STATE OF MICHIGAN

COURT OF APPEALS

WHITNEY SCHUSTER, Plaintiff-Appellant,	UNPUBLISHED July 21, 2016
v	No. 328797 Kent Circuit Court
RIVER OAKS GARDEN APARTMENTS LLC, Defendant-Appellee.	LC No. 14-005418-NO

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

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition on plaintiff's claims for negligence and premises liability. We affirm in part and remand in part for further proceedings consistent with this opinion.

Plaintiff was a resident of an apartment complex located in Kentwood, Michigan, owned by defendant. On the morning of February 19, 2013, at approximately 6:30 in the morning, she left her apartment to go to work. She stopped her car at the complex's "mailbox kiosk" area to check her mail. As she was walking to her mailbox, she slipped and fell, on what she describes as an "ice-covered sidewalk" leading up to the kiosk. According to plaintiff, this was the first time that morning that she encountered ice. As a result of the fall, she suffered a fracture and tendon injuries, which required surgery.

Plaintiff filed suit against defendant. Following discovery, defendant moved for summary disposition under both MCR 2.116(C)(8) and (10), arguing a lack of notice of the icy condition and that the condition was open and obvious. The trial court granted summary disposition based upon the notice issue, opining as follows:

> All right. Well, the Court has reviewed everything. It's heard the arguments here this afternoon. It's this Court's opinion that this case rises or falls on the issue of notice, and the Court is satisfied that there was no evidence of notice here to the defendant, so the motion is granted.

On appeal, plaintiff argues that defendant had constructive notice of the potential for icy conditions and should have pretreated for the coming ice or at least had been more rigorous in its inspection of the premises at reacting to the ice more quickly. In support of its argument that

there was a basis for defendant's having known about the approaching freezing rain, plaintiff quotes the following from the internet blog of Bill Steffen, the Chief Meteorologist of a local television station:

> Rain starts late afternoon at the Indiana border and moves north across the area this evening. Rainfall amounts should be ¼ to ½ inch. **Winter Weather Advisory for Tuesday for the entire area!** The cold air comes in after midnight and the rain will change to snow. **BIG WEATHER STORY**: Flash freeze for the Tues. AM rush hour. It could be nasty…after about 1/3" rain and melting snow first, with puddles…then temperature falls to the upper 20s and it starts snowing for the Tues. AM commute. That could make for a very slippery Tues. AM (and not much better Tues. PM.) commute. My advice…do this PM if you have the choice and stay put on Tues.

According to plaintiff, the winter weather advisory with a flash freeze warning was posted early on the morning of Monday, February 18, more than 24 hours before plaintiff's fall.

Both parties present good arguments for their positions. Cf. *Grandberry-Lovette v Garascia*, 303 Mich App 566, 579; 844 NW2d 178 (2014) ("Accordingly, if under the totality of the circumstances a reasonably prudent premises possessor would have employed a more vigorous inspection regime that would have revealed the dangerous condition, the fact that the condition was not observable on casual inspection would not preclude a jury from finding that the premises possessor should have discovered the hazard in the exercise of reasonable care notwithstanding its latent character.") and *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999) ("Insofar as plaintiff seeks to use general knowledge of local weather conditions to show that defendant should have known that ice lay under the snow on his steps, the same knowledge can be imputed to plaintiff."). But we need not decide which presents the better argument on the notice issue, because under either view of the notice issue, plaintiff's arguments fail.

If we accept plaintiff's position and follow the *Grandberry-Lovette* decision, then it necessarily follows that plaintiff too was on notice of the conditions. Accordingly, looking to defendant's alternative argument that the trial court should have granted it summary disposition under the open and obvious danger doctrine, we would agree. In *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010), the Supreme Court held that black ice conditions are

> open and obvious when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall." Here, 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. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection.

The very reason that plaintiff argues that defendant had constructive notice of the icy conditions also gives plaintiff such notice so as to make the condition open and obvious. And, because this is the very point that the Court made in *Altairi*, 235 Mich App at 639-640, we reach a similar result if we follow that decision.

This leaves plaintiff's argument that she nevertheless still has a viable claim under MCL 554.139. Defendant concedes that the open and obvious doctrine does not apply to that statutory provision. Nonetheless, defendant argues that it was entitled to summary disposition on this issue as well for a number of reasons: (1) while plaintiff references the statute in her complaint, she never actually states an independent claim under the statute; (2) plaintiff has not shown that the area where she fell was unfit for the intended purpose, as is necessary to establish a breach of the statutory duty; and (3) notice remains an issue with regard to a claim under the statute.[1] But, because the trial court did not address the issue of a potential claim under MCL 554.139, a remand is necessary to resolve this question.

Accordingly, we affirm the trial court's grant of summary disposition to defendant as to all claims except for any potential claim under MCL 554.139(1)(a). On that claim only, we remand the matter to the trial court for further consideration. On remand, the trial court shall consider (1) whether plaintiff has actually pled an independent claim under the statute and (2) if so, whether there is a genuine issue of material fact relative to such a claim. See *Allison v AEQ Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008). Defendant is, of course, free to raise any additional arguments in favor of summary disposition that it may wish to present.

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Patrick M. Meter

[1] We note that there does not appear to be any published decisions that clearly establish that notice is required to establish a breach of duty under MCL 554.139(1)(a).