STATE OF MICHIGAN

COURT OF APPEALS

TONI BROUGHTON,

Plaintiff-Appellant,

v

TEL-EX SHOPPING CENTER,

Defendant-Third Party Plaintiff-Appellee,

and

ARTISTIC OUTDOOR SERVICES,

Defendant-Third Party Defendant.

UNPUBLISHED
November 29, 2012

No. 306360
Oakland Circuit Court
LC No. 2010-114940-NO

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

PER CURIAM.

Plaintiff appeals as of right an order granting defendant, Tel-Ex Shopping Center's (defendant Tel-Ex), motion for summary disposition pursuant to MCR 2.116(C)(10), in this premises liability action. We affirm.

First, plaintiff argues that summary disposition was inappropriate because defendant Tel-Ex neglected its duty to inspect its parking lot and concedes that there were other indicia that made the alleged "black ice" in question open and obvious, and thus, defendant may not claim a lack of notice. Plaintiff further asserts that there was evidence that the "black ice" existed for at least 13 hours before this incident. We disagree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews de novo a trial court's grant or denial of summary disposition based on the record to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The party moving for summary disposition must specifically identify the matters that have no issues of disputed fact. *Coblentz v*

Novi, 475 Mich 558, 569; 719 NW2d 73 (2006). Then the party opposing the motion has the burden of showing, through documentary evidence, that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). This Court must review a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Affidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule [(C)(10)] shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The trial court ruled as follows regarding defendant Tel-Ex's motion for summary disposition:

> Plaintiff has failed to establish that the "black ice" condition on the handicap ramp existed for a sufficient length of time that Defendant Tel-Ex should have known about it. Plaintiff argues that the metrological [sic] data indicated conditions were conducive to the formation of black ice. Under Michigan law, there is no duty to inspect the premises throughout the night and into the early morning hours simply because the weather forecasted temperatures both above and below freezing. Therefore, the Court finds that summary disposition is appropriate as to Defendant Tel-Ex because Plaintiff failed to create a genuine issue of material fact regarding whether Defendant had actual or constructive notice of the presence of ice on the ramp.

"To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Kosmalski ex rel Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). To be liable under a premises liability theory, a plaintiff must show that the defendant was in possession of, and had control over the land at the time of the plaintiff's injury. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702, 705; 644 NW2d 779 (2002). If a defendant had possession of, and was in control over the land in question at the time of the plaintiff's injury, the defendant would be liable for the plaintiff's injury if the condition was caused by the defendant's active negligence or if the condition had existed for a sufficient length of time that the defendant should have had knowledge of it. *Id.* at 706.

"A premises possessor owes an invitee a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the premises." *Bialick v Megan Mary, Inc*, 286 Mich App 359, 362; 780 NW2d 599 (2009) (brackets, quotation marks and citation omitted). Furthermore, "a premises possessor owes a duty to undertake reasonable efforts to make its premises reasonably safe for its invitees," *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008) (quotation marks and citation

omitted), which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, and only if, all of the following are true: the possessor (a) knows, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001).

> [A]n invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. This duty requires an invitor to take reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. [*Anderson v Wiegand*, 223 Mich App 549, 555; 567 NW2d 452 (1997).]

"Invitors are liable for dangerous conditions that might be discovered with reasonable care." *Id*. "However, the possessor of land is not an absolute insurer of the safety of an invitee." *Id*. at 554.

A landowner's constructive notice of a condition can be inferred from evidence that the condition is of such a character or has existed a sufficient length of time that the landowner should have had knowledge of it. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). However, mere conjecture or speculation does not constitute evidence, which establishes a genuine issue of material fact. *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001); *Altairi v Alhaj*, 235 Mich App 626, 629; 599 NW2d 537 (1999). A theory is speculative even when reasonable and supported by evidence when there are other equally plausible explanations for the same condition. *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). Also, circumstantial evidence that weather conditions may have produced ice does not allow a reasonable inference that a defendant had constructive notice of it. See *Altairi*, 235 Mich App at 640 (a meteorologist's affidavit asserting general weather conditions was not evidence of the defendant's knowledge of ice).

There is no evidence that defendant had actual knowledge of the "black ice" in its parking lot. Thus, the question is whether there is a genuine issue of material fact regarding whether the "black ice" existed for a sufficient length of time that defendant should have had knowledge of it.

Plaintiff did not recall when it had last snowed before her slip and fall. Also, it was not snowing the day of the incident. However, plaintiff has lived in Michigan all of her life, and there was some snow on the ground at the time of the accident. There was snow on the ground in defendant Tel-Ex's parking lot, including a small amount of snow near the ramp where the incident happened. On the day of the incident, the minimum temperature in the surrounding area was 32 degrees Fahrenheit (freezing) and the maximum temperature was 37 degrees Fahrenheit. Additionally, in an affidavit, certified consulting meteorologist, Paul Gross, asserted that "[t]he meteorological data indicate[d] that this ice developed no later than thirteen hours prior to this incident." Gross further asserted that "[t]he meteorological data indicate[d] that conditions prior

to this incident in Southfield, Michigan on 4 February 2008 at 8:30 A.M. were conducive to the formation of ice on untreated or insufficiently treated pedestrian surfaces."

First, Gross's opinion in his affidavit that the ice developed no later than 13 hours before plaintiff's accident is mere speculation, and thus, is insufficient to create a genuine issue of material fact regarding whether the "black ice" existed for a sufficient period of time that defendant Tel-Ex should have had knowledge of it. See *Skinner*, 445 Mich at 164-165; *Altairi*, 235 Mich App at 629.

Next, Gross's opinion in his affidavit that the conditions before the incident were conducive to the formation of ice, the fact that the temperature was at freezing at some point during the day, and the fact that there was some snow left on the ground from a prior snow fall were insufficient to impose a duty on defendant Tel-Ex to inspect its parking lot for ice. Furthermore, Gross's general assertion regarding the weather being conducive to the formation of ice was circumstantial evidence that does not allow a reasonable inference that defendant Tel-Ex had constructive notice of the "black ice." See *Altairi*, 235 Mich App at 640. In sum, plaintiff did not present any evidence that defendant Tel-Ex caused, knew, or should have known of the "black ice." The evidence only suggests that plaintiff was the victim of a combination of innocent circumstances, not of defendant Tel-Ex's negligence. Therefore, summary disposition was appropriate on this basis. In light of our resolution of this issue, plaintiff's other issue need not be addressed.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter