

STATE OF MICHIGAN
COURT OF APPEALS

KATHERINE JEAN HAY and JOHN HAY,

Plaintiffs-Appellants,

v

MCKINLEY & ASSOCIATES, INC.,

Defendant-Appellee.

UNPUBLISHED

December 16, 2010

No. 291594

Washtenaw Circuit Court

LC No. 07-001344-NO

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

This case stems from an alleged slip and fall accident that occurred on defendant's property. The trial court granted defendant's motion for summary disposition, holding that the ice upon which plaintiff Katherine Hay¹ fell was open and obvious. Plaintiffs appeal as of right. We affirm.

Plaintiffs argue on appeal that they produced sufficient evidence to create a genuine issue of material fact as to whether the ice constituted an open and obvious hazard. We disagree.

This Court reviews de novo the decisions of trial courts on summary disposition motions. *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). Summary disposition is proper if the evidence, when viewed in the light most favorable to the non-moving party, reveals the lack of any genuine issue of material fact. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). A genuine issue of material fact exists if reasonable minds might differ on an issue based on the evidence. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "This court is liberal in finding genuine issues of material fact." *Jimkoski*, 282 Mich App at 5.

The owner of land has a duty of reasonable care to protect invitees 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, this duty does not apply to dangers that are open and obvious. *Id.*; *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499

¹ References to "plaintiff" in the singular throughout this opinion are to Katherine Hay only.

NW2d 379 (1993). A danger 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.” *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). This is an objective standard that is judged according to a reasonable person standard, and does not depend on whether the particular plaintiff knew or should have known about the danger. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008).

Black ice, by nature, is difficult to see because it is a thin layer of ice that can be transparent. *Id.* at 482-483. In *Slaughter*, this Court established that the dangers of black ice may be open and obvious if there is other evidence that black ice may be present and constitutes a hazard. *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010) (citing *Slaughter*, 281 Mich App at 483). The existence of a hazardous condition should be determined by using all the senses as well as common knowledge. *Slaughter*, 281 Mich App at 479. To determine whether the black ice was an open and obvious condition this Court reviews whether there is “evidence that the black ice in question would have been visible on casual inspection before the fall or [evidence of] other indicia of a potential danger.” *Id.* at 483. Such other indicia may include circumstances such as the presence of snow in the area or covering the ice, the recent occurrence of any type of precipitation combined with freezing temperatures, or a situation where the plaintiff observed others slipping before she herself slipped. *Id.* at 479-481.

In this case, the courtyard where plaintiff fell was shaded by the nearby building, making it difficult to notice the black ice. But, not being able to see the black ice does not mean that the black ice was not an obvious danger. According to the *Slaughter* standard, this Court must also review the other factors present to determine whether the danger of the black ice was open and obvious. It was a very cold day and there had been a light snow fall the day before. Several clients of the business plaintiff had visited had already reported icy conditions. And, the business’ employee stated that the area around the business was often icy. Defendant produced photographs of the scene, taken within minutes of the incident, in which the ice is clearly visible and distinct from the surrounding pavement, even in the shadows. There is also snow on the ground in the photographs. When viewed in the light most favorable to the plaintiffs, the conditions on the day of the accident should have alerted the reasonable person to the possibility of black ice. See *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002) (wintry conditions in Michigan should alert the reasonable person that there could be ice). The evidence shows that a reasonable person could have detected the presence of the ice by a casual inspection. We hold that summary disposition in favor of defendant was appropriate.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad