

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM OSANTOWSKI,

Plaintiff-Appellee,

V

DOW CHEMICAL COMPANY,

Defendant-Appellant.

UNPUBLISHED

December 20, 2011

No. 300707

Midland Circuit Court

LC No. 09-005690-CZ

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ the trial court's order denying defendant's motion for summary disposition in this premises liability case. We reverse and remand.

I. BASIC FACTS

In 2007, plaintiff was an employee of Signal Perfection, Ltd. which in turn was a contractor to defendant, Dow Chemical Company ("Dow"). At that time, plaintiff worked the night shift from 11:00 p.m. until 7:00 a.m. on Dow's premises, specifically at Dow's "2020" building. Plaintiff was an audio/visual technician. On December 12, 2007, as part of plaintiff's usual practice when arriving for work, he parked his vehicle in the first parking spot in the first row because the 2020 parking lot was empty at night. After parking, plaintiff walked diagonally across the parking lot directly to the rear entrance of the building. He did not see or encounter any ice or slippery conditions on his way to the building.

Almost two hours after arriving at work, plaintiff left the building but could not recall if it was to smoke a cigarette or if it had something to do with his lunch pail, which he kept in his car. In any event, while plaintiff was walking back to the building, he slipped and fell to the ground.

¹ This Court initially denied defendant's application for leave to appeal. *Osantowski v Dow Chem Co*, unpublished order of the Court of Appeals, entered February 10, 2011 (Docket No. 300707). However, later, the Supreme Court remanded this case to this Court for consideration as on leave granted. *Osantowski v Dow Chem Co*, 489 Mich 982; 799 NW2d 177 (2008).

Plaintiff was still in the parking lot, anywhere from 10 to 15 feet away from his vehicle. Only after falling did plaintiff feel “wet and ice” and realize that he had slipped on ice.

After returning to the building, plaintiff reported the incident through the proper Dow channels. Plaintiff reported that the incident happened at 12:45 a.m. on December 13, 2007. At approximately 3:00 a.m., David Dietlein, from Dow Security, arrived at the 2020 building to take a report from plaintiff. During this time, both plaintiff and Dietlein went to the parking lot to view the site of the fall. Dietlein noted that as they approached plaintiff’s car, he saw an area of patchy ice nearby. The area was approximately eight to ten feet wide and contained thin, patchy ice. Dietlein also testified that the parking lot, including the area in question, was illuminated by a single, 100-foot tall light tower (containing six bulbs), which was located approximately 80 to 100 feet southwest of plaintiff’s car. Additionally, there also was a 15-foot tall light pole (containing one bulb) approximately 100 feet to the north of plaintiff’s car. Notably, Dietlein did not see any other ice in the parking lot, except for this one area.

After returning to his office, Dietlein prepared an incident report and contacted Dow dispatch to request salting to remove the ice in the 2020 parking lot. As a result, the salting/plowing contractor, Johnson Contracting, Inc., came out and salted the entire parking lot at around 3:30 or 4:00 a.m. Whenever Johnson Contracting applied salt, its practice was to salt the entire lot, even if only a portion of the lot was icy.

The weather and associated snow/ice removal leading up to plaintiff’s fall was presented to the trial court. On December 11, 2007, 1.3 inches of snow fell, and the high temperature was 33 degrees with the low temperature being 23 degrees. At 3:00 p.m. on that day, Johnson Contracting applied salt to the Dow parking lots, which were full of cars at that time.² On December 12, 2007, there was no snow fall, and the high temperature was 32 degrees with a low of 12 degrees. During the early morning hours of December 12, Johnson Contracting returned to the now-empty lots and plowed and salted them before the day-shift workers arrived at 7:00 a.m. At 12:45 a.m. on December 13, the time of the slip and fall, the temperature apparently was 17 degrees.³ As noted earlier, Johnson Contracting came out around 3:30 a.m. or 4:00 a.m. and salted the entire 2020 parking lot.

Plaintiff filed this premises liability suit on May 5, 2009. Dow later moved for summary disposition, arguing that (1) it did not owe plaintiff any duty because any danger was open and obvious, (2) it did not owe plaintiff any duty because it was not aware of any hazardous condition, and (3) to the extent that any duty existed, Dow’s snow and ice removal measures were reasonable as a matter of law. Plaintiff, on the other hand, argued that the ice was black ice, which by definition was not open and obvious. Furthermore, plaintiff argued that there were

² The driver explained that when salting during the work day, he would narrow the throw of the salt and only drive down the aisles in order to avoid throwing salt directly on vehicles. He admitted that in this instance, salt was not applied along the sides of the parked cars.

³ The evidence submitted shows that the Saginaw airport reported a temperature of 17 degrees at 11:53 p.m. and 17 degrees at 12:53 a.m.

no other indicia present that the black ice could exist at the area in question. Finally, plaintiff claimed that the snow/ice removal procedures were not reasonable since “[n]o efforts of any kind of nature were utilized . . . to remove ice from next to the sides of the parked vehicles.” The trial court denied the motion because it determined that (1) the hazard was not open and obvious, (2) the question of notice was a question for the jury, and (3) it was for a jury to determine whether Dow’s actions were reasonable.

The trial court denied the motion and stated the following at the hearing:

The Court is of the opinion that the circumstances presented in this situation as addressed in the hearing do not rise to the level that they would have as a matter of law . . . would have been visible upon casual inspection, nor as a matter of law does the Court believe that there is sufficient basis to find that the matter of indicia of a potential hazard should not be addressed by the trier of fact in this case.

There is case law that addresses what the court believes are weather conditions that were more contemporaneous with the actual fall that occurred in those cases. In this situation, the weather condition that is alleged to have potentially created the black ice – the Court has identified as black ice, not making a determination of fact but simply for purposes of this hearing; the jury will make the determination whether there was in fact black ice – was sufficiently removed so that this Court cannot determine or cannot make a determination that a reasonable trier of fact would necessarily rule in that fashion and, therefore, it’s an issue that the trier of fact will have to decide.

The other conditions that were presented the Court also feels do not rise to the level of establishing a potentially hazardous condition that as a matter of law would have been something a person of – an objective reasonable person would have necessarily known would have established the condition that is alleged to have occurred.

[A]dditionally, the Court is of the opinion that it is a question of fact as to whether there was adequate warning and/or notice to the premises owner in this case. The plaintiff has the right to rely upon circumstantial evidence to establish that there was the condition present and what steps may or may not have been taken to then lead to the trier of fact determining whether there was in fact adequate steps being taken and, if there was not, if that would have led – if there had been adequate steps taken, if that would in fact have led to the disclosure of this condition. Therefore, the Court is of the opinion that is a question of fact to be addressed by the trier of fact and will deny summary disposition on that basis as well.

Lastly, the defendant raises the issue that requests the Court to determine as a matter of law that the procedures that have been implemented were in fact reasonable and therefore not warranted any further action. By its very nature the decision as to whether an act is or is not reasonable is prone to a question of fact

and under all those standards and those cases which address that the Court concurs that a determination as to whether any kind of policy is or is not reasonable is a matter that the trier of fact should decide and that there are questions of fact in this situation as to what was or was not appropriate steps to be taken and it[']s for the jury

II. DUTY ANALYSIS

Dow argues that the trial court erred when it denied its motion for summary disposition. We agree.

On appeal, this Court reviews a trial court's decision on a motion for summary disposition made under MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

A negligence claim requires that a plaintiff prove the following four elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The duty a landowner owes to those who enter the landowner's land is determined by the status of the visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Michigan recognizes three traditional categories of visitors: trespasser, licensee, and invitee. *Id.* It is not contested that plaintiff was an invitee while on Dow's premises. A landowner has a duty to invitees to "inspect the premises and, depending on the circumstances, make any necessary repairs or warn of any discovered hazards." *Id.* at 597. However, this duty does not require a landowner to protect an invitee from dangers that are "open and obvious." *Benton v Dart Properties*, 270 Mich App 437, 440-441; 715 NW2d 335 (2006).

A. OPEN AND OBVIOUS

Dow argues that it is not liable for any of plaintiff's injuries because there is no question of fact that the danger was open and obvious. We disagree.

Whether a hazard is open and obvious is a question of fact. See *Joyce v Rubin*, 249 Mich App 231, 242-243; 642 NW2d 360 (2002). Thus, if reasonable jurors could not disagree, summary disposition is appropriate. See *id.* Determining if a danger is open and obvious utilizes an objective test. *Kenny v Kaatz Funeral Home, Inc.*, 264 Mich App 99, 119-120; 689 NW2d 737 (2004) (Griffin, J., dissenting), adopted in 472 Mich 929 (2005). Objectively, a danger is open and obvious if "an average user with ordinary intelligence" would have discovered 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). The word "casual" is defined by *Random House Webster's College Dictionary* (2001) as meaning "happening by chance,"

“without definite or serious intention,” and “off hand.” Thus, a *casual* inspection of the premises is one that occurs in an offhand manner, without definite and serious intention.

Here, plaintiff testified that an icy patch of ice in Dow’s parking lot caused him to fall. He also testified that he did not actually see the patch of ice before falling; he only noticed it after he fell and felt “wet and ice” while on “all fours.” Plaintiff equates this situation with “black ice,” which is ice that “is either invisible or nearly invisible, transparent, or nearly transparent.” *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008). This Court stated that such a condition is “inherently inconsistent with the open and obvious danger doctrine.” *Id.* As a result, in order for black ice to be considered open and obvious, there must be some “evidence that the black ice in question would have been visible on casual inspection before the fall” or some other “indicia of a potentially hazardous condition.” *Id.* Such evidence or indicia typically consists of visible snow covering the ice. See, e.g., *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007); *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 65; 718 NW2d 382 (2006); *Kenny*, 264 Mich App at 119-120; *Joyce*, 249 Mich App at 239-240. In *Slaughter*, it had not snowed in a week leading up to the slip and fall. *Slaughter*, 281 Mich App at 475. After midnight, the plaintiff stopped at a gas station when it had just started to rain. *Id.* When the plaintiff alighted from her vehicle, she immediately lost her footing on black ice and fell to the ground. *Id.* The plaintiff never saw the ice before she fell and could not readily see it afterwards. *Id.* at 483. Notably, even though it had started to rain at the time the plaintiff fell, there was no snow in the area. *Id.* Thus, the Court determined that summary disposition was not warranted because there was a question of fact regarding whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection. *Id.* at 484.

In the instant case, when viewing the evidence submitted to the trial court in a light most favorable to plaintiff, we cannot conclude that the hazard was open and obvious. There were only two witnesses that testified regarding the patch of ice. Both witnesses agreed that the parking lot was free from snow.⁴ Plaintiff testified that he did not see the ice even though he had walked through that same area at least twice earlier that night. Dietlein testified that he saw the ice patch “as we were walking out there” when plaintiff was leading him to the ice.⁵ However, it is important to note that Dietlein was walking out to the parking lot with the sole purpose of investigating plaintiff’s reported fall. Thus, looking at Dietlein’s testimony in a light most favorable to plaintiff, it is easy to conclude that Dietlein was not merely *casually*, or in an offhand manner, inspecting the premises – instead, a logical inference is that he was *actively* looking for ice to see what caused plaintiff’s fall.

⁴ Even though the parking lot was plowed approximately 23 hours earlier, there was no snow in the 2020 parking lot because Johnson Contracting’s practice for this lot was to remove all of the snow to a lesser-used, adjoining lot 400 feet away (the 2010 parking lot).

⁵ We note that plaintiff’s brief on appeal mischaracterizes this fact. Plaintiff claims that Dietlein only saw the ice after plaintiff pointed it out to him. However, in response to being asked, “Did you see it before [plaintiff] pointed it out to you?” Dietlein said, “I saw it as we were walking out there.” That response cannot be considered an acceptance of the premise in the posed question.

Therefore, similar to the situation in *Slaughter*, the evidence in the present case shows that there is an open question of fact regarding whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection, and summary disposition was properly denied on this ground.

B. NOTICE

Dow argues that even if the ice were not open and obvious, plaintiff failed to present any evidence that Dow had actual or constructive notice of the dangerous condition. We agree. Just as a landlord's duty to protect an invitee only extends to dangers that are not "open and obvious," *Benton*, 270 Mich App at 440-441, a defendant also owes a duty to an invitee only to the extent that a hazard on the land can be found to be attributable to the defendant's negligence, or only if the defendant had actual or constructive knowledge of the hazard's existence, *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706-707; 644 NW2d 779 (2002).

Plaintiff attempted to show that (1) Dow negligently caused the formation of the patch of ice by the way it salts the parking lots and (2) the sheer size of the ice patch was enough to put Dow on notice of its existence. Each of these arguments is unpersuasive.

First, plaintiff heavily relies on the method that Dow (specifically its contractor) uses to salt the parking lots when the lots are full of cars. The driver who applies the salt testified that when the lot is full of cars, he simply travels down the aisles and narrows the throw of the salt to avoid hitting or damaging any vehicles with the salt. He admitted that this method prevented the immediate areas on the sides of the parked vehicles from receiving any salt. Plaintiff claims that this salting technique either caused the ice patch to form or, alternatively, it gave Dow constructive notice that ice will remain between vehicles. However, plaintiff's reliance on testimony regarding this salting method is misplaced because it does not reflect all of the evidence about the salting of the lots. Johnson Contracting's employee specifically testified that, while this was his standard salting practice during the work day, he also regularly would return to the empty lots at night to salt the lot in its entirety. The record further establishes that after the snow fell on December 11, 2007, at 3:00 p.m. that day, Johnson Contracting salted down the aisles of the full parking lot and returned later that night, when the parking lot was empty, to fully plow and salt the entire lot. This work was completed by 6:00 a.m. or 7:00 a.m. on December 12. There was no evidence of any other snowfall that occurred between this time and when plaintiff fell at 12:45 a.m., December 13. Moreover, plaintiff never established that the patch of ice was located in a spot that normally would be unsalted during a daytime salting. Plaintiff testified that he parked in the first spot, first row in the empty parking lot. He also testified that he was walking directly towards the building on a diagonal line when he fell. He estimated that he got 10 to 15 feet away from his car. Thus, since he was in the first spot and was walking towards the building, he did not fall in a position that would have been "in between" any cars.

Second, plaintiff argues that the sheer size of the icy patch (8 to 10 feet wide) was sufficient to put Dow on notice of its existence.⁶ However, no one knew how long the ice patch had been present, and thus, there was no evidence that Dow or its salting contractor had actual or constructive notice of the patch of ice.⁷

In summary, we conclude that plaintiff failed to establish that Dow had actual or constructive notice of the icy condition in the parking lot, and that such failure was fatal to plaintiff's case. Accordingly, the trial court erred when it denied Dow's motion for summary disposition on this basis.

III. BREACH ANALYSIS

Dow also argues that summary disposition should have been granted because the actions that it and its contractor undertook could not have breached any duty because they were reasonable as a matter of law. Because defendant owed no duty to plaintiff and summary disposition should have been granted in defendant's favor on that basis, we decline to address this issue.

IV. CONCLUSION

The trial court erred when it denied summary disposition because there was no issue of fact whether Dow had actual or constructive notice of the icy condition in the 2020 parking lot. We reverse and remand for entry of summary disposition in favor of Dow. As the prevailing party, Dow may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

⁶ Plaintiff does not explain how an icy patch, which is allegedly so large as to place Dow on constructive notice of its existence, would not have also been open and obvious to plaintiff.

⁷ We also note that Roger Thornton, the superintendent for Johnson Contracting, testified that he inspected the work after the December 12 plowing/salting and found that the work was up to expectations, which meant the lots were sufficiently covered in salt so that every step would sound "crunchy."