STATE OF MICHIGAN

COURT OF APPEALS

SUSAN MUSKETT,

Plaintiff-Appellant,

v

GRAND PRIX FLOATING LESSEE, L.L.C.,

Defendant/Cross-Plaintiff-Appellee,

and

BIRCH TREE BARK & STONE, L.L.C.,

Defendant/Cross-Defendant-Appellee.

UNPUBLISHED
June 26, 2012

No. 297953
Kent Circuit Court
LC No. 09-003680-NI

Before: GLEICHER, P.J., AND HOEKSTRA AND STEPHENS, JJ.

PER CURIAM.

In this premises liability case, plaintiff, Susan Muskett, appeals the April 16, 2010 order granting summary disposition in favor of defendants Grand Prix Floating Lessee, L.L.C. (Grand Prix) and Birch Tree Bark & Stone, L.L.C. (Birch Tree). We affirm as to Grand Prix and reverse and remand for further proceedings regarding Birch Tree.

Plaintiff was staying at the Residence Inn, owned by defendant Grand Prix, in December of 2008 when she slipped and fell on black ice in the parking lot. Plaintiff fractured her foot as a result of the fall. Earlier that winter, Birch Tree contracted with Grand Prix to provide snow removal services for the Residence Inn parking lot. Plaintiff filed a complaint alleging that Grand Prix negligently failed to maintain the premises in a safe condition and that Birch Tree negligently plowed the parking lot. The trial court granted summary disposition in favor of Grand Prix because it found the dangerous condition was open and obvious. The trial court granted summary disposition in favor of Birch Tree because it found Birch Tree did not owe a duty to plaintiff.

On appeal, plaintiff asserts that the trial court erred in concluding that Birch Tree did not owe a duty to plaintiff. We agree. We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

Summary disposition is appropriate when "the proffered evidence fails to establish a genuine issue regarding any material fact." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The trial court's grant of summary disposition in favor of Birch Tree occurred prior to the release of our Supreme Court's opinion in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011). Consequently, the trial court's holding was based on *Fultz v Union-Commerce Assoc*, 470 Mich 460, 461-462; 683 NW2d 587 (2004) and its progeny. As the Court explained in *Loweke*, the courts of this state had been interpreting and applying *Fultz* in an overly-broad manner. Specifically, the *Loweke* Court stated, "Courts have misconstrued *Fultz's* test requiring a 'separate and distinct duty' by erroneously focusing on whether a defendant's conduct was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract." *Id*. at 168. Continuing, the *Loweke* Court explained

> Instead, *Fultz's* directive is to determine whether a defendant owes a noncontracting, third-party plaintiff a legal duty apart from the defendant's contractual obligations to another. As this Court has historically recognized, a separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties and the generally recognized common-law duty to use due care in undertakings. [*Id*. at 169-170.]

Here, plaintiff alleged that Birch Tree negligently plowed the snow, causing it to thaw and refreeze, which caused black ice to form. While it is true that Birch Tree was obligated to tend to the snow pursuant to a contract, *Loweke* demonstrates that the mere existence of that contract does not preclude plaintiff from maintaining a cause of action for negligence. Rather, when Birch Tree involved itself in providing snow removal services, it had a duty to use due care in providing those services. That duty extended to parties like plaintiff, who were outside the scope of the contract. Consequently, the trial court erred in determining that no duty existed and that summary disposition was proper.

Plaintiff also argues that the trial court erred in its grant of summary disposition to Grand Prix. We disagree. Plaintiff correctly states that black ice is not always either open or obvious as a matter of law. *Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396, 399; 775 NW2d 1448 (2009). In *Janson*, the Court noted

> Rather several cases have held that ice may be open and obvious under some circumstances where other facts present should have alerted a Michigan resident of the likelihood of the hazard. Precedent from this Court and our Supreme Court has explained that a long-term Michigan resident should be aware that ice might lurk under snow or after certain weather conditions, that observing other people slipping on a surface should constitute a warning that the surface is slippery and that ordinary ice may well be visible. But in the absence of some other, visible indicia of an otherwise-invisible hazard, black ice per se simply cannot be 'open and obvious.' [*Id*., internal citations and footnote omitted, reversed on other grounds by 486 Mich 934 (2010).]

In this case, plaintiff was a long-term Michigan resident before her migration to North Carolina. While she did not observe the ice before her fall or see anyone else slip, she acknowledged on the day of her fall it had snowed off and on and that the temperature had fluctuated such that the precipitation on that day had presented itself as rain, snow and sleet. She also testified that her husband had driven to the parking lot on which she fell with great caution due to the weather condition. Finally, she noticed that some plowing of the lot had occurred and that there was snow immediately adjacent to the vehicle from which she alighted. These are sufficient indicia under the law of this state to find that a reasonable person should have been aware of the possibility of black ice. The trial court did not err in applying the open and obvious doctrine and granting summary disposition in favor of Grand Prix.

Affirmed as to Grand Prix and reversed and remanded for further proceedings as to Birch Tree. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens