STATE OF MICHIGAN

COURT OF APPEALS

LAROSA BUTLER, Plaintiff-Appellee,	UNPUBLISHED August 2, 2018
v	No. 336671 Wayne Circuit Court
GOLD MOUNTAIN INC, d/b/a EASY PICK FOOD MARKET, Defendant-Appellant.	LC No. 15-015302-NO

Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the trial court's order denying its motion for summary disposition. We reverse and remand for entry of summary disposition in favor of defendant.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant is a convenience store located in Highland Park. On the evening of February 21, 2014, plaintiff drove to the store with an acquaintance, Darnell Battle. According to plaintiff, she parked her vehicle and walked toward the store, with Battle following some distance behind. She allegedly slipped and fell on ice that had accumulated just outside the entrance to the store. She got up before Battle reached her. She and Battle then entered the store, and Battle walked past the area where she had fallen. Plaintiff testified that she reported the incident to two people inside the store—a man and a woman whom she believed were employees of defendant. According to plaintiff, the woman told her "that she would take care of it, that they hadn't got [sic] to it and she would take care of it," which plaintiff indicated gave her

[1] *Butler v Gold Mountain Inc*, unpublished order of the Court of Appeals, issued May 12, 2017 (Docket No. 336671) (two judges would have peremptorily reversed the trial court's order, and one judge would have denied leave; because peremptory reversal requires unanimity, MCR 7.211(C)(4), this resulted in a grant of leave). This Court also granted defendant's motion to stay proceedings in the trial court. *Id.*

the impression that the employees were aware of the ice but had not yet put salt on it. However, plaintiff admitted that at no time did either person specifically acknowledge the presence of ice. No one witnessed the alleged fall or the alleged conversation. Battle did, however, observe plaintiff getting up from the ground.

Plaintiff testified that she did not see the ice before falling, but that she did see it after she fell and was then able to identify it as such. However, even after standing up after her fall, she could not see the ice looking down at it. Plaintiff stated that, based on how the ice felt when she touched it, it was "thick" and covered the entire front of the doorway into the store. Plaintiff also stated that she had not encountered any slippery conditions earlier in the day. Battle testified at his deposition that, although it had not been snowing that day and he did not recall that there was any accumulated snow on the ground, it was cold and the ground was "wet" and "icy." Battle also testified that he did not see the ice on his way into the store, but that he did see it on his way out; he did not slip on any ice when either entering or leaving the store. Battle later submitted an affidavit attesting that he saw no ice when he walked into the store, only saw ice after he exited the store and "bent down close to the ground outside the front door to look closer at the location," and saw no ice or snow anywhere that day "before looking closely at the ground after exiting the store."

Defendant's employees, Taghred Bitros and Rhonda Petros,[2] testified at their depositions that they were the only people who regularly worked in the store; their brother, the owner, stopped in sometimes but was not present on February 21, 2014. Defendant did not keep documentation regarding accidents, shoveling, salting, or hours worked by particular employees. However, Petros testified that she remembered the day of plaintiff's fall because it was shortly after a break-in had occurred at the store. Petros and Bitros both testified that the only noteworthy incident that occurred on that day had been that an elderly woman had lost her grip on her cane in the parking lot and "wobbled" or "bent on her knee" before entering the store. When Petros and Bitros learned of the lawsuit, they initially assumed that plaintiff was that same woman. They both agreed, however, after seeing photographs of plaintiff, that plaintiff and the elderly woman were not the same person. Regardless, both Petros and Bitros testified that they did not recall anyone reporting having slipped and fallen on the premises that day.

Both Petros and Bitros testified that it had snowed and been cold during the days preceding February 21, 2014, but that it had either not snowed that day or had not snowed hard enough to leave any accumulated snow. Both also opined that the temperature that day was above freezing, with Bitros describing the day as "nice and warm" and Petros recalling that the temperature was in the mid-40s. Both of them testified that they inspected the parking lot at some point during the day; they stated that it was defendant's policy to inspect the outside of the premises three to five times a day regardless of weather conditions and to salt or shovel walkways, including in the area of the store's entrance, as necessary. Petros testified that ice

[2] The parties dispute who was working at the store that day: plaintiff testified that she spoke to a male and female employee, whereas defendant's witnesses stated that there were no male employees other than their brother, who was not present that day.

would sometimes accumulate in front of the entrance door, and that when it did, it had to be cracked with a shovel and salted; otherwise, the door would not open. Bitros testified that she salted the area when she started work at 1:00 p.m., and Petros testified that she inspected the parking lot after the incident with the elderly woman, which had occurred sometime after dark.[3] Neither employee saw any snow or ice when they inspected the lot. Defendant's video camera footage of the scene automatically erased after three days and therefore had not been preserved.

Plaintiff filed the instant premises liability suit against defendant. After discovery, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that no genuine issue of material fact existed regarding whether the ice on which plaintiff allegedly slipped had been open and obvious, or whether defendant lacked actual and constructive notice of the hazard. The trial court held a hearing on defendant's motion. During the first day of the hearing, the trial court went off the record to give defendant's counsel the opportunity to locate specific deposition testimony that counsel wished to reference, but never went back on the record that day. The hearing continued the next day, but for unknown reasons the proceedings were not recorded. The trial court entered an order denying defendant's motion "for the reasons stated on the record."[4]

This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's grant or denial of summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. See *Id.* at 120.

III. SUMMARY DISPOSITION

To establish a premises liability claim, a plaintiff must prove (1) that the defendant owed it a duty; (2) the defendant breached that duty; (3) causation; and (4) that the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179

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[3] Sunset in the Detroit area occurred around 6:12 p.m. on February 21, 2014. See https://www.timeanddate.com/sun/usa/detroit?month=2&year=2014. The record in this case reflects that plaintiff and Battle arrived at the store between 8:30 p.m. and 10:00 p.m.

[4] The fact that we are unable to determine the trial court's rationale for its denial of summary disposition is not, in itself, error in light of our de novo review. "Although it is always preferable for purposes of appellate review that a trial court explain its reasoning and state its findings of fact with respect to pretrial motions, the court is not required to do so by court rule." *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993).

(2007). Whether defendant owed plaintiff a duty is a question of law, which this Court reviews de novo. *Dawe v Dr Reuven Bar-Levav & Assocs, PC*, 289 Mich App 380, 390; 808 NW2d 240 (2010), lv den 489 Mich 869 (2011).

The owner of property owes invitees a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm that is caused by a dangerous condition on the property. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty arises where there is "'an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

A premises owner "is not a guarantor or insurer of the safety of" invitees. *Serinto v Borman Food Stores*, 3 Mich App 183, 193; 142 NW2d 32 (1966). A premises owner owes invitees on his land no duty to protect against dangerous conditions unless he is, or should be, aware of the dangerous condition. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). Such notice can be actual or constructive. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 8-9; 890 NW2d 344 (2016). Defendant argues that plaintiff has not demonstrated that it had actual or constructive notice of the alleged ice, and that it was therefore entitled to summary disposition. We agree.

The evidence, viewed in the light most favorable to plaintiff, did not establish a genuine issue of material fact regarding whether defendant had constructive notice of the ice. Plaintiff correctly points out that Petros and Bitros stated that they were aware in general that ice could form in front of the store's entrance. However, the fact that ice buildup may occur in winter, without more, does not permit a court to impute to a defendant constructive notice of a specific ice buildup on a particular day. See *Altair v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999) (rejecting the plaintiff's argument that the defendant's "general knowledge of local weather conditions" meant that the defendant knew or should have known of a particular patch of ice).

Nonetheless, evidence that ice had historically formed in a certain location on the premises could be relevant to the issue of a defendant's constructive notice of the hazard. Premises owners owe invitees a duty to inspect the premises and either warn them of any discovered hazards or conduct necessary repairs. *Grandberry-Lovette v Garascia*, 303 Mich App 566, 573; 844 NW2d 178 (2014); *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). However, a defendant is not required to present evidence that it conducted regular or routine inspections in order to avoid summary disposition. *Lowrey*, 500 Mich at 10. With regard to the accumulation of ice on the premises, a premises owner does not have a "duty to guarantee that ice will never form on its premises, but it does have a duty to ensure that invitees are not unnecessarily exposed to an unreasonable danger." *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 696-697; 822 NW2d 254 (2012).

Here, there was testimony that ice had in fact formed in front of the door previously. But Petros and Bitros both testified that they inspected the parking lot that day and did not observe

any ice in front of the door. Plaintiff provided the trial court with an affidavit from Walter Cygan, a "safety & human factors consultant," opining that "it is more likely than not that the ice in front of the doorway would have formed at least seven hours before Plaintiff fell."[5] This affidavit is extremely conclusory and provides no explanation of the reasoning underlying Cygan's conclusions. Cygan's opinion is not based on any evidence regarding the nature of the conditions that in fact existed at defendant's location on that day. The affidavit states that Cygan reviewed plaintiff's testimony, a photograph taken of the premises, and the weather reports. The only photographs discussed in this matter appear to have been taken a significant period of time after plaintiff's fall, in warm and dry weather.

This Court has held "that an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts," especially "where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation." *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278; 286; 602 NW2d 854 (1999). Here, Petros and Bitros testified that they did not observe ice accumulation earlier in the day. Furthermore, no witness discovered the ice until after plaintiff fell.

The unrefuted evidence is that defendant's employees conducted regular inspections and received no other reports or indications of anyone slipping. Cygan's affidavit does not create a question of fact regarding constructive notice, because it does not bear on the issue of the nature or duration of the actual hazard alleged to have been present at the store; Cygan's affidavit merely opines, based on plaintiff's deposition testimony about the ice that she observed only after falling, weather reports for the area, and photographs taken during an entirely different season, that if ice as described by plaintiff was present in the doorway at the time of the fall, it would have been present for at least 7 hours before plaintiff's fall. A non-movant, when presented with evidence that no genuine issue of material fact exists, must present more than speculation or conjecture in rebuttal to survive a motion for summary disposition under MCR 2.116(C)(10). See *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). We conclude that plaintiff has failed to carry that burden regarding constructive notice.

Plaintiff also did not demonstrate a genuine issue of material fact regarding defendant's actual notice of the ice. Petros and Bitros testified that they were not aware of the ice before plaintiff fell. Plaintiff's evidence in support of actual notice consists of her deposition testimony that she gained the impression from their statements that Petros and Bitros were already aware of the ice when she fell, yet she admitted that neither employee ever specifically acknowledged the ice or otherwise explicitly communicated that they were already aware of the hazard. Indeed, plaintiff stated that she "knew" that an employee knew about the ice strictly from the employee's

[5] Defendant challenges Cygan's qualification as an expert. We find it unnecessary to decide this issue; further, defendant does not explain why Cygan would need to be qualified in meteorology, rather than as a professional engineer in the field of safety engineering, to opine in the manner that he did.

pledge "to take care of it," and that the employee's statements were "[a]s if they knew [the ice] was there."

At best, the statements referred to by plaintiff only indicate that the employee told plaintiff that she would take care of the ice once plaintiff had made her aware of it. The employee's statements do not support the inference that the employee had prior knowledge of the hazard. Plaintiff variously testified that an employee told her that she "was going to handle it," "would get to it," "was going to get to it," "that they hadn't got [sic] to it" and "would take care of it." None of these statements, viewed in the light most favorable to plaintiff, individually or in their totality establish a genuine issue of material fact regarding the employee's knowledge of the ice *before* plaintiff's fall. At best, they provide a factual basis for how plaintiff arrived at the *belief* that the employee knew about the ice before her fall. Plaintiff's subjective belief based on one of many possible inferences from the employee's statements is not sufficient evidence to survive summary disposition. To conclude otherwise would be nothing more than plausible conjecture and subjective belief, neither of which is sufficient to establish a question of fact to withstand summary disposition. *Marsh v Dep't of Civil Service*, 173 Mich App 72, 81; 433 NW2d 820 (1988); *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Therefore, plaintiff has not carried her burden of showing that a genuine issue of material fact exists regarding actual notice.[6]

In summary, we hold that plaintiff failed to demonstrate a genuine issue of material fact regarding defendant's constructive notice of the ice, *Lowrey*, 500 Mich at 9-10, 12-13, or actual notice of the ice, *Marsh*, 173 Mich App at 81; *Libralter Plastics*, 199 Mich App at 486.[7] We therefore reverse the trial court's denial of summary disposition and remand for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Mark T. Boonstra

[6] Both parties at various times attack the credibility of the other's witnesses. We decline to weigh their respective credibility. This Court may not resolve factual disputes or evaluate witness credibility when reviewing a motion for summary disposition; nor may a trial court do so in the first instance at the summary disposition stage of the proceedings. See *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 624-625; 739 NW2d 132 (2007).

[7] Because we reverse on the issue of defendant's constructive or actual notice, we need not reach the trial court's determination regarding whether the hazard was open and obvious.

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Plaintiff-Appellee,

v

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Defendant-Appellant.

UNPUBLISHED
August 2, 2018

No. 336671
Wayne Circuit Court
LC No. 15-015302-NO

Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

BECKERING, J. (*concurring*).

I concur in result only.

/s/ Jane M. Beckering

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v	No. 336671 Wayne Circuit Court
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Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. *(dissenting)*

I respectfully dissent, because I find that plaintiff adequately established a genuine question of fact regarding defendant's actual notice of the ice, and I would find the ice not to be open and obvious. I would therefore affirm and remand for further proceedings.

I agree with the lead opinion that this Court should decline the parties' invitations to draw conclusions about the truthfulness of each others' witnesses. *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 624-625; 739 NW2d 132 (2007). My colleagues, explicitly or implicitly, nevertheless do so. At a summary disposition stage of proceedings, the courts "may not weigh the evidence or make determinations of credibility," and summary disposition is improper if the evidence is conflicting. *Patrick v Turkelson*, 322 Mich App 595, 605-606; 913 NW2d 369 (2018) (quotation omitted). When reviewing a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, the court "must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Radke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

The lead opinion accurately recites portions of plaintiff's testimony. However, a more complete recitation is as follows:

> [*Defendant's attorney*]. Tell me about your conversation with the guy that was dealing with the bottles.
>
> [Plaintiff's attorney]: I'll object to form.

A. I walked in and a lady was first that I talked to, told her I fell, the bottle guy told me to be careful, that's what he said, he told me to "Be careful."

Q. And why did he say to be careful?

[Plaintiff's attorney]: Object to foundation.

[Defendant's attorney]: Let me rephrase.

Q. Did he tell you why he was telling you to be careful?

A. Because when I walked in I told them both I fell.

Q. Okay.

A. And he was like "You should be careful." And me and the lady interacted.

Q. What did the lady say to you when you told her you fell?

A. She said – what did she say. I walked in and I said "I just fell outside the store."

And she said to me "Oh." She said "Oh, you fell out there?"

I said "Yeah."

And that's when the bottle guy said – yeah, "Be careful."

And she said to me "Oh," something of she was "Sorry," and she was sorry and with a – with a grin.

Q. I'm sorry?

A. With a smile, with a grin, that's what I recall and she was – they were going to take care of it.

Q. She said they were going to take care it of? [sic]

A. Yeah, she said they were going to take care of it. As if they knew it was there like we'll take care of it with a grin, was kind of –

Q. What did you fall on?

A. I fell on ice right here (indicating)

* * *

Q. So the lady inside she said "Sorry" and grinned at you. Did you have any other conversation with her?

A. No.

Q. Did you ask her to fill out an incident report or anything like that?

A. No.

Q. Did you tell her what caused your fall?

A. No. Told her I slipped and fell.

Q. Did you tell her there was ice out there?

A. I told the bottle guy, me and the bottle guy. Her, she was grinning.

* * *

Q. I only have a few more questions for you. The lady that you saw at the store, you didn't get her name. Did you tell me that you did not recall what color hair she had?

A. No. I don't recall what color hair she had, I just remember –

Q. Okay.

A. –her apologizing and saying that she would get to the ice out there that they hadn't got to.

Q. And you said she was behind the counter?

A. Yes.

* * *

[Plaintiff's attorney]. And we were talking about – counsel asked about conversation [sic] you had with the employee when you got – entered into the store.

A. Uh-huh (affirmative).

Q. So I just want to talk to you about that. You indicated that the employee said – after you told her that you had fallen, she said she would take care of it. What did she mean when she indicated she would take care of it, what did she indicate to you?

[Defendant's attorney]: Object to form and foundation. You can answer.

[The witness]: She said I can answer?

Q. Yeah, you can answer.

A. Okay. She said – I told her I fell and she said – she told me she was sorry but with a little funky grin, little smirk behind it, but she did tell me that she would get to it, that they hadn't got to it but they would get to it –

Q. Okay.

A. – I guess put salt out.

Q. Okay.

A. But that they hadn't had time to put salt out or get salt out so that she would get to it but she did apologize.

Q. Okay. So it sounds like she acknowledged that she had known about it but didn't have time to get to put salt out?

[Defendant's attorney]: I would object to form and foundation.

A. She acknowledged that she knew.

Q. What was your impression by what she said how long she had known about it?

[Defendant's attorney]: Again, object to form and foundation.

A. Just amazed that you knew and didn't do anything.

Q. Okay. And what was your impression of how long she had known about the ice that you slipped on?

[Defendant's attorney]: Same objection.

A. Okay. Say it again.

Q. Want me to rephrase it?

A. Yeah.

Q. That's fine. When she told you – you indicated that she said she would get to it, she didn't have time to, because – to put the salt out but she would get to it?

A. She would get to it.

Q. So she acknowledged that she was aware of it –

A. Yes, ma'am.

Q. – correct? And what was your impression when she told you that about how long she had known that the ice was out there?

[Defendant's attorney]: Same objection to the foundation of the question.

A. She didn't do anything, that she had left it out there, and I told her I fell.

Q. And afterwards did you see her go out there and –

A. No.

Q. – put salt down?

A. No. And the guy never went either.

* * *

[Defendant's attorney]. Now you had said that the lady that you talked to that she said they'd take care of it and that you took this to mean that she knew about it. Why did you think she knew about it?

A. Because she said she knew, she said that she hadn't got to it, that she would take care of it.

Q. She hadn't gotten to what?

A. I guess putting salt out.

Q. Is that what she said to you or did she say – I mean, like what were her words?

A. That was our conversation. Like I said, I walked into the store, told her I fell, the lady and the guy, and she said – she apologized, she said okay, she apologized to me with the laugh, and then after the laugh she said she would get to it, and I guess they hadn't – she said they hadn't got to it or they would get to it.

Q. Do you know which she said?

A. Can't recall but I'm think'n that she really said to me that she hadn't got to it and she would get to it.

Q. But you're not sure?

A. No. And I don't know if the bottle guy went out and put the salt out either.

* * *

Q. So between the five minutes that you – or I'm sorry. Between the time that you had the conversation with her and the time you left about five minutes passed?

A. I'm saying the time he came – yeah, when I left out [sic] five minutes she didn't come out or she didn't come and put salt out, she didn't come out behind me at all.

Q. Okay. Did she ever say to you that she saw the ice?

A. She indicated that she knew it was out there.

Q. When did she say that?

A. When we had the conversation, I told you when I said to her that – she said I would get to it, they hadn't got to it or they was [sic] going to get to it and like I said, her or the guy never left out [sic] behind me.

Q. I understand that. But you're saying that her saying that they would get to it --

A. They were going to get to it. She was going to take care of it.

Q. Did she ever say to you "I know there's ice out there"?

A. No, she didn't say "I know there's ice out there" –

Q. Okay.

A. – but she did indicate that she knew it was out there.

Q. And in what way did she indicate that to you?

A. That she would get to it.

Q. So when she said "she would get to it" to you that meant she knew?

A. She said she was going to handle it, that they hadn't got out there, she would get to it.

Q. But she never actually said outright that she knew that there was something out there; is that correct?

A. That they hadn't handled it so that she knew.

Q. I'm not asking for what you –

A. Oh, okay.

Q. – I mean, you're speculating right now, aren't you?

A. Okay.

Q. Wouldn't you agree that that's speculation, you're assuming that you knew what she meant when she said (inaudible) –

[Plaintiff's attorney]: Object to form.

Q. But she didn't actually say that she knew it was ice, did she?

A. I'm not assuming, I'm telling you she knew the ice was out there.

Q. How do you know she (inaudible) –

A. She said she was going to get to it, that they hadn't got to it, so if you hadn't got to it you knew the ice was out there.

* * *

[Plaintiff's attorney]. And I know you just went back and forth with counsel about what was said by the employee at the store.

A. Yes.

Q. And you indicated that the employee knew the ice was out there by what she was telling you?

A. Yes.

Q. So when you walked in you told her that you had fallen on ice; correct?

A. Yes.

Q. And what did she say in response?

A. That she would take care of it, that they hadn't got to it and she would take care of it, and she apologized to me.

Q. So she knew the ice was out there?

[Defendant's attorney]: Objection, form and foundation –

A. Yes.

[Defendant's attorney]: – speculation.

Q. Did she – so she said "Sorry," she smirked.

A. Yes.

Q. And then she said – what did she say?

A. That she would take care of it, that they hadn't got to it and she would take care of it.

Consequently, I believe the lead opinion mischaracterizes plaintiff's testimony. Contrary to the lead opinion's assertion, plaintiff did not "admit[] that at no time did either person specifically acknowledge the presence of ice." Rather, plaintiff only admitted that neither employee said that they knew of the ice *in in those exact words*. I believe my colleagues, explicitly or implicitly, unfairly deem plaintiff's testimony speculative because some of her responses were unclear or because plaintiff could not recall the entirety of her conversation verbatim.

Plaintiff's testimony establishes a genuine question of fact whether defendant's clerk had actual notice of the ice. First, plaintiff repeatedly emphasized that the clerk said she "*hadn't got to*" the ice. Such a statement necessarily implies awareness that there *had been* a matter to address; in other words, knowledge of a pre-existing condition. Even if plaintiff could not recall specifically what words the clerk used, any limitations of plaintiff's memory go to the weight and credibility the trier of fact may choose to give her testimony, not to its admissibility. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995); *People v Burch*, 170 Mich App 772, 775; 428 NW2d 772 (1988). Furthermore, to the extent it may be ambiguous whether plaintiff was recounting further conversation or surmising the clerk's intent, any doubt must be construed in favor of plaintiff as the non-moving party. *Radke*, 442 Mich at 374.

Additionally, plaintiff's partial reliance on nonverbal communication, such as the clerk's facial expression and demeanor, is consistent with how people communicate. See *Gadde v Mich Consolidated Gas Co*, 377 Mich 117, 127; 139 NW2d 722 (1966). Our jurisprudence is founded on the principle that the trier of fact may draw non-speculative conclusions based in part on witnesses' demeanor and an associated "plethora of subjective and objective factors" that cannot be captured in words. See *People v Stewart*, 36 Mich App 93, 98; 193 NW2d 184 (1971); see also *People v Paille*, 383 Mich 621, 627-628 n 2; 178 NW2d 465 (1970). Furthermore, "facial expressions, body language, and manner of answering questions" are considered "[p]erhaps the most important criteria in selecting a jury" to attorneys conducting voir dire, *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008), which would be reasonable to apply to jurors or to any other person acting as a trier of fact. An admission may be implicit, *Shook v Proctor*, 27 Mich 349, 359-360 (1878), and testimony is not improperly conclusory merely because a witness can only recall "the main fact" of what was spoken rather than the "particular expressions." *Chambers v Hill*, 34 Mich 523, 524-525 (1876). Plaintiff expressly stated that the clerk acknowledged her prior awareness of the ice, which by itself creates a triable question of fact. However, even presuming plaintiff was merely stating a conclusion, I believe the lead opinion

inappropriately discounts plaintiff's objective and particularized articulations of why she drew that conclusion.

Because there is a genuine question of fact as to whether defendant was on actual notice of the ice, it is necessary to address whether the ice was open and obvious. Premises owners in Michigan are required to exercise reasonable care to protect invitees from unreasonable risks of harm from dangerous conditions on the premises, unless the dangerous condition is open and obvious. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477-478; 760 NW2d 287 (2008). This Court has rejected the contention that black ice is open and obvious *per se* "without evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition." *Id*. at 483. As the lead opinion's recitation of the evidence suggests, little, if any, evidence of such indicia existed. As a consequence, there is no basis for finding the black ice open and obvious. *Id*.

At a summary disposition stage of proceedings, the issue before the court is not whether a party should ultimately prevail at trial on the basis of the admitted evidence, but whether the admitted evidence shows a question of fact within the exclusive province of the trier of fact. See *Lytle v Malady (On Reh)*, 458 Mich 153, 175-176 n 23; 579 NW2d 906 (1998) (WEAVER, J.) (quoting *Anderson v Liberty Lobby, Inc*, 477 US 242, 249-250; 106 S Ct 2505; 91 L Ed 2d 202 (1986), for the proposition that although evidence must be more than "merely colorable" to raise an issue for trial, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). I believe the lead opinion subjects plaintiff's deposition testimony to excessive scrutiny at this stage of the proceedings. Plaintiff's testimony constitutes competent evidence that defendant's clerk was actually aware of the ice at defendant's door. I would therefore affirm the trial court's denial of summary disposition and remand for further proceedings.

/s/ Amy Ronayne Krause