STATE OF MICHIGAN

COURT OF APPEALS

LINDA ROBINSON,

Plaintiff-Appellant,

v

BIRDS EYE FOODS, INC., d/b/a DEAN FOODS AGRILINK, IVANHOE HUNTLEY 7001 OLR, L.L.C., IVANHOE MAINTENANCE COMPANY and IVANHOE MANAGEMENT COMPANY,

Defendants-Appellees.

UNPUBLISHED
July 15, 2008

No. 277339
Oakland Circuit Court
LC No. 06-072938-NO

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendants' motion for summary disposition. We affirm.

This premises liability action arises out of injuries incurred by plaintiff when she slipped and fell on a patch of ice on the sidewalk outside the office of Birds Eye Foods, Inc., d/b/a Dean Foods Agrilink ("Birds Eye"). Birds Eye is a tenant of Ivanhoe Huntley 7001 OLR, L.L.C., Ivanhoe Maintenance Company and Ivanhoe Management Company ("defendants"). The trial court dismissed Birds Eye, and Ivanhoe moved for and was granted summary disposition because defendants did not have notice of the ice patch, and the ice patch was an open and obvious hazard.

Plaintiff argues on appeal that defendants had constructive notice of the ice based on the weather patterns preceding the accident. Plaintiff also argues that the patch of ice was not open and obvious, but even if it were, it possessed special aspects that triggered defendants' duty to remedy the condition or warn against it.

On appeal, a decision to grant a motion for summary disposition is reviewed de novo. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in the same manner as the trial court. *Id.* Any court considering such a motion must consider all the pleadings and the evidence in a light most favorable to the nonmoving party. *Id.* A court may not weigh the evidence or make factual findings. *Id.* The motion tests whether there exists a genuine issue of material fact for trial. *Id.*

In a premises liability action, the plaintiff must prove (1) the defendant owed the plaintiff a duty, (2) the defendant breached the duty, (3) the breach caused plaintiff injury, and (4) the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). Further, in order to show a breach of duty, a plaintiff's injury resulting from a dangerous condition must be caused either by the active negligence of the defendant or a dangerous condition that is known to the defendant or has existed long enough that the defendant should have known about it. *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 603-604; 601 NW2d 172 (1999).

Further, this duty does not extend to dangerous conditions that are open and obvious. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). An open and obvious condition is one that an average person of ordinary intelligence could discover upon casual inspection. *Kennedy, supra* at 713. Thus, it is an objective test unrelated to the actual perceptions of a particular plaintiff. *Id.*

Plaintiff argues that weather reports show that the temperature was consistently below freezing for nearly two days before plaintiff's fall. Thus, she argues that the patch of ice must have existed for at least that long; consequently, defendants had constructive notice of the ice. This is merely circumstantial evidence which may give rise to a possible inference. *Clark v Kmart Corp*, 465 Mich 416, 420-421; 634 NW2d 347 (2001). In the face of this possible inference, a witness to the scene testified that she clearly remembered seeing the snow melting from the roof of the building on the day in question. It is not uncommon for freezing and thawing patterns to be inconsistent with reported ambient temperatures. Sunshine, shade, heat emanating from buildings or pipes, wind, and a host of other factors may contribute to the actual temperature of a specific location or surface. The testimony about melting snow was consistent with fluctuations in temperature. Further, the presence and creation of ice is unpredictable. Circumstantial evidence that ice may have formed under the weather conditions of the previous two days does not allow a reasonable inference that it *was* created at the beginning of those conditions or that defendants had constructive notice of it. See *Clark, supra* at 421 (reasonable inference drawn from location of grape which could only be left by human hand), and *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999) (meteorologist's affidavit of general weather conditions was not evidence of the defendant's knowledge of ice). The trial court properly granted summary disposition because defendants did not have notice of the dangerous condition.

Plaintiff also argues that the ice was not open and obvious because it was clear and therefore not discoverable by a casual observer. This Court has stated that "[a]s a general rule, and absent special circumstances, the hazards presented by snow and ice are open and obvious." *Teufel v Watkins*, 267 Mich App 425, 428; 705 NW2d 164 (2005). The conditions considered in *Teufel* and cases it cites involve snow *and* ice. *Id.* at 428-429. Snow is a common condition in Michigan winters and presages potentially hazardous walking surfaces, whether the danger actually presented is snow or ice. *Royce v Chatwell Club Apts*, 276 Mich App 389, 392-393; 740 NW2d 547 (2007); *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 65; 718 NW2d 382 (2006). But, where there is no snow on the surface of the walkway and no other indication that the walkway presents a slipping hazard, the ice itself must be discoverable upon casual observation in order to be an open and obvious hazard. See *Royce, supra* at 394; *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002).

In the instant case, plaintiff avers that the ice on the sidewalk was not covered or otherwise accompanied by snow. There was snow on the ground elsewhere, but it had been cleared off the sidewalks. She further states that the ice was clear and not visual to the casual observer. Plaintiff had been walking the sidewalks of the area delivering mail for approximately an hour before encountering this ice. The only other witness to the scene testified that she saw the ice when she came to the aid of plaintiff. The witness did not testify about the general ability to see the ice, and she did not observe the ice under conditions that could be called "casual observation." She specifically looked at the vicinity of the ice where plaintiff fell because of plaintiff's predicament. A condition need not be invisible to escape casual observation.

Michigan law does not support the contention that all sidewalks present appreciably dangerous conditions during the winter months. Plaintiff properly raised a genuine issue of material fact regarding whether the ice that caused her fall was open and obvious.[1] Summary disposition was nevertheless proper because there was no genuine issue of material fact that defendants had notice of the condition.

We affirm.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder

[1] Plaintiff also argues in the alternative that the condition possessed special aspects taking it out the scope of the open and obvious doctrine. We need not address this argument.