that plaintiff fell on or that it had actual knowledge of the existence of ice in the parking lot. Thus, the question is whether there is a genuine issue of material fact regarding whether the icy condition was of such a character or existed a sufficient length of time that defendant should have had knowledge of it. Plaintiff's deposition testimony established that the parking lot appeared to be clear of snow and ice. Further, there had not been precipitation the day prior to plaintiff's fall or on the morning of plaintiff's fall.

Plaintiff submitted the affidavit of meteorologist Paul Gross who opined that the ice buildup was solely caused by the combination of below freezing temperatures in the presence of elevated humidity and fog in the vicinity, which began around 4:30 a.m. on the day of the incident. In his affidavit, Gross averred as follows, in part:

> 8. The meteorological data indicate that ambient air conditions prior to this incident were conducive to the formation of black ice on untreated or insufficiently treated pedestrian surfaces in Auburn Hills, Michigan on 19 March 2004 at 6:00 A.M.
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> ***
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> 10. It is my opinion that the subject black ice patch and subsequent ice buildup that occurred on the lot starting around 4:30 a.m. on March 19, 2004, was solely caused by the combination of below freezing temperatures in the presence of elevated humidity and fog in that vicinity.
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> 11. The meteorological data indicate that this black ice first developed about an hour-and-a-half prior to this incident and, left untreated, would have persisted through the time of plaintiff's fall.
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> ***
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> 13. National Weather Service forecasts (for the overnight period leading up to this incident) issued from the afternoon of the day before this incident through the time of this incident all mentioned anticipated fog and below freezing temperatures. This combination is well known for its potential to cause black ice.

However, even accepting Gross's observations as true, this opinion, based on the data, affords no evidence that defendant knew or should have known about the specific icy patch on which plaintiff fell. Circumstantial evidence that ice may have formed under the weather conditions of that morning does not allow a reasonable inference that defendant had constructive notice of it. See *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999) (meteorologist's affidavit of general weather conditions was not evidence of the defendant's knowledge of ice).

Moreover, it would not be reasonable to presume that a landowner would have to inspect every inch of a parking lot for black ice, which according to plaintiff was not visible on casual examination.

Importantly, based on the affidavit, the icy condition started developing at approximately 4:30 a.m. Thus, it could have only been in existence for a maximum of an hour and a half prior to plaintiff's fall, but, it could have developed as little as a few minutes prior to the fall. Again, constructive notice can be inferred from evidence that the condition existed a sufficient length of time that the landowner should have had knowledge of it. See *Clark*, 465 Mich at 419. Based on the record presented in this case, even when viewing the evidence in the light most favorable to plaintiffs, plaintiffs have not established a question of fact with regard to constructive notice.

Finally, to the extent plaintiff argues that defendant should have known of the condition as a result of the National Weather Service forecasts, this reasoning is not persuasive. In *Altairi*, 235 Mich App at 640, this Court stated, "[i]nsofar as plaintiff seeks to use general knowledge of local weather conditions to show that defendant should have known [of the condition], the same knowledge can be imputed to plaintiff." Under these circumstances, it cannot be said that defendant would have discovered the hazard with the exercise of reasonable care.

In sum, because plaintiff presented no evidence that defendant caused, knew, or should have known of the unsafe condition, summary disposition is appropriate on this basis.

Reversed. Costs to neither party.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio