STATE OF MICHIGAN

COURT OF APPEALS

LINDA GARRISON,

Plaintiff-Appellee,

v

ST. PAUL FABRIC SERVICES INC., d/b/a HANCOCK FABRICS,

Defendant-Appellant.

UNPUBLISHED
June 25, 2009

No. 274826
Wayne Circuit Court
LC No. 05-510147-NO

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition in this premises liability case. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On January 8, 2002, plaintiff slipped and fell on black ice in a parking lot by defendant's store. The day was overcast, plaintiff believed the temperature was in the thirties, and no snow had fallen for a day or two. Plaintiff claimed that the asphalt lot was clear and that she saw no remains of snow in the parking lot except for a "very small amount" to the far side of the row of buildings. Her husband drove their vehicle to the handicapped spot in front of the store.[1] Plaintiff stated that she looked down before she stepped out of the truck. The area looked clear, both where she was about to step, and all of the surrounding asphalt. Plaintiff placed her left foot on the ground. Her leg immediately went out from under her, and she fell on her left knee. Plaintiff landed on her hands and her shoulder jammed into the truck. She realized that she had slipped on ice when she felt the ice under her hands. She did not see the ice before she fell. Plaintiff indicated that the store manager stated that the ice was supposed to have been taken care of that morning.

On appeal, defendant argues that the trial court erred when it denied its motion for summary disposition on the ground that the condition causing plaintiff's injury was open and

[1] Plaintiff is disabled due to a lung condition that is not related to the instant matter.

obvious. Defendant contends that it owed no duty to plaintiff to warn of or protect her from the same. We disagree.

We review a trial court's decision to grant or deny summary disposition de novo. *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "In deciding a motion pursuant to subrule (C)(10), the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

A premises possessor has the legal duty "'to 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), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1981). The premises possessor is generally not required, however, to protect invitees from open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A danger is open and obvious when an average person with ordinary intelligence would be able to discern the danger with only a casual inspection. *Richardson v Rockwood Ctr*, 275 Mich App 244, 247; 737 NW2d 801 (2007).

Generally, our Supreme Court and this Court have found that ice and snow, and even "black ice" should be treated as an open and obvious danger, especially to long-time Michigan residents. See, e.g., *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006), *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002). However, in *Slaughter v Blarney Oil Castle Co*, 281 Mich App 474; 760 NW2d 287 (2008), this Court clarified the applicability of the open and obvious doctrine with respect to black ice. After considering several dictionary definitions of black ice, *Slaughter* observed that, "[t]he overriding principle behind the many definitions . . . is that [black ice] is either invisible or nearly invisible, transparent[] or nearly transparent." *Id*. at 483. The *Slaughter* Court noted that these characteristics are "inherently inconsistent with the open and obvious doctrine," and declined to find that black ice is necessarily open and obvious. After reviewing previous case law from our Supreme Court and this Court, the *Slaughter* Court instead determined that, to find black ice to be open and obvious, some evidence must exist either to show that the black ice in question would have been visible on casual inspection prior to the fall, or that there were other signs that could place an individual on notice of a potentially hazardous condition. *Id*. Applying this requirement to the facts before it, the *Slaughter* Court reasoned:

> With regard to whether other evidence of an open and obvious danger existed in this case, there was no snow on the ground, and it had not snowed in a week. Before alighting from her truck, plaintiff did not observe anyone else slip or hold onto an object to maintain his or her balance. She did not see the ice before she fell, and could not readily see it afterwards. Although it was starting to rain at the time of plaintiff's fall, the danger and risk presented by a wet surface is not the same as that presented by an icy surface. Contrary to defendant's assertion that the mere fact of it being wintertime in northern Michigan should be

> enough to render any weather-related situation open and obvious, reasonable Michigan winter residents know that each day can bring dramatically different weather conditions, ranging from blizzard conditions, to wet slush, to a dry, clear, and sunny day. As such, the circumstances and specific weather conditions present at the time of plaintiff's fall are relevant. We are not persuaded that the recent onset of rain wholly revealed the condition and its danger as a matter of law such that a warning would have served no purpose. [*Id*. at 483-484 (citation omitted).]

We would be hard pressed to find a case more similar to *Slaughter* than the instant case. Here, as in *Slaughter*, plaintiff fell immediately after leaving her truck, the parking lot was asphalt, there was no snow on the ground anywhere near the area where plaintiff fell, and it had not snowed for a number of days before the accident. Plaintiff here did not observe anyone else have trouble navigating the lot. In fact, the instant case presents an even more compelling case for finding that the condition was not open and obvious. While arguably the lighting might not have been as poor in the instant case as in *Slaughter*, there was not even the presence of rain here to suggest the existence of any type of slippery condition. The temperature was reportedly above freezing. And while plaintiff might have been able to see the ice upon a focused, post-fall examination of the area, that is not the applicable standard. In addition, contrary to defendant's contention, the *Slaughter* Court did extensively examine previous case law to carve out this slim exception to the general recognition that snowy or icy conditions are open and obvious dangers. We find that the trial court did not err in determining that there remained a question of fact as to whether the dangerous condition was open and obvious.

Defendant also argues that, notwithstanding the above analysis, this Court should find that the failure to remove a small patch of ice in a parking lot could not constitute the breach of any duty to keep the premises safe. We disagree.

The trial court did not err when it implicitly rejected defendant's argument that it did not have a duty to act when the entirety of the parking lot was clear except for the ice patch upon which plaintiff slipped. Such a finding would be inconsistent with the general premise of landowner liability. Otherwise, a landowner would almost always be able to avoid owing a duty simply by maintaining that, apart from the defect that caused the injury, his property was in good repair. Defendant's argument appears akin to a claim that the danger was effectively avoidable, which does not come into play unless the danger was obvious. See *Lugo, supra* at 517-518. Here, plaintiff presented evidence that defendant's manager knew that, notwithstanding any previous snow removal efforts, there remained a dangerous condition on the land that was not readily observable to persons in plaintiff's position. Especially given the fact that this danger lay in the handicapped parking area of the lot, we find that a question of facts exists as to whether defendant breached its duty to plaintiff.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio