STATE OF MICHIGAN

COURT OF APPEALS

LAMAR CRAIG,

Plaintiff-Appellant,

v

SUTTON PLACE APARTMENTS, doing business as WELSH MULTI-FAMILY MANAGEMENT, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
February 4, 2010

No. 287371
Oakland Circuit Court
LC No. 2008-088792-NO

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant summary disposition of his premises liability claim. We reverse and remand. We have decided this appeal without oral argument pursuant to MCR 7.214(E).

Shortly after midnight on March 10, 2007, plaintiff slipped and fell on black ice outside a friend's rented Southfield townhouse. The fall occurred as plaintiff traversed a sidewalk located between buildings in defendant's complex, in conditions that plaintiff described as very dark. Plaintiff, who suffered a broken ankle, later filed a negligence claim and other counts against defendant.[1]

Defendant sought summary disposition of the complaint, which the circuit court granted after a brief hearing. The circuit court offered the following explanation:

> Okay. I'm . . . done with discussions of the black ice. Okay?
>
> * * *

[1] The additional counts are not at issue in this appeal.

> I have sworn to follow the law. I may not agree with the law, but there's case law that says black ice is open and obvious. And you can recite common sense and eyewitness—
>
> * * *
>
> —but if I deny this motion, I'm gonna be reversed. It's a useless endeavor. The only way to change this is through legislature [sic]. I'm not gonna make new law.

Plaintiff now challenges the circuit court's reliance on the open and obvious doctrine in granting defendant summary disposition. We review de novo a circuit court's summary disposition ruling. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005).[2] A motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "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*, 469 Mich at 183.

To demonstrate a prima facie case of negligence, a plaintiff must show (1) a duty, (2) breach of that duty, (3) causation, and (4) damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). A premises owner or possessor owes invitees a duty to take reasonable care to protect against unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises owner need not warn invitees of an open and obvious danger unless special aspects of the condition make the risk unreasonably dangerous. *Id*. at 516-517. The standard for determining whether a particular condition qualifies as open and obvious "is whether 'an average user with ordinary intelligence (would) have been able to discover the danger upon casual inspection.'" *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008), quoting *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Plaintiff maintains that the black ice that caused his fall was not an open and obvious condition because no potential indicators of black ice existed, like snow on the ground, and the

---

[2] Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The circuit court did not specify under which subrule it found summary disposition appropriate, but because the parties plainly referenced documentary evidence beyond the pleadings as relevant to plaintiff's negligence claim, subrule (C)(10) governs our analysis. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

sidewalk on which he fell was shrouded in darkness. Michigan courts have on numerous occasions addressed the potentially open and obvious nature of winter weather conditions in Michigan. In this regard, this Court recently summarized that

> [w]hen applying the open and obvious danger doctrine to conditions involving the natural accumulation of ice and snow, our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." [*Slaughter*, 281 Mich App at 479.]

The Court in *Slaughter*, *id*. at 481, proceeded to consider "whether black ice, without the presence of snow, is considered an open and obvious danger in and of itself." The Court explained that because black ice by definition is either invisible or nearly invisible, it normally does not pose an open and obvious danger. *Id*. at 482-483.

> The overriding principle behind the many definitions of black ice is that it is either invisible or nearly invisible, transparent, or nearly transparent. Such definition is inherently inconsistent with the open and obvious danger doctrine. Consequently, we decline to extend the doctrine to black ice without evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition. [*Id*. at 483.]

Among other cases, defendant cites *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 118-119; 689 NW2d 737 (2004), rev'd *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929 (2005), in which the Michigan Supreme Court reversed a decision by this Court and adopted the dissenting opinion's analysis that black ice is open and obvious when covered in snow and when the injured plaintiff sees that others are slipping on it. Defendant also invokes *Kaseta v Binkowski*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2007 (Docket No. 273215), rev'd *Kaseta v Binkowski*, 480 Mich 939 (2007), in which the Supreme Court again reversed this Court and adopted the dissenting opinion, which viewed the existence of black ice as open and obvious in light of the facts that the plaintiff, a lifelong Michigan resident, observed snow on a driveway and knew that the temperature was dropping, notwithstanding that the fall occurred in darkness.

Most recently, in *Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396, 399; 775 NW2d 148 (2009), this Court reiterated the view set forth in *Slaughter*, 281 Mich App 483, that black ice in Michigan did not constitute an open and obvious danger as a matter of law. The Court declined to find that the black ice that had caused the plaintiff to slip and fall in a funeral home's parking lot was open and obvious. *Id*. at 399-400. The Court highlighted that on the day of the plaintiff's accident, some light precipitation had fallen and temperatures had remained below freezing, and that although roads had been icy in the morning, the roads and the defendant's parking lot had been cleared and salted. *Id*. at 397, 399-400. In the early evening, the plaintiff attempted to walk from his vehicle to the funeral home, and encountered no ice until he fell on a slippery patch that neither he nor the defendant's agent had seen. *Id*. at 399-400. This Court held that no circumstances existed that would have alerted the plaintiff to the presence of the invisible ice before he slipped on the patch of black ice, and the danger thus was not open and obvious. *Id*. at 400. The decisions in *Slaughter* and *Janson* plainly demonstrate

that black ice is not open and obvious per se, although a court may deem it open and obvious if the ice is visible or other indicators, like snow, weather conditions, or witnessing other people fall, reasonably put a plaintiff on notice of the presence of the black ice.

In this case, viewing the evidence in the light most favorable to plaintiff, a question of fact exists whether on casual inspection he reasonably should have detected the black ice that caused his fall. As in *Slaughter*, plaintiff testified that although he was looking ahead as he walked, he did not see the ice before he fell; rather, he felt the "wet" ice and saw it dimly only after he had landed on the ground. Unlike the facts underlying *Kenny*, where the plaintiff saw her friends slip, plaintiff here did not witness anyone else fall before he did. Plaintiff's friend, who walked alongside plaintiff when he fell, did not see ice on the sidewalk, did not fall or slip at any point before plaintiff did, and only detected the ice after he had "bent down to" assist plaintiff. As in *Janson*, but unlike *Kenny*, no measurable snow had fallen; here, the sidewalk was clear of snow and ice and the ground was clear of snow as well. Plaintiff recalled during his deposition that rain "sprinkle[s]" were falling when he arrived at defendant's complex around 10:00 p.m. on March 9, 2007, that a snow flurry might also have fallen at some point that evening, and that some form of precipitation probably had taken place for an unspecified period after 5:00 p.m. on March 9, 2007. The parties each rely on portions of weather records for March 9, 2007 and March 10, 2007, which reflect that no measurable precipitation occurred in the Detroit area between 5:00 p.m. and 11:00 p.m. on March 9, 2007, that trace amounts of precipitation fell between 11:00 p.m. on March 9, 2007 and 1:00 a.m. on March 10, 2007, and that temperatures ranged between 44 and 22 degrees Farenheit on March 9, 2007, and 53 and 37 degrees Farenheit on March 10, 2007. The weather evidence taken as a whole, and viewed most favorably to plaintiff, does not establish as a matter of law that he should have known about or taken cognizance of potentially hazardous icy, rainy or snowy conditions. Furthermore, plaintiff and the friend who accompanied him when he fell averred that the segment of the sidewalk where plaintiff fell was shrouded in darkness because defendant had not placed outdoor lighting in the area between its buildings.[3] See *Abke v Vandenberg*, 239 Mich App 359, 361-363; 608 NW2d 73 (2000) (recognizing that darkness may impair a plaintiff's visibility to the extent that an otherwise observable danger no longer qualifies as open and obvious); see also *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992) ("The fact that defendant's vacant warehouse was not adequately lit was both obvious and known to plaintiff, but there was no evidence that he was aware or had reason to anticipate that there were interior loading docks that otherwise were not marked or blocked off.").

We conclude that plaintiff has demonstrated a genuine issue of material fact with respect to whether an average person of ordinary intelligence would have discovered the black ice on casual inspection, given the lack of snow on the ground, the dearth of precipitation that occurred around the time of plaintiff's fall, the absence of any prior accidents witnessed by plaintiff

---

[3] Defendant insists that darkness is not a special aspect that defeats the open and obvious defense. To reach the question of whether something is a special aspect, however, we must first find the danger to be open and obvious. In this case, there is a question of material fact regarding whether the black ice was open and obvious.

around the time of his fall, and the darkness surrounding the sidewalk where plaintiff fell. Because the available evidence reasonably gives rise to a factual dispute regarding what a reasonable person in plaintiff's position should have seen on casual inspection, a jury must make this determination. *Abke*, 239 Mich App at 362-363. Consequently, the circuit court improperly granted defendant summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder