STATE OF MICHIGAN

COURT OF APPEALS

TAMMY GARZA,

Plaintiff-Appellant,

v

GPM INVESTMENTS, LLC, doing business as ADMIRAL GAS STATION,

Defendant-Appellee,

and

ADMIRAL PETROLEUM COMPANY,

Defendant.

UNPUBLISHED
May 20, 2021

No. 353591
Genesee Circuit Court
LC No. 19-112402-NO

Before: SAWYER, P.J., and STEPHENS and RICK, JJ.

PER CURIAM.

In this slip-and-fall case, plaintiff appeals by right the trial court order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff injured her wrist when she slipped and fell while an invitee at defendant's gas station. Plaintiff attributes the fall to "black ice" accumulated on the pavement outside the gas station store. In her deposition testimony, plaintiff at first indicated that she did not know what caused her to fall. Later in the deposition, she stated that after she fell, she "felt ice." And when asked later to clarify her earlier statement that she did not know what caused her fall, she agreed that it was her opinion that ice caused her to fall.

Weather data submitted to the trial court indicated that the temperature on the day of the fall ranged from a low temperature of 18 degrees to a high of 30 degrees. The weather conditions were described as "fair," although the data indicated that there was "light snow" on the previous day.

After plaintiff filed her complaint, defendant moved for summary disposition, arguing that plaintiff could not establish causation and that any ice present in defendant's parking lot was open and obvious, and not unreasonably dangerous or unavoidable. The trial court granted defendant's motion for summary disposition, stating that while there was a genuine issue of material fact regarding causation, the ice was open and obvious, and therefore, summary disposition in favor of defendant was warranted. Plaintiff now appeals.

I. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition. Issues of law are also reviewed de novo." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008) (citation omitted).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

"There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

II. CAUSATION

The trial court determined that a genuine issue of material fact existed because the parties differed in their view of the testimony related to the cause of plaintiff's fall, and therefore, summary disposition under MCR 2.116(C)(10) was inappropriate for this issue. We agree.

Whether plaintiff's fall was caused by black ice is a question of causation in fact. In *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994), our Supreme Court held:

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

The causation question in this case is whether plaintiff fell as a result of ice or for some other reason. The parties point to different portions of plaintiff's deposition testimony to support their positions. Defendant refers to the section of plaintiff's testimony when she responded to the question: "Do you know what caused your fall?" Plaintiff answered "no." But as plaintiff points

out, she also stated that when she fell, she "felt ice." Moreover, she later clarified that it was ice that caused her to fall.

Considering the available evidence in the light most favorable to the nonmoving party, a genuine issue of material fact exists regarding whether plaintiff's fall was caused by black ice on defendant's property. See *Allison*, 481 Mich at 425. Therefore, the trial court correctly declined to grant summary disposition under MCR 2.116(C)(10) on the basis of this issue.

III. BLACK ICE WAS OPEN AND OBVIOUS

Plaintiff argues that there was no noticeable black ice at the time of the fall, and therefore, the open and obvious doctrine should not apply. We disagree.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach was the proximate cause of the plaintiff's injury; and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "Absent special aspects, this duty generally does not require the owner to protect an invitee from open and obvious dangers." *Benton*, 270 Mich App at 440-441. A condition is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]" *Novotney v Burger King Corp*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). "[A]n obvious danger is no danger to a reasonably careful person." *Id*. at 474. If "the condition is for all practical purposes invisible and indiscernible, then the application of the open and obvious danger doctrine would not be appropriate." *Slaughter*, 281 Mich App at 483.

In *Slaughter*, this Court analyzed the application of the open and obvious danger doctrine to cases involving injuries from falling on ice. In that case, the plaintiff fell when she was getting out of her truck. *Id*. at 475. "The parking lot was paved with black asphalt, and plaintiff was not able to observe ice or snow. It was, however, starting to rain at the time of her fall." *Id*. at 475-476. This Court reasoned that summary disposition was inappropriate, because a material question of fact existed "whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection . . . ." *Id*. at 484.

> When applying the open and obvious danger doctrine to conditions involving the natural accumulation of ice and snow, our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months. [*Id*. at 479.]

Reviewing the history of cases in this area, the *Slaughter* Court held that in cases that involved a "visibly snowy and icy sidewalk," "snow covered surfaces," or "visible frost and ice," the hazard presented was open and obvious. *Id*. at 479-481. The Court questioned whether in the case of "black ice," "an average user with ordinary intelligence would be able to discover black ice upon casual inspection, absent the presence of snow. *Id*. at 482 (quotation marks and citation

omitted). The Court cited five dictionaries to determine an appropriate definition of "black ice," *id*. at 482-483, deciding:

> The overriding principle behind the many definitions of black ice is that it is either invisible or nearly invisible, transparent, or nearly transparent. Such definition is inherently inconsistent with the open and obvious danger doctrine. Consequently, we decline to extend the doctrine to black ice 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 (emphasis added).]

Our Supreme Court adopted the *Slaughter* standard, stating:

> [A]lleged black ice conditions [are] 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. [*Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935 (2010).]

The Supreme Court's order in Janson clarifies the importance of weather conditions as indicia of a potential hazard. *Id*.

In this case, the trial court based its decision to grant summary disposition in part on the photograph taken by defendant's store manager shortly after plaintiff's fall. The trial court stated:

> First, both parties presented to the Court the photograph taken by the store clerk shortly after the incident that shows ice and snow in the natural breaks of the sidewalk. More importantly, the photograph clearly shows the ice on the ground that Garza claims caused her to slip. This, the Court believes is the clearest indicator that the ice was in fact an open and obvious condition.

However, even if the photograph were considered inconclusive on the visibility of black ice, the record contains sufficient indicia of the possibility that black ice exists to support a holding that any black ice present was open and obvious. First, the plaintiff is a lifelong Michigan resident and, therefore, is assumed to be aware of the possibility of ice formation during cold weather. See *Slaughter*, 281 Mich App at 479. Weather information in the record indicated that the high temperature in Flint, Michigan, on November 14, 2018, was 30 degrees, and the low temperature was 18 degrees. At 2:53 p.m., the report described the weather as "fair," and the indicated temperature was 30 degrees. Readings from the previous day intermittently indicated "light snow." Therefore, the weather data—indicating that it snowed the previous day and that the temperature remained below freezing—supports a conclusion that any black ice present was open and obvious. See *Janson*, 486 Mich at 935.

Further, the record suggests that plaintiff did not see the ice because she was not paying attention. Plaintiff fell on ice in the parking lot while walking to her car. She testified that she was looking straight ahead when she fell, and she did not see ice before the fall. Although she also testified that she "felt ice," this was in response to a question that started with "after you fell."

In conclusion, the black ice that allegedly caused plaintiff's fall was an open and obvious hazard. Therefore, the trial court did not err by granting summary disposition under MCR 2.116(C)(10) on the basis of this issue.

Affirmed.

/s/ David H. Sawyer
/s/ Cynthia Diane Stephens
/s/ Michelle M. Rick