

STATE OF MICHIGAN
COURT OF APPEALS

IAN MUSKOVIN,

Plaintiff-Appellant,

v

ASMARO, INC., d/b/a FENTON PARTY SHOP,

Defendant-Appellee.

UNPUBLISHED

November 30, 2006

No. 270170

Genesee Circuit Court

LC No. 05-081336-NO

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

SERVITTO, J. (*dissenting*).

I respectfully dissent.

While the majority cites to *Kenny v Kaatz Funeral Home*, 472 Mich 929; 697 NW2d 526 (2005) (*Kenny II*) for the proposition that black ice, by itself, is an open and obvious condition, I believe that is an incorrect interpretation of the Supreme Court's ruling. As observed by the majority, *Kenny II* reversed this Court's decision in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004) (*Kenny I*), adopting the dissenting opinion in *Kenny I* in doing so. As also observed by the majority, the plaintiff in *Kenny I*, fell on a patch of snow-covered ice after exiting her vehicle on a dark, snowy evening and observing her companions hang onto a vehicle for support as they exited the vehicle. The majority in *Kenny I* found that questions of fact regarding the open and obvious nature of the condition precluded summary disposition in defendant's favor, while the dissent opined, "[i]n my view, after witnessing three companions exit a vehicle into the snow-covered parking lot on December 27 and seeing them holding on to the hood of the car to keep their balance, all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery."

In adopting the above dissent, there was no explicit or implicit holding by the Supreme Court that black ice is necessarily always an open and obvious condition. Rather, I believe the *Kenny II* court ruled that upon a studied review of the specific facts before them, the black ice at issue was open and obvious. *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006), also cited by the majority, similarly addressed snow-covered ice when it stated, "[w]e hold as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." The specific facts in this case, on the other hand, are markedly different and, in my opinion, present sufficient questions of fact to avoid summary disposition in defendant's favor.

Here, defendant presented local climatological data indicating that on January 11, 2005 (the date of the fall) the sky was overcast and snowfall measured .6 inches. Undated photos, purportedly also taken the day after plaintiff's fall, show a significant amount of snow and slush in the lot. Additional photographs (dated the day after the fall), however, show snow around the perimeter of the building the day after plaintiff's fall, but not in the lot itself. Evidence in the form of an affidavit by a snowplow driver was also provided that the store parking lot was plowed on the morning of the accident.

In addition, plaintiff testified that he saw no ice in the parking lot on the day of the fall, although he did observe slushy snow against the building. Plaintiff also submitted affidavits of his companions indicating that they saw plaintiff fall then went to assist him. In at least one of the affidavits, a companion swore that he was looking very carefully as he approached plaintiff so he would not fall as well and that he while saw no ice in the parking lot, he also slipped while trying to help plaintiff up. Additionally, the employee on duty at the store on the date of the accident testified that he did not see snow in the parking lot that day and that he did not think there was ice in the parking lot.

I believe that the contradicting evidence set forth above presents questions of material fact as to whether the icy condition was open and obvious. The trial court recognized as much when making its ruling stating, "It's a decision that certainly is a close one and could go either way. . . ." Because resolution of the conflicting evidence regarding whether the ice was open and obvious should be left to the factfinder, I would not reach the issue of whether the ice presented special aspects and would simply reverse.

/s/ Deborah A. Servitto