STATE OF MICHIGAN

COURT OF APPEALS

JACQUELYN ROBBINS,

Plaintiff-Appellant,

v

VILLAGE CREST CONDOMINIUM ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
July 30, 2013

No. 300842
Oakland Circuit Court
LC No. 2009-106178-NO

ON REMAND

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

This case returns to this Court on remand from our Supreme Court for "reconsideration in light of *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012)." *Robbins v Village Crest Condo Ass'n*, 493 Mich 945; 827 NW2d 722 (2013). Plaintiff appeals by right an order granting defendant's motion for summary disposition in this premises liability action. For the reasons set forth below, we reverse and remand to the circuit court for further proceedings consistent with this opinion.

In this case, the circuit court granted summary disposition in favor of defendant because it found that the condition was open and obvious. Plaintiff alleged that, on November 18, 2008, she slipped and fell on black ice on defendant's premises: the parking lot of her condominium. On appeal, plaintiff argues that the circuit court erred in granting summary disposition in favor of defendant because there were no indicia of a potential icy condition existing at the time plaintiff fell. We agree.

"This Court reviews de novo a trial court's grant or denial of a motion for summary disposition." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion brought under MCR 2.116(C)(10) is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing, in part, that the alleged black ice was open and obvious because there were indicia of a potentially hazardous condition. In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach was the proximate cause of the plaintiff's injury; and (4) the plaintiff suffered damages. *Benton v Dart Properties, Inc*, 270 Mich App 437, 440-441; 715 NW2d 335 (2006) (citations and quotation marks omitted). As our Supreme Court observed in *Hoffner*, a premises possessor's duty of care to others upon the premises depends on the status of that other person, and the greatest duty attends to business invitees. *Hoffner*, 492 Mich at 460 n 8. Specifically,

> [i]n Michigan, a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises, including snow and ice conditions. However, liability does not arise for open and obvious dangers *unless special aspects* of a condition make even an open and obvious risk *unreasonably dangerous*. This may include situations in which it is "effectively unavoidable" for an invitee to avoid the hazard posed by such an inherently dangerous condition. [*Id.* at 455 (emphases in the original).]

In determining whether a danger is open and obvious, the inquiry is whether an average person with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Several recent precedents support the proposition that weather conditions are relevant to the open-and-obvious determination, and that landowners have a duty to diminish the risks to invitees associated with ice and snow. For example, in *Slaughter v Blarney Castle Oil Co.*, 281 Mich App 474; 760 NW2d 287 (2008), this Court affirmed the trial court's denial of summary disposition, concluding that a question of fact remained regarding whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection. *Slaughter*, 281 Mich App at 484. In *Slaughter*, the plaintiff fell while alighting from her truck at a gas station sometime between midnight and 1:00 a.m. *Id.* at 475. There was no snow on the ground, it had not snowed in a week, the plaintiff had not observed anyone else slip prior to her fall, and the plaintiff did not see the ice before she fell, but it had started to rain. *Id.* at 483. The Court stated:

> Contrary to defendant's assertion that the mere fact of it being wintertime in northern Michigan should be enough to render any weather-related situation open and obvious, reasonable Michigan winter residents know that each day can bring dramatically different weather conditions, ranging from blizzard conditions, to wet slush, to a dry, clear, and sunny day. As such, the circumstances and specific weather conditions present at the time of plaintiff's fall are relevant. We are not persuaded that the recent onset of rain wholly revealed the condition and its danger as a matter of law such that a warning would have served no purpose. [*Id.* at 483-484 (citation omitted).]

In *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010), the Michigan Supreme Court reaffirmed *Slaughter* as governing precedent but reversed the Court of

Appeals decision and reinstated summary disposition finding that the wintry conditions would have alerted an average person of ordinary intelligence to discover the danger upon casual inspection. In *Janson*, "the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening." *Id.* The *Janson* Court reasoned that "these wintry conditions by their nature would have altered an average user of ordinary intelligence to discover the danger upon casual inspection." *Id.*

Finally, in *Hoffner*, the Supreme Court held:

> With specific regard to ice and snow cases, this Court has rejected the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability under any circumstances. Rather, a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and show accumulation, requiring that reasonable measures be taken within reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. However, it is also well established that wintry conditions, like any other condition on the premises, may be deemed open and obvious. Michigan courts thus ask whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger. [*Hoffner*, 492 Mich at 463-464 (citations and quotation marks omitted).]

Defendant argues that there were indicia of a potentially hazardous condition. Plaintiff testified that it was "cold" and based on the meteorological records the temperature was below freezing at the time plaintiff slipped and fell. According to plaintiff, she did not recall seeing any snow or ice on defendant's parking lot which was the parking lot of her condominium. Further, in the days leading up to the incident, there was mild precipitation. In particular, two days before plaintiff's fall, less than an inch of snow fell. However, there was no precipitation the day before the incident and there was also no precipitation on the day of the incident or when plaintiff traversed on defendant's premises. In fact, in the days leading to plaintiff's fall, the temperatures varied and fluctuated above freezing. In particular, following the snow fall just two days before the incident, there were periods of temperatures above freezing, and the meteorological records indicate that, an hour before the incident, the temperature was below freezing.

We conclude that, viewing the evidence in the light most favorable to plaintiff, there is a material question of fact regarding whether there were indicia of a potentially hazardous condition. Although, like in *Janson*, plaintiff's fall occurred on a "cold" day and the temperature was below freezing, the temperature had fluctuated above freezing in the days before plaintiff's fall. While the meteorological records indicate there were trace amounts of snow on the ground the day plaintiff fell and that it had snowed two days before, there was no evidence that there was snow present on defendant's premises or where plaintiff fell. Further, unlike in *Janson*, there was no precipitation on the morning of or the day before the incident. That is, there was no mist, light freezing rain or snow falling the day before or the day plaintiff fell. Further, there is no evidence that plaintiff had observed anyone else slip prior to her fall. Like in *Slaughter*, the facts of the case at bar establish that merely because there were wintry weather conditions days

prior to plaintiff's fall, "each day can bring dramatically different weather conditions" and these facts are not enough to render any weather-related situation open and obvious. *Slaughter*, 281 Mich App at 483. Thus, there exists a question of material fact regarding whether the weather conditions in this case would have alerted an average user of ordinary intelligence to discover the danger. See *Id*. at 484. Because there is a question of fact regarding whether there were indicia of a potentially hazardous condition such that the condition was open and obvious, we need not decide whether there were special circumstances that made the condition unreasonably dangerous. See *id.* at 484.[1]

With regard to the Supreme Court's remand order, again, we conclude that the trial court erred in failing to recognize the existence of a question of fact regarding whether the condition that allegedly caused plaintiff to fall was open and obvious. That was the only issue raised in the claim of appeal, and also in plaintiff's application for leave to appeal in the Supreme Court. *Hoffner* adds nothing to existing principles for making that determination, but instead concerned itself with whether the hazard there at issue—plainly visible ice—was an unavoidable one and so actionable because of that special aspect. *Hoffner,* 492 Mich at 465. However, the question of special aspects was not raised in the instant appeal, or, apparently, even decided below. *Hoffner* therefore does not change our conclusion that the trial court erred by failing to recognize the existence of a question of fact regarding whether the condition that allegedly caused plaintiff to fall was open and obvious.

In support of its argument that the circuit court correctly granted summary disposition in its favor, defendant argues that plaintiff's theory, i.e., that black ice caused her to fall, is not supported by the record. Specifically, defendant argues that plaintiff offered nothing more than mere speculation and conjecture to establish that she slipped and fell on black ice. Defendant argued below that plaintiff's causation theory was mere conjecture, but the circuit court failed to address or decide the issue below. "Although filing a cross-appeal is not necessary to argue an alternative basis for affirming the [circuit] court's decision, the failure to do so generally precludes an appellee from raising an issue not appealed by the appellant." *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 351; 725 NW2d 684 (2006), citing *Kosmyna v. Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999). While we could refuse to consider the issue because defendant has not filed a cross-appeal, we will address the issue because it involves a question of law for which all necessary facts have been presented.

[1] We note, however, that if we were to find that the condition was open and obvious, we would conclude that there were not special aspects that made it unreasonably dangerous. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384(2001). There is no evidence that the black ice was unavoidable and it did not impose an unreasonably high risk of severe harm, such as a 30-foot deep pit in a parking lot. See *id.* at 518. With regard to *Hoffner* specifically, given that plaintiff fell while walking to her car with plans to drive from her home location to another, *Hoffner*'s admonishments that the special aspects doctrine does not permit "recovery for a typical hazard confronted under ordinary circumstances," *Hoffner*, 492 Mich at 469, does not throw into doubt, but rather confirms, this conclusion.

See *Miller v Department of Mental Health*, 161 Mich App 778, 783; 411 NW2d 856 (1987) rev'd on other grounds 432 Mich 426 (1989).

It is well-established that an action for negligence requires a plaintiff to prove four elements: duty, breach, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1 6; 615 NW2d 17 (2000). The third element requires a plaintiff to prove both that the defendant's negligence was the cause in fact and proximate cause of the injuries. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact requires a plaintiff to show that, but for the defendant's negligence, the injuries would not have occurred. *Id*. at 164-165. Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inference, not mere speculation. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). That is, "a causation theory must have some basis in established fact" and "a basis in only slight evidence is not enough." *Skinner*, 445 Mich at 162-163.

Defendant relies on *Stefan v White*, 76 Mich App 654; 275 NW2d 206 (1977), to support its argument that summary disposition is appropriate because plaintiff is merely speculating as to the cause of her fall. *Stefan* involved a plaintiff who tripped and fell at the defendant's home. *Id*. at 656. The plaintiff was deposed and testified that she did not know how or why she fell. *Id*. The plaintiff stated, "I don't recollect anything . . . I don't know what happened. I just went down." *Id*. at 657. The *Stefan* Court found that this testimony contradicted the complaint and negated a causal relationship between the plaintiff's fall and the defendant's premises. *Id*. at 660. The plaintiff's deposition testimony in *Stefan* demonstrated that she had no knowledge of the actual cause of her. *Id*. Accordingly, the *Stefan* Court concluded that the mere occurrence of the plaintiff's fall is not enough to raise an inference of negligence on the part of the defendant. *Id*. at 661.

Stefan is distinguishable from the case at bar because plaintiff offered a reasonable theory of causation with respect to her fall. Plaintiff testified that "[a]ll I can tell you is I hit the remote [to open the car garage], and next thing -- and I'm walking to the car, and I'm on the ground. And that's just how it happened." After plaintiff's fall, she did not touch the ground or look to see if there was ice where she fell. However, when asked, "[w]hy do you think it was black ice?" she simply stated, "[b]ecause I slipped." We note that if this were the extent of evidence presented, plaintiff's theory, that black ice caused her to slip and fall, could be found to have been premised on mere speculation and conjure. However, there are more facts in the record that could support a reasonable inference of plaintiff's causation theory.

Plaintiff testified that she slipped and fell backwards onto her buttocks in defendant's parking lot. After she fell, EMS personnel arrived at the scene. They placed her on a spine board, stabilized her foot, and then attempted to lift the board from the ground; however the EMS technician slipped and lost his footing. According to plaintiff, the EMS technician then easily slid the board along the parking lot without the aid of wheels or rollers. A fireman, who also arrived at the scene, testified that he did not recollect seeing any ice or the EMS technician slipping or the EMS technician sliding the board along the parking lot. The fireman acknowledged that he did not leave his truck and that he had little memory of the incident independent of his report. Despite his testimony, the EMS report indicated that the primary complaint was "slip and fall on *ice*." There was also evidence that the a few days before her fall

there was mild precipitation and that the temperatures on the days leading to the incident fluctuated between below and above freezing. On the morning plaintiff fall, the temperature was below freezing. The record indicates that plaintiff pinpointed the area in which she fell; she described the mechanics of her fall, i.e., slipping and falling backwards onto her buttocks, and she observed the EMS technician slipping in the same area. While there is no direct evidence of the existence of ice, the circumstantial evidence gives rise to a reasonable inference that plaintiff fell on black ice. Accordingly, plaintiff's theory of causation is not premised on mere speculation and conjecture. We conclude that there is an issue of material fact regarding the cause of plaintiff's fall, and therefore, summary disposition was not proper.

Finally, defendant argues that the circuit court correctly granted summary disposition in its favor because it had no notice the condition. We decline to address this issue because the record in not sufficiently developed to allow us to make a ruling on this issue. In sum, we conclude that there is a question of fact regarding whether the condition on the premises was open and obvious. We also conclude that plaintiff has offered sufficient evidence to create a material question of fact on the element of causation. Therefore, summary disposition was inappropriate and the circuit court erred in granting summary disposition in favor in defendant.

Reversed and remanded for further proceedings consistent with this opinion. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219(A).

/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause