S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MICHELE KASETA,

Plaintiff-Appellee,

v

THEODORE BINKOWSKI and CAROL BINKOWSKI,

Defendants-Appellants.

UNPUBLISHED
July 12, 2007

No. 273215
Macomb Circuit Court
LC No. 05-001971-NO

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Defendants appeal by leave granted an order denying their motion for summary disposition pursuant to MCR 2.116(C)(10) in this slip and fall case involving an alleged patch of black ice located on defendants' driveway. We affirm.

On the evening of March 13, 2002, plaintiff, a real estate agent, arrived at defendants' home to have defendants execute a contract regarding the purchase of a vacant parcel of land. Upon concluding their business, plaintiff left the home and proceeded to walk down the driveway where she slipped and fell on black ice, injuring her knee. The driveway was clear of snow, nor was there any ice that did not fit the description of black ice. On defendants' motion for summary disposition, the trial court ruled that a question of fact existed regarding whether the ice that caused plaintiff's fall constituted an open and obvious condition, as well as there being a factual dispute concerning whether defendants took reasonable measures within a reasonable time to diminish the "black ice" hazard.

Defendants first contend that the trial court erred in failing to grant their motion for summary disposition given that the ice upon which plaintiff fell was open and obvious and possessed no special aspects.

On appeal, this Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v*

Cross & Peters Co, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

The parties agree that plaintiff was an "invitee" at the time of the accident. In general, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land, but this duty does not extend to requiring a warning or protecting invitees from hazards that are open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). In determining whether a condition is "open and obvious," an objective standard, i.e., a reasonably prudent person standard, is utilized. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 330; 683 NW2d 573 (2004). A danger 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.*" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002) (emphasis added).

The trial court's written opinion is well-reasoned, and we incorporate it into our opinion. After recitation of the applicable legal principles, the trial court ruled:

> Plaintiff testified that when she was walking down defendants' driveway, she did not notice any ice because it was dark, and defendants did not have their front porch light on.[1] Plaintiff testified that she felt the ice with her hand after she fell, and still could not see it due to the darkness. Plaintiff also testified that she did not notice any salt on the driveway despite defendants' testimony that they shoveled and salted the driveway prior to plaintiff's fall several times, and the driveway appeared to be just cement.
>
> The court is satisfied that plaintiff has established a question of fact whether the ice that caused her fall constituted . . . an open and obvious condition. Plaintiff's testimony indicates that the ice was essentially unnoticeable due to the time of day and lack of lighting. Plaintiff has also submitted an affidavit that attests to the fact that defendants failed to warn her of the potential hazard, contrary to defendants' testimony otherwise. . . . [P]laintiff testified that although there was snow on the street and on the lawn, defendants' driveway was clear. Therefore, plaintiff did not have any reason to believe that the driveway would be slippery since it was clear of snow, and also that it appeared to be cement. Defendants' reliance upon cases holding that a snow-covered surface presents an open and obvious danger because of the high probability that it may

[1] There is a factual dispute with respect to whether the porch light was on or off at the time of the fall.

> be slippery is therefore misplaced based upon the distinguishing facts of the case at hand. Taking the facts in the light most favorable to plaintiff, the testimony and evidence presented is insufficient to demonstrate that an average person would have discovered the ice upon casual inspection. Consequently, defendants' motion for summary disposition based upon the open and obvious doctrine should be denied.

We adopt the court's reasoning and conclusion as set forth above. This Court's decision in *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61; 718 NW2d 382 (2006), does not demand a contrary holding. *Ververis* involved snow-covered ice on a parking lot. The *Ververis* panel held "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Id.* at 67. The Court also noted:

> This holding regarding a snow-covered surface is an extension of precedents already recognizing that an icy surface presents an open and obvious danger. See, e.g., *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002) ("There was nothing hidden about the frost or ice . . . , and anyone considering it would become aware of the slippery conditions."). [*Ververis, supra* at 67 n 2 (omission in original).]

Here, there was no evidence that the black ice was snow-covered. Indeed, the evidence shows that there was no snow anywhere on the driveway. Further, the icy surface in the present case was not ice that could be described as typical, clearly visible, and as having a defined mass; rather, it was black ice, which by its very nature is difficult, if not nearly impossible, to observe *upon casual inspection.* Any person regularly driving the highways of Michigan is more than familiar with the danger of black ice, which danger is created because of the hidden qualities of black ice and the inability to identify such ice by observation. Moreover, the accident here occurred in the dark at night, and, viewing the evidence in the light most favorable to plaintiff, without any lighting from the house. The trial court did not err in its ruling regarding the open and obvious danger doctrine.

With regard to whether defendants were negligent, absent an open and obvious danger or the existence of special aspects, the premises possessor must take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard. *Mann, supra* at 332. Although defendant Carol Binkowski testified that she shoveled and salted the driveway at various times on the day of the accident, plaintiff testified that she did not see any salt or ice melting products on the driveway. Defendant Theodore Binkowski could not recall whether there was salt or ice melting products on the driveway when he returned home from work. He also sent an e-mail to plaintiff soon after the accident in which he stated that his wife must have missed a spot. Simply stated, there are factual issues regarding whether defendants took reasonable measures within a reasonable period of time to diminish the hazard.

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper

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C O U R T O F A P P E A L S

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Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

WHITBECK, C.J. (*dissenting*).

The Binkowskis contend that the trial court erred in failing to grant their motion for summary disposition given that the ice upon which plaintiff Michele Kaseta fell was open and obvious and possessed no special aspects. I agree. Therefore, I respectfully dissent because, contrary to the majority's opinion, I would conclude that the ice on which Michele Kaseta fell was an open and obvious condition under the undisputed facts of this case. Accordingly, I would reverse.

An invitor has a common law duty to exercise reasonable care to warn or protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land.[1] The basic duty to warn or protect an invitee does not generally include removal of open and obvious dangers. "'Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.'"[2] Determination whether a danger is open and obvious depends on whether it was reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection.[3] The test is objective, and the court should look to whether a reasonable

[1] *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88, on rem 243 Mich App 461 (2000).

[2] *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 3; 649 NW2d 392 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

[3] *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005).

person in the plaintiff's position would foresee the danger, not whether a particular plaintiff should have known that the condition was hazardous.[4]

I find unpersuasive Kaseta's claim that there was nothing to alert her to the possibility of ice on the Binkowskis' driveway. First, the weather conditions on the day of Kaseta's accident were such that a reasonable person would anticipate and foresee the possibility of ice on paved surfaces. Snow had fallen early on the day in question, followed by sunshine and warmer temperatures, which served to melt some of the snow. Then in the evening, temperatures dipped, causing melted snow to refreeze into ice. Kaseta, a life-long resident of Michigan, has had considerable experience with such weather. Kaseta even testified that she was aware that the temperature was dropping as the day progressed, and when she exited her car and walked up to the Binkowskis' property, she observed that the street was wet and slushy. All of the paved areas around the Binkowskis' house were clear of snow and ice, but there were mounds of shoveled snow on the Binkowskis' lawn, adjacent to the driveway. Given the temperature fluctuations of the day, a reasonable person would note the possibility of ice forming on the driveway, particularly on the edges of the driveway which were adjacent to the snow. I believe, therefore, that a reasonable person in Kaseta's position would anticipate or foresee that the Binkowskis' driveway could be icy.

I agree with the majority that *Ververis v Hartfield Lanes* is distinguishable because in that case this Court held that "the potential slipperiness of a *snow-covered surface* is an open and obvious danger . . ."[5] Here, the ice was not snow covered. But I am of the opinion that "where there is snow in winter in Michigan, there is likely to be ice and the presence of snow puts a person on notice that there may be slippery conditions."[6]

Even an "open and obvious" condition may be "unreasonably dangerous" if there are "special aspects" of the condition that impose upon the invitor a duty to undertake reasonable precautions to protect invitees from such danger.[7] In determining whether a danger is unreasonably dangerous despite being open and obvious, a court must consider whether such a condition is effectively unavoidable or poses an unreasonably high risk of severe harm.[8] The determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee.[9]

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[4] *Corey*, *supra* at 5.

[5] *Ververis v Hartfield Lanes*, 271 Mich App 61, 63; 718 NW2d 382 (2006).

[6] *Drobot v Way*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2006 (Docket No. 270132), slip op p 2. See also *Crawford v Detroit Entertainment, LLC*, unpublished opinion per curiam of the Court of Appeals, issued August 22, 2006 (Docket No. 266289).

[7] *Mann v Shusteric Enterprises*, 470 Mich 320, 328; 683 NW2d 573 (2004).

[8] *Lugo*, *supra* at 518.

[9] *Id.* at 523-524.

Kaseta cannot establish that the ice posed an unreasonably high risk of severe injury. Although the ice may have posed some risk of injury, the type of danger contemplated by *Lugo* is of a different nature. The critical inquiry is whether there is something unusual about the ice, which because of its character, location, or surrounding conditions gives rise to an unreasonable risk of harm.[10] When analyzing whether an ordinary pothole in a parking lot could give rise to an unreasonable risk of harm, the *Lugo* Court concluded, "Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury."[11] Similarly, the ice in the instant case cannot be considered to have given rise to an unreasonably high risk of severe injury. Moreover, Kaseta could have avoided the driveway all together and chosen an alternate path to get to her car.

For the foregoing reasons, I believe that the trial court erred when it denied the Binkowskis' motion for summary disposition given that the ice was an open and obvious danger possessing no special aspects.

I would reverse.

/s/ William C. Whitbeck

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[10] *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

[11] *Lugo*, *supra* at 520.