STATE OF MICHIGAN

COURT OF APPEALS

M. L. PRAY,

Plaintiff-Appellant,

v

BAYBEST RIBS, L.L.C., and NORMICH, INC., d/b/a DAMON'S GRILL,

Defendants-Appellees.

UNPUBLISHED
March 23, 2010

No. 286672
Genesee Circuit Court
LC No. 07-087443-NO

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

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

Plaintiff argues that the open and obvious danger doctrine should not apply with respect to the black ice in this case because there were no signs of the existence of ice and there remained a question of fact regarding whether defendants had actual or constructive notice of the hazard. We agree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion should be granted only if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A negligence claim requires that a plaintiff prove the following four elements: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The duty a landowner owes to those who enter his or her land is determined by the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Michigan recognizes three traditional categories of visitors: trespassers, licensees, and invitees. *Id.* It is undisputed that plaintiff was an invitee while on defendants' premises. A landowner has a duty to invitees to "inspect the premises and, depending on the circumstances, make any necessary repairs or warn

of any discovered hazards." *Id.* at 597. However, this duty generally does not require a landowner to protect an invitee from dangers that are "open and obvious." *Benton v Dart Properties*, 270 Mich App 437, 440-441; 715 NW2d 335 (2006).

Whether a hazard is open and obvious is preliminarily a question of law. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 126; 492 NW2d 761 (1992); see also *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-97; 485 NW2d 676 (1992). Determining whether a danger is open and obvious requires the use of an objective test. See *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 119-120; 689 NW2d 737 (2004) (GRIFFIN, J., dissenting), adopted 472 Mich 929 (2005). Objectively, a danger is open and obvious even if the plaintiff did not know of its existence, but "an average user with ordinary intelligence" would have discovered it upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In the instant case, plaintiff testified at his deposition that a patch of ice caused him to fall. He also testified that he did not actually see the patch of ice at the time. However, contrary to the trial court's ruling, the mere fact that it is wintertime in Michigan is not enough, by itself, to make black ice open and obvious as a matter of law. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008). In *Slaughter*, this Court held that in order for black ice to be considered an open and obvious danger, there must be some "evidence that the black ice in question would have been visible on casual inspection before the fall," or some other "indicia of a potentially hazardous condition." *Id.* Such evidence or indicia often consists of visible snow covering the ice. See *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007); see also *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 65; 718 NW2d 382 (2006). In *Slaughter*, 281 Mich App at 475, it had not snowed during the week leading up to the plaintiff's slip and fall. After midnight, the plaintiff stopped at a gas station when it had just started to rain. *Id.* When the plaintiff alighted from her vehicle, she immediately lost her footing on black ice and fell to the ground. *Id.* The plaintiff never saw the ice before she fell and could not readily see it afterwards. *Id*. at 483. Nor did she see anyone else slip or fall. *Id*. This Court reasoned that a hazard that is "either invisible or nearly invisible, transparent, or nearly transparent" is "inherently inconsistent with the open and obvious danger doctrine." *Id.*

Plaintiff in this case similarly stated at his deposition that the weather at the time in question was "dry and slightly overcast," with the roads being dry as well. Plaintiff did not see any accumulations of snow or ice, any remnants of salt, or any wet areas on the ground between the time of leaving the parked car and the time he fell near the restaurant's entrance. Plaintiff also made his way to the entrance archway without any near-slips, and did not see any water dripping down from the building's roof. Plaintiff testified that he first realized there was black ice after he had fallen and was examining his injured ankle. There is nothing to suggest that a reasonable person with average intelligence would have seen anything different. Thus, we conclude that the circumstances of plaintiff's fall in this case are essentially indistinguishable from the circumstances in *Slaughter*. We hold that "an average user with ordinary intelligence" would not have discovered the black ice at issue in this case upon casual inspection. *Novotney*, 198 Mich App at 475.

Defendants rely on weather records to show that a reasonable person would have been on notice that black ice could be present. Specifically, defendants provided records that on the day

of the accident, 0.90 inches of snow had fallen, resulting in an overall undisturbed snow depth of six inches. But defendants admit that the snow stopped falling by 11:00 a.m. that morning, and only the specific weather conditions *at the time of the fall* are typically relevant in cases such as this. See *Slaughter*, 281 Mich App at 483. Plaintiff's slip and fall occurred at 3:30 p.m., more than four hours after the precipitation had ended. The significance of the snowfall earlier in the day is diminished, as any snow that fell in the morning would not necessarily have remained later in the afternoon. Defendants also rely on the cold temperatures that day—a low of one degree and a high of fifteen degrees—as a further reason that plaintiff should have been on notice of the potential for black ice. However, these temperature data provided by defendants were of slight significance in light of the fact that plaintiff did not see any water or precipitation in the area leading up to his fall. On the particular facts of this case, we conclude that the trial court erred by finding that the black ice hazard was open and obvious.

Defendants argue that Supreme Court precedent requires that all black ice conditions must be considered open and obvious as a matter of law. Specifically, defendants rely on *Kenny* and *Mitchell v Premium Properties Investments Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals, issued October 4, 2005 (Docket No. 253847) (ZAHRA, J., dissenting), adopted 477 Mich 1060 (2005). However, defendants' reliance is misplaced. In *Kenny*, the plaintiff did not see the ice because it was covered by snow. Furthermore, the plaintiff saw several other persons slip and slide on the surface. Both of these facts would have made a reasonable person aware of the hazardous condition. Similarly in *Mitchell*, it appears that a layer of snow concealed any slipping hazard that may have existed in the parking lot. Therefore, these cases do not stand for the premise that black ice, by itself, poses an open and obvious danger.

Even if a hazard is not open and obvious, a landowner's duty to invitees extends only to (1) hazards caused by the defendant's negligence, or (2) hazards of which the defendant has either actual or constructive knowledge. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). Plaintiff offers the statement of an unidentified employee as proof that defendants had actual knowledge of the icy condition. Plaintiff claims that an employee appeared immediately after he fell. The employee, carrying a bucket, had coincidentally just arrived to salt the area and said it was a "known problem area" with regard to ice accumulating.

A statement is not hearsay, and is thus admissible, if it is "offered against a party" and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." MRE 801(d)(2)(D); see also *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 440; 653 NW2d 415 (2002). Plaintiff, as the proponent of this statement, bears the burden of establishing its admissibility. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004).

The main requirement at issue here is whether plaintiff established that the declarant was an actual employee of defendants. In addition to the declarant's words, admitting that his purpose was to apply salt to the area, plaintiff states that the declarant emerged from the restaurant carrying a bucket, which apparently contained salt. It is only reasonable to presume that the declarant was an employee of defendants since, typically, only an employee would have come from the building carrying a bucket and making statements concerning the application of salt. Furthermore, the presence of the bucket makes it logical to infer that applying salt was within the declarant's scope of employment. We find sufficient evidence in the record to infer that the declarant was an employee of defendants and was speaking about a matter within the

scope of his employment. See *In re Air Crash Disaster*, 86 F3d 498, 537 (CA 6, 1996); see also *Embrico v US Steel Corp*, 404 F Supp 2d 802, 809 n 7 (ED Pa, 2005).[1] In light of the statements of the declarant, we must conclude that plaintiff submitted sufficient evidence to create a genuine issue of material fact concerning whether defendants had actual or constructive notice of the hazardous black ice.

In sum, the trial court erred by granting summary disposition in favor of defendants on the basis of the open and obvious danger doctrine. There were no signs of the existence of the black ice on which plaintiff slipped, and there remained a question of fact regarding whether defendants had actual or constructive notice of the hazard.

Reversed and remanded. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering

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[1] Defendants also argue that the fact that plaintiff does not remember seeing the declarant wearing a uniform is proof that the declarant was not an employee of defendants. However, defendants have presented no admissible evidence to support the existence of a uniform policy; they have merely speculated that one of defendants' employees *likely* would have been wearing a uniform at the time. Defendants' bare allegation in this regard, which amounts to nothing more than conjecture, is quite simply insufficient to overcome the inference of admissibility of the declarant's statements to plaintiff.