STATE OF MICHIGAN

COURT OF APPEALS

FAVY MARTINEZ,

Plaintiff-Appellant,

v

BOYS & GIRLS CLUBS OF SOUTHEASTERN MICHIGAN, f/k/a BOYS & GIRLS CLUBS OF AUBURN HILLS, INC.,

Defendant-Appellee.

UNPUBLISHED
April 17, 2008

No. 275965
Oakland Circuit Court
LC No. 06-073633-NO

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting defendant's motion for summary disposition in this premises liability action. This case arises out of an accident in which plaintiff slipped and fell on a patch of black ice in defendant's parking lot while taking garbage to a dumpster. Plaintiff was performing janitorial work for defendant in the course of her employment with a third party. The ice was not covered by snow but was located in an area where there was snow on the ground. We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant because there was a genuine issue of material fact as to whether the condition that caused her to slip and fall was open and obvious. We disagree. This Court reviews the trial court's grant of summary disposition de novo. *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). In reviewing a grant of summary disposition under MCR 2.116(C)(10),[1] this Court considers affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties to the trial in the light most favorable to the party opposing the motion. *Greene*, *supra* at 507. Summary disposition is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

[1] Defendant filed a motion for summary disposition under both MCR 2.116(C)(8) and (C)(10). However, because the court reviewed evidence outside the pleadings, we review the decision as one granted under MCR 2.116(C)(10).

"[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). However, where a dangerous condition is open and obvious, the premises owner is protected from liability for harm caused by that condition so long as there are no special aspects of the condition that make it unreasonably dangerous. *Id.* at 517. 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* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993). The determination depends on the characteristics of a reasonably prudent person, not on the characteristics of a particular plaintiff. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). The open and obvious doctrine applies to the accumulation of snow and ice. *Id.* at 331-333.

The question of whether black ice can be an open and obvious danger was discussed in *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005) (*Kenny II*), which reversed this Court's decision in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004) (*Kenny I*). The *Kenny* plaintiff fell at night on snow-covered black ice. Before she fell, she saw her three companions holding on to the hood of the car for support. This Court's dissenting judge opined, and the Supreme Court agreed, that "after witnessing three companions exit a vehicle into the snow-covered parking lot on December 27 and seeing them holding on to the hood of the car to keep their balance, all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery." *Kenny I, supra* at 120. And in *Ververis v Hartfield Lanes* (*On Remand*), 271 Mich App 61, 67; 718 NW2d 382 (2006), this Court observed that even ice covered by snow is open and obvious despite the lack of any other factor that would alert a plaintiff to the danger.

The facts of the instant case differ from *Kenny*. No snow covered the ice here at the time of plaintiff's fall. Nevertheless, the facts in this case are such that an average user of ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney, supra* at 475. Though, according to plaintiff's deposition testimony, the immediate area in which plaintiff fell was not covered by snow, areas around it were snow-covered, which under *Kenny* and *Ververis* would suggest to the average person that the area could be slippery. Plaintiff also acknowledged that the snow in the parking lot accumulated a few days before she fell, making her aware of the snowy conditions as she approached the dumpster. Indeed, a pile of snow was visible right in front of the dumpster. Under the circumstances, a reasonably prudent person in plaintiff's position at the time of the incident should have been aware that the dangerous condition could exist.

Nor can plaintiff show that the slippery condition was unreasonably dangerous despite its open and obvious nature. "An open and obvious accumulation of snow and ice, by itself, does not feature any 'special aspects.'" *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005), citing *Mann, supra* at 332-333. Here, plaintiff failed to present any evidence to show that she could not have chosen a safer alternate path to avoid the black ice. In fact, plaintiff stated that she likely took a different route the night before the incident, as she did every time she approached the dumpster. In addition, as she walked back from the dumpster after her fall, she took a different path and avoided the area where she had just fallen. That a particular path is more convenient does not make the dangerous condition present in that path effectively

unavoidable. See *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002). Thus, the trial court did not err in finding that summary disposition was proper because plaintiff encountered an open and obvious danger.[2]

Plaintiff also argues that defendant's had notice of the hazard. To prove notice, plaintiff must produce evidence the condition is of such a character or had existed for a sufficient period of time that defendant should have had known about it before the incident. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Defendant claimed below that plaintiff could not establish that defendant had actual knowledge of the condition. Defendant supported this assertion with the affidavit of its director, who indicated that he was unaware of the black ice before plaintiff's fall, and that while overseeing the maintenance of defendant's premises, he had never received any complaints of black ice in the parking lot. Plaintiff made no effort to rebut this evidence or provide evidence to the contrary. MCR 2.116(G)(4).

Plaintiff predicates her constructive notice argument on certain weather statistics. We note an inherent contradiction in plaintiff's argument. If defendant had constructive notice of the condition because of the temperature and the thaw/freeze cycle, then so did plaintiff, thus rendering the condition open and obvious. *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999) ("Insofar as plaintiff seeks to use general knowledge of local weather conditions to show that defendant should have known that ice lay under the snow on his steps, the same knowledge can be imputed to plaintiff."). In any event, the statistics show that temperature was above freezing most of the day and remained so when the director finally left for the night. Certainly, these statistics do not evidence a condition which existed long enough for one to conclude that defendant should have known of it. See *Derbabian v S & C Snowplowing*, 249 Mich App 695, 706; 644 NW2d 779 (2002).

We affirm.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

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[2] See also *Mitchell v Premium Properties Investments Ltd Partnership*, 477 Mich 1060; 728 NW2d 460 (2007) and *Kaseta v Binkowski*, 480 Mich 939; 741 NW2d 15 (2007) two recent Supreme Court orders evidencing the prevailing law that black ice situations are virtually always open and obvious.