STATE OF MICHIGAN

COURT OF APPEALS

JUDY HAZELTON,

Plaintiff-Appellant,

v

C.F. FICK AND SONS, INC and FICK OPERATING COMPANY a/k/a SUNNY SPOT,

Defendants-Appellees.

UNPUBLISHED
October 25, 2012

No. 307024
Roscommon Circuit Court
LC No. 10-728915-NI

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Because we agree with the trial court that there is no genuine issue of material fact in regard to whether defendant had notice of the dangerous condition, we affirm.

This case arises out of injuries sustained by plaintiff on January 3, 2009, when she slipped and fell on a patch of black ice in defendant's parking lot. At her deposition, plaintiff testified that she is a lifelong resident of Roscommon, Michigan and that defendant's business, The Sunny Spot, is a gas station and convenience store located approximately one mile from her home. On the day she was injured, plaintiff arrived at The Sunny Spot in the early evening. She was familiar with the store, having shopped there for several years. After parking, she proceeded toward the entrance by walking along the front of the building underneath a large wooden awning. Plaintiff entered the store without incident and completed her purchase. On her way back to her vehicle, plaintiff slipped and fell on a patch of black ice near the store entrance. Plaintiff's foot and ankle were injured as a result of her fall.

According to plaintiff, the temperature that day was below freezing, the skies were clear and sunny, it had not recently snowed or rained, and the roads were clear. The weather was consistent for several days leading up to the date of plaintiff's accident. Plaintiff and another Sunny Spot customer testified that defendant generally keeps its parking lot in good condition during the winter months. The other customer also stated that there are no "trouble" areas that are often slippery, but ice can accumulate near the front doors when water drips from the roof. Similarly, plaintiff stated during her deposition that she did not recall any specific area at The Sunny Spot that was continually icy, and had never had a problem entering the store before.

During her deposition, plaintiff testified that on the date of her injury, she did not notice any ice, snow, or salt near her parking spot or on her way into the store. She stated that the concrete did not appear wet or discolored, there were no puddles, and the wooden awning did not appear to be dripping any water. She also stated that the patch of black ice she slipped on was nearly invisible. Plaintiff noticed the ice only after falling, and even then, only after touching the ice with her hands.

In her complaint, plaintiff alleged that black ice formed in front of the store because of melted snow dripping from the roof of the business. Plaintiff further alleged that defendant, through its agents or employees, had notice that ice formed in the parking lot because it knew, or should have known, that water dripped from the roof that afternoon and had previously formed ice at or near the location of the accident. Defendant answered plaintiff's complaint, and eventually filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that it did not know, and could not have known, that black ice had formed in its parking lot. The trial court granted summary disposition in favor of defendant, finding that it did not have constructive or actual knowledge of the dangerous condition on its premises.

On appeal, plaintiff argues that the trial court erred by granting summary disposition in favor of defendant. Specifically, plaintiff argues that she produced sufficient evidence to create a question of fact about whether defendant caused ice to form in the parking lot by failing to repair a gutter and about whether defendant knew or should have known that water dripped from the store's roof, causing ice to form near the front entrance.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

"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*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty that a landowner owes to a visitor depends on the visitor's status at the time of the injury. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). It is undisputed that plaintiff was an invitee at the time she was injured on defendant's property.

Generally, an invitor must "exercise reasonable care to protect invitees from 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). An invitor's liability must arise from a condition of which the invitor knew or a condition of such a character or duration that the invitor should have known of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). The plaintiff has the burden of demonstrating that the defendant had actual knowledge of the

dangerous condition or should have had knowledge of the dangerous condition due to the condition's character or duration. See *Benton*, 270 Mich App at 440; *Stitt*, 462 Mich at 597.

In this case, plaintiff has failed to produce evidence to create a genuine issue of material fact regarding whether defendant had actual knowledge of the dangerous condition or should have had knowledge of the dangerous condition due to the condition's character or duration. To the contrary, the facts in this case demonstrate that there is no genuine issue of material fact, and that defendant did not have notice of the dangerous condition. Plaintiff has not produced any evidence suggesting that the ice had existed for a length of time. Nor has plaintiff produced evidence establishing that defendant should have noticed the ice due to its character or the circumstances of its formation. The evidence shows that the weather was consistent for several days leading up to plaintiff's injury, and the skies were clear and sunny. Plaintiff stated that defendant's parking lot was visibly free of snow and ice, and the concrete did not appear wet or discolored. She also testified that she did not encounter or see any ice walking into the store. In fact, plaintiff stated that she only noticed the presence of ice after she fell and touched the ground with her hands.

Contrary to plaintiff's claim, the fact that defendant's employees admitted that they were aware that water sometimes dripped from the roof of the store and caused ice to form in front of the store does not demonstrate that defendant had notice that a dangerous condition was present on the property on the day that plaintiff was injured. Indeed, plaintiff failed to produce any evidence that snow melt was dripping from the roof on the date of her injury. If anything, plaintiff's deposition testimony suggests that there was no water drip on the day she was injured because she testified that she did not see any puddles near the entrance. Moreover, deposition testimony supports the conclusion that the parking lot does not have any specific problem area.

Similarly, we reject plaintiff's argument that defendant should be liable for her injuries because it caused ice to form in the parking lot by failing to repair a gutter. There is no evidence to support the contention that ice would not drip from the rooftop or sides of any gutter onto the pavement if a gutter were in place. Further, there is no evidence to suggest that the presence of a gutter at the time of plaintiff's injury would have prevented the formation of the black ice on which plaintiff slipped and fell.[1]

Therefore, we conclude that there was insufficient evidence to create a genuine issue of material fact regarding whether defendant caused the dangerous condition or whether defendant

[1] In response to the dissent, we reiterate the significance of the evidence that for several days prior to plaintiff's fall the weather conditions were not conducive to snow melting and dripping from the awning onto the pavement below. In this case, there is no evidence that snow existed on the awning at the time of plaintiff's injury, let alone that water was dripping off the awning onto the pavement below. Thus, the fact that water dripped from the awning onto the pavement on other occasions does not establish that on this particular day defendant failed to exercise reasonable care. That a patch of ice existed is not in dispute; it is also clear that the formation of the black ice cannot be traced to the overhead awning because the record evidence establishes no connection to it except on the basis of pure speculation.

had actual notice of the dangerous condition or would have discovered the dangerous condition with the exercise of reasonable care. Thus, the trial court properly granted summary disposition in defendant's favor.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra

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

On review of the documentary evidence, and all reasonable inferences arising therefrom, in a light most favorable to plaintiff, I conclude that a genuine issue of material fact exists for purposes of MCR 2.116(C)(10) with respect to whether defendants C.F. Fick & Sons, Inc., and Fick Operating Company (collectively "Fick") *should have known* about the black ice that allegedly formed on the ground under the edge of Sunny Spot's awning and caused plaintiff to slip and fall. I would reverse the trial court's ruling granting Fick's motion for summary disposition. Accordingly, I respectfully dissent.

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 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). For purposes of a motion for summary disposition brought pursuant to MCR 2.116(C)(10), "the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Circumstantial evidence can be evaluated and utilized in regard to determining whether a genuine issue of material fact exists for purposes of summary disposition." *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004). A court may only consider substantively admissible evidence actually proffered relative to a motion for

summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

A storekeeper is liable for an injury suffered by a customer that results from an unsafe condition that is caused by the storekeeper's own active negligence, from an unsafe condition that is known by the storekeeper, or from an unsafe condition that is of such a character *or* that had existed a sufficient length of time that the storekeeper should have known about it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968); *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979) ("plaintiff must show either that an employee of Sears caused the unsafe condition or that a servant of Sears knew or should have known that the unsafe condition existed[;] [n]otice may be inferred from evidence") (citations omitted). A possessor of land can be held liable for an injury to an invitee caused by a dangerous condition on the land if he or she knew about the condition or through the exercise of reasonable care would have discovered the condition. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting 2 Restatement Torts, 2d, § 343, pp 215-216; see also *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).

Here, employee Sarah Osmond, who was a cashier at the store at the time plaintiff fell, testified in her deposition that store personnel salted and shoveled in front of the doors at various times because ice would form there when "[s]now melts off the roof . . . and . . . freezes on the ground." She indicated that a strip of ice would develop "underneath the awning" after snow or water dripped from the awning. The store manager, Renee Gallant, testified that when water dripped off the roof during winter months, ice would form along the front door area, which is why the area was salted by employees. Indeed, Gallant stated that "[w]e probably over salt." Gallant testified that, with respect to salting, particular attention was paid to the area in front of the store below the edge of the awning. Plaintiff claimed that a store employee who assisted her after the fall – she believed that it was Sarah Osmond – commented about a "gutter that was supposed to get put up and they never put it back up." Osmond testified that the purpose of the gutter had been to keep water on the awning from coming down on top of people and to stop water from landing on the ground, preventing freezing water in front of the store. Plaintiff, a regular store customer, asserted that a gutter had previously been mounted on the roof.

Daniel Fishel, a store customer who was present at the time of the incident and assisted plaintiff after the fall, testified as follows:

> *Q.* Do you remember any conversations with that female behind the counter, regarding how the ice may have developed?
>
> *A.* I heard someone . . . behind the counter [] complaining that [] they worked on the roof and didn't put something back, and that's what caused it to run down.
>
> *Q.* Okay. Do you remember if she used the term "gutter?"
>
> *A.* No, I don't.
>
> *Q.* Just remember there was some --

A. Something wasn't put back in place there that allowed the water to run down.

Q. Okay. In the area approximately where [plaintiff] slipped, would that be consistent about where water, if it did drip off the awning, the location, the ground, where it may drip onto?

A. Well, I would say it was.

There was evidence reflecting that around the time of the slip and fall it was sunny, the sky was clear, it had not snowed nor rained that day, the temperature was below freezing, snow was generally present on the ground, and that it had been a couple of days since it last snowed. Gallant testified as follows:

Q. Okay. I mean, have you ever seen ice accumulate when it hadn't snowed in the wintertime for a day or two? And so there's no snow in that area, but just ice or snow melting off the awning and dripping along that edge that ice develops?

A. Yes.

Osmond likewise indicated that ice would form on the ground in the awning area from melting snow coming from the awning even when it was not snowing.

Given the documentary evidence which revealed that melting snow would drip off the awning and form ice on the ground in a strip outside the front of the store, that plaintiff slipped and fell in an area where such ice regularly formed, and that remarks made by a store employee to plaintiff and Fishel suggested that the origin of the ice that plaintiff slipped on was water that rolled off the awning because of an absent gutter, it is reasonable to infer, if not directly conclude, that the ice that caused plaintiff to slip and fall was ice produced from snow that had melted and dripped from the awning to the ground. The next question is whether the hazard or dangerous condition, i.e., the black ice, was of such a character or had existed a sufficient length of time that Fick or the store's employees should have known about or discovered the condition by the exercise of reasonable care. Although it perhaps would be overly speculative to conclude that the ice had been formed for a sufficient length of time, viewing the evidence in a light most favorable to plaintiff, including reasonable inferences arising from that evidence, a reasonable juror could conclude that the character of the dangerous condition was such that Fick should have known about the condition and its likely occurrence and taken action. The store's employees were aware of an ongoing issue regarding ice in front of the store that formed from dripping water that came from the awning, and they believed that the problem was caused by the failure to have a gutter on the awning that would have captured the melting snow. The store's employees in fact paid particular attention to salting the area where plaintiff slipped because of the tendency of ice to form in that location. Fishel testified that he immediately took some deicing salt after plaintiff's fall and salted the area; he did not observe any preexisting salt on the spot. Because of the problem with icing outside the front doors and under the edge of the awning, Fick could have employed a policy to have employees keep that area salted at all times in the winter months to prevent the formation of ice, or Fick could have mounted a gutter on the

awning to eliminate the hazard. The fact that it was clear and sunny and was not raining and snowing when the fall occurred did not negate the possibility of ice forming, nor did it mean that Fick should not have known about the ice. Gallant's and Osmond's testimony acknowledged that ice would form even when it was not snowing or had not snowed for a few days. Indeed, the fact that it had snowed a couple of days earlier, combined with the sunshine and freezing temperatures thereafter, would seem to be the perfect recipe for previously-fallen snow to melt, drip off the awning, land on the ground, and then freeze to form black ice. The majority places a great emphasis on the absence of any evidence showing that water was *actively* dripping from the awning at the time of the fall. The fact that water was not observed dripping from the awning at the exact time of the fall does not negate the reasonable inference, as supported by the evidence, that the black ice upon which plaintiff slipped was formed from water that dripped from the awning. The water that eventually froze on the pavement could certainly have dripped from the awning at an earlier point in time; this is just a matter of simple logic. In the context of the question whether Fick should have known about the hazard, the lack of an active drip does not defeat implied or constructive knowledge relative to the general character of the hazard as testified to by store personnel. If water were actively dripping, indicating melting, it would seem less likely that the black ice would even have been present, as opposed to a water puddle on the pavement. And, if consideration is given to whether Fick should have known about the hazard based on the length of time it existed, the fact that water was not actively dripping would reasonably suggest that the solidified black ice had been present for some time.

The majority simply fails to view the documentary evidence in a light most favorable to plaintiff and fails to give plaintiff the benefit of reasonable inferences that flow from the evidence.[1] I would reverse the trial court's ruling.

I respectfully dissent.

/s/ William B. Murphy

[1] I fail to see how this is a case of "pure speculation" when Fick's own store clerk immediately placed blame for the ice on water coming off the awning and plaintiff slipped exactly where such ice would form, the formation of which was a common occurrence known to Fick's employees. Plaintiff presented evidence "that would support a reasonable inference of a logical sequence of cause and effect," not "mere conjecture." *Skinner*, 445 Mich at 174.