STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN DAWOOD,

Plaintiff-Appellant,

v

STUART FRANKEL CO., a/k/a STUART FRANKEL DEVELOPMENT CO.,

Defendant/Third-Party Plaintiff-Appellee.

and

UNCHI, INC., d/b/a WEBER'S LANDSCAPE SERVICES, and AMERICAN STATES INSURANCE CO./SAFECO,

Third-Party Defendants-Appellees.

UNPUBLISHED
November 15, 2005

No. 255054
Wayne Circuit Court
LC No. 02-217408-NO

Before: Gage, P.J., and Hoekstra, and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff slipped and fell on an icy sidewalk in Livonia. She brought suit against defendant, the premises owner, alleging negligence. Defendant in turn complained against third-party defendants, a snow removal service and its insurer. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that the condition allegedly causing plaintiff's fall was an open and obvious one.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.*

Summary disposition is appropriately granted, "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*.

A premises owner is held to no absolute duty to diminish the hazards of ordinary winter precipitation. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333 n 13; 683 NW2d 573 (2004). Where the condition is open and obvious, such a duty exists only if some special aspect renders the condition unreasonably dangerous. *Id.* at 331. A condition is unreasonably dangerous if the premises owner must expect a person to risk the hazard despite its openness and obviousness, or if the hazard itself presents an extraordinary danger. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-518 n 2; 629 NW2d 384 (2001). In determining whether accumulation is open and obvious, we consider whether the plaintiff had actual knowledge of ice or snow-covered ice. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002).

Plaintiff does not argue that she felt compelled to navigate the ice despite any danger, or that the ice constituted some extraordinary hazard, but instead insists that the ice was not visible. However, plaintiff neither offers details concerning why this particular patch of ice was invisible, nor cites authority for the proposition that ice must be plainly visible to constitute an open and obvious hazard. Recently, the Michigan Supreme Court reversed this Court's decision in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004)(*Kenny I*), "for the reasons stated in the dissenting opinion." *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005)(*Kenny II*). In *Kenny I*, the plaintiff argued that the black ice at issue was virtually undetectable because it took on the color of the pavement and was covered by a layer of snow. Judge Griffin, in his dissent, however, found that the slippery condition of the parking lot was open and obvious. *Kenny I*, *supra* at 3-4 (Griffin, J, dissenting). Furthermore, plaintiff admitted to detecting slippery conditions before she fell. Because plaintiff thus observed a slippery surface on a cold winter morning, we conclude that she was on notice that she was confronting an ice hazard.

Plaintiff also argues that parts of the surface she first encountered on that occasion were not slippery, and that this led her to suppose that she would not encounter ice. Plaintiff cites no authority for the proposition that ice constitutes an open and obvious hazard only where it is present with some consistency throughout the premises, or that a person finding some dry pavement on a cold winter morning is thus relieved of any duty to anticipate ice elsewhere. In any event, because plaintiff detected a slippery surface before she fell, by the time she did fall, the existence of ice on the surface was apparent to her, rendering that condition open and obvious.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray