

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UNPUBLISHED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.

FITZGERALD, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that plaintiffs failed to produce sufficient evidence to create a genuine issue of material fact as to whether the ice upon which plaintiff Katherine Hay fell was open and obvious.

Ice that is not visible, such as black ice, is not necessarily open and obvious. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008). Rather, its status depends on whether there is evidence that the ice in question was visible to a casual inspection, or whether there were other indicia of a potential danger. *Id.* 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.

Here, plaintiffs' three witnesses indicated that the ice on which plaintiff slipped appeared to be the same color as the pavement and was not clearly visible. 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. However, the witnesses testified that these photographs do not accurately reflect what was visible to the naked eye. Additionally, plaintiff testified that she had not encountered any other snow or ice while travelling that day, though it may have snowed lightly the day before. Finally, there is no evidence that plaintiff saw or heard about anyone else slipping in the location where she fell.

When viewed in the light most favorable to the plaintiffs, the witnesses' testimony casts doubt on the relevance of defendant's photographic evidence. Also, according to the testimony, the ice was not visible and there were no indicia of a hazardous condition. The evidence therefore leaves open a genuine issue of material fact as to whether an average person could have

detected the presence of the ice by a casual inspection. In my view, summary disposition in favor of defendant was inappropriate. I would reverse and remand.

/s/ E. Thomas Fitzgerald