STATE OF MICHIGAN

COURT OF APPEALS

NICHOLAS LAWSON,

Plaintiff-Appellant,

v

CHERYLENE NORTON,

Defendant-Appellee.

UNPUBLISHED
June 2, 2011

No. 296896
Lapeer Circuit Court
LC No. 09-041113-NI

Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

In this premises liability case, plaintiff Nicholas Lawson appeals as of right the trial court's order granting defendant Cherylene Norton's motion for summary disposition. We affirm.

I. FACTS

Nicholas Lawson is a resident of Lapeer, Michigan, and has lived in Michigan his entire life. Norton owns, and formerly lived in, a house in Lapeer, Michigan. At the time of Nicholas Lawson's injury on March 8, 2008, Norton was living in her Lapeer home.

On the morning of March 8, 2008, Nicholas Lawson arrived at Norton's home in Lapeer at approximately 9:00 a.m. Nicholas Lawson described the temperature that day as "in the 40s[,]" and he stated that "it hadn't snowed for awhile[.]" Nicholas Lawson asserts that Norton's son and daughter-in-law asked him to come over and give an estimate for work to be performed at Norton's house. Nicholas Lawson stated that Norton's son confirmed the visit via telephone on the morning of March 8, 2008.

Lacy Lawson, Nicholas Lawson's then girlfriend and now his wife, drove Lawson to Norton's house. By means of affidavit, Lacy Lawson stated that she did not see any ice or snow on Norton's driveway or surrounding property on the morning of March 8, 2008. She further stated that she did not see any snow or ice on any public roadways the morning of March 8, 2008. Nicholas Lawson similarly testified that he did not notice any snow or ice on the roads as Lacy drove him to the house.

Norton's driveway, which is not paved, is very long. She described it as capable of accommodating over 10 cars. Norton was the only person responsible for snow and ice removal

at the Lapeer, Michigan home. Norton accomplished this task with a standard snow shovel and a cup, which she used to spread salt. Norton testified that it was not raining or snowing on the morning in question. When asked if there had been any rain or snow a couple days before the incident, she responded, “No, not that I remember.”

When Nicolas and Lacy Lawson arrived at Norton’s home, Lacy Lawson parked the vehicle toward the end of the driveway behind several other vehicles. Nicholas Lawson observed several individuals farther up the driveway, near the garage, throwing construction materials into a dumpster. Nicholas Lawson got out of his vehicle and proceeded to walk toward the individuals near the dumpster. But after taking approximately eight to ten steps, Nicholas Lawson slipped and fell. He explained that his left foot just “went out from underneath” him, causing him to fell “straight down on to [his] right foot.”

Nicholas Lawson testified that, after the fall, the back of his pants were wet from sitting on the ground. He testified that while he was on the ground he could feel with his hand that the ground underneath him was “slippery. It was ice.” When asked to describe the ice, Nicholas Lawson explained that “it would be like looking at the ground. It was clear. You couldn’t, I couldn’t tell it was ice.” Lacy Lawson similarly averred that as she crouched down to help Nicolas she noted that there was a large patch of “black clear ice” that “was difficult to see.” The other people present picked Nicholas Lawson up, carried him to his vehicle, and Lacy Lawson drove him to the hospital.

At his deposition, Nicholas Lawson repeatedly testified that he did not see any ice or snow in the area before he slipped and fell. However, when opposing counsel showed Nicholas Lawson pictures of Norton’s driveway and surrounding property that Lacy Lawson took four days after the incident, he confirmed that they depicted “how the condition would have appeared” on the morning of the March 8, 2008. The pictured showed snow on Norton’s driveway and the area surrounding the driveway.

As a result of this fall, Nicholas Lawson broke his ankle. Lawson’s injury required him to undergo surgery. The doctor recommended physical therapy, but Lawson has no medical insurance and could not afford it. Lawson will need further surgery to repair his ankle.

Nicholas Lawson filed suit against Norton, asserting a premises liability claim. Nicholas Lawson asserted in his complaint that after he took several steps up Norton’s driveway, he “slipped and fell on a dangerous accumulation of black ice[.]”

Norton moved for summary disposition under MCR 2.116(C)(8) and (10), asserting that, as a matter of law, Nicholas Lawson was not entitled to relief because the condition on which he fell was open and obvious and did not possess any special aspects that made the condition unreasonably dangerous. In so arguing, Norton explained that case law supported that wintery conditions such as snow and ice are open and obvious dangers, especially when the plaintiff has lived in Michigan his entire life. Norton pointed out that Nicholas Lawson confirmed that the photographs taken after the incident showed that there was snow on the ground on the day of the incident, which would put a Michigan resident of average intelligence on notice that there was a high likelihood of the presence of ice as well.

Nicholas Lawson responded, arguing that under Michigan law, black ice of the type present in this case was "inherently inconsistent" with the open and obvious doctrine. Relying on *Slaughter v Blarney Castle Oil Co*,[1] Lawson argued that where the ice at issue is not visible upon casual inspection because it is "either invisible or nearly invisible, transparent, or nearly transparent[,]" and there are no other indicia of the potential presence of ice (that is, snow or ice nearby), the court should find that the condition was not open and obvious as a matter of law.

The trial court granted Norton's motion and dismissed Nicholas Lawson's claim, ruling as follows:

> The Plaintiff claims that the alleged condition on the driveway was black ice and was not open and obvious. The Plaintiff further asserts that it is very doubtful that this woman, the Defendant, went out with a hand shovel and a bag of salt to clear the ice and snow from this 200-foot-long dirt driveway.
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> The argument fails to acknowledge other pertinent facts, namely, that the Plaintiff has lived in Michigan for many winters. In other words, he's aware that ice many times is not visible and that no snow covered up the icy condition does not end the inquiry. The weather and driveway conditions at the time of the slip and fall, coupled with the knowledge gained by experience would lead an average person of ordinary intelligence to anticipate that the driveway would be icy and to foresee the danger of slipping and falling on that ice.
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> Hence, it is the holding of this Court that the alleged black ice condition was, in fact, open and obvious.

The trial court also rejected Nicholas Lawson's argument that, even if the ice was open and obvious, there was a genuine question of fact with regard to the invisible nature of the ice constituting a special aspect. Additionally, the trial court found that, regardless, Nicholas Lawson's premises liability claim lacked merit because there was no evidence that Norton knew or should have known that the icy condition existed or that it presented an unreasonable risk of harm to invitees.

Nicholas Lawson now appeals.

II. MOTION FOR SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition.[2] When reviewing the record de novo, this Court must determine whether the moving party was

[1] *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008).

[2] *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

entitled to judgment as a matter of law.[3] This Court's review is limited to the evidence that was presented to the trial court at the time the motion was decided.[4] If a party moved for summary disposition on multiple grounds, and the trial court ruled on the motion without specifying the subrule under which it decided the issue, but considered material outside the pleadings, this Court will review the decision based on MCR 2.116(C)(10).[5]

Under MCR 2.116(C)(10), summary disposition of all or part of a claim or defense may be granted when:

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

This Court is liberal in finding a genuine issue of material fact.[6] Accordingly, a genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ.[7] Further, circumstantial evidence can present a factual issue.[8] "The trial court is not permitted to assess credibility, to weigh the evidence, or to determine the facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)."[9]

B. OPEN AND OBVIOUS DOCTRINE

Absent special circumstances or a statutory duty, the hazards presented by visible ice and snow are generally open and obvious and do not impose a duty on the property owner to warn of or remove the hazard.[10] Only if there is some special aspect that makes the accumulation unreasonably dangerous must a possessor of land take reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to an invitee.[11] However, black ice by definition is transparent, or nearly invisible, and without evidence that it would have been visible upon casual inspection or other indication of a potentially hazardous

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[3] *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); see also *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

[4] *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

[5] *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

[6] *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

[7] *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

[8] *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004).

[9] *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 597-598;__ NW2d __ (2010).

[10] See *Slaughter*, 281 Mich App at 479-481; *Benton v Dart Properties Inc*, 270 Mich App 437, 443 n 2; 715 NW2d 335 (2006).

[11] *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004).

condition, this Court has held that it does not present an open and obvious danger.[12] Indication of a potentially hazardous condition may include circumstances such as the presence of snow in the area or covering the ice, the recent occurrence of any type of precipitation combined with freezing temperatures, or a situation where the plaintiff observed others slipping.[13]

In support of her argument that summary disposition of Nicholas Lawson's claims was proper, Norton argues that the photographs taken by Lacy Lawson show that there was snow covering the driveway and surrounding property, thus providing Nicholas Lawson indicia that ice may be present on the driveway. Indeed, Norton points to the fact that, during his deposition, Nicholas Lawson confirmed that the pictures taken by Lacy Lawson accurately depicted the condition of the driveway on the day he fell. Specifically, during his deposition, the following exchange occurred:

> *Q.* Looking at the picture, . . . [d]oes that depict what the conditions were on March 8, 2008, the date of the accident?
>
> *A.* Yeah, I don't believe it's snowed or anything since that day.
>
> * * *
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> *Q.* And you can see there's snow on the ground and snow on the driveway and some tracks; correct?
>
> *A.* Yes.
>
> *Q.* And that's the way, to the best of your recollection, the, how the condition would have appeared on March 8, 20008 [sic] at nine a.m. when you got there?
>
> *A.* Yes.

Norton relies on this as proof that the driveway conditions were open and obvious.

However, Lacy Lawson took the photographs four days after the incident. And in Lacy Lawson's own affidavit, she indicates that she did not see any snow or other ice on or around the driveway preceding the incident and, further, that the ice on which Nicholas Lawson fell was a large patch of "black clear ice" that "was difficult to see." Moreover, Nicholas Lawson similarly testified that he did not see any ice or snow in the area before he slipped and fell. And, when asked to describe the ice, Nicholas Lawson explained that "it would be like looking at the ground. It was clear. You couldn't, I couldn't tell it was ice." Nicholas Lawson further testified that the temperature that day as "in the 40s[,]" and that "it hadn't snowed for awhile[.]" Further, Norton herself testified that it was not snowing on the morning in question and that she did not

[12] *Slaughter*, 281 Mich App at 483.

[13] *Id.* at 479-481.

recall it having snowed in the days immediately preceding the incident. These statements are at odds with the pictures that Norton claims accurately depict the condition of her driveway on the morning of March 8, 2008.

Nicholas Lawson argues that, despite his statement during his deposition confirming the accuracy of the photograph, he was confused by the question. He points out that he was very nervous during the deposition and claims that he only has a tenth-grade education; therefore, he did not fully understand what opposing counsel was referring to when he asked whether the photos accurately "depict[ed] . . . the conditions." He contends that he thought the question was simply asking whether the photos actually were photos of Norton's home.

At the summary disposition hearing, the trial court stated:

> Plaintiff has lived in Michigan for many winters. In other words, he's aware that ice many times is not visible and that no snow covered up the icy condition does not end the inquiry. *The weather and driveway conditions at the time of the slip and fall*, coupled with the knowledge gained by experience would lead an average person of ordinary intelligence to anticipate that the driveway would be icy and to foresee the danger of slipping and falling on that ice.[14]

In so ruling, the trial court made a factual determination, based on the pictorial evidence, that there were indications of a potentially hazardous condition present at the time of Nicholas Lawson's fall. However, "a trial court may not make findings of fact in deciding a motion for summary disposition."[15] Further, "the circuit court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition."[16] Based on our de novo review of the entire record, we conclude that when Nicholas Lawson's deposition, Lacy Lawson's affidavit, and Norton's own testimony are considered alongside the pictures that were taken after the date of the incident, reasonable minds could differ as to the open and obvious condition of the driveway. Therefore, we hold that the trial court erred in finding that the icy condition was open and obvious.

C. MICHIGAN RESIDENCY FACTOR

Nicholas Lawson argues that the trial court erred in finding that the icy condition was open and obvious primarily because Lawson was a life-long Michigan resident. Lawson contends that the mere fact that he was a life-long Michigan resident should not make the condition of Norton's driveway open and obvious because, under that reasoning, only residents of other states would be able to recover for black ice related injuries in Michigan courts.

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[14] Emphasis added.

[15] *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

[16] *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 480; 776 NW2d 398 (2009).

Contrary to Nicholas Lawson's argument, the trial court did not err in considering Lawson's Michigan residency in determining whether the icy condition was open and obvious. Under Michigan law, a plaintiff's experience as a Michigan resident is an appropriate factor for a court to consider when determining whether an icy condition was open and obvious. In *Kaseta v Binkowski*,[17] the Michigan Supreme Court reversed this Court's decision[18] affirming denial of summary disposition to the defendant and adopting the dissenting opinion. The dissent concluded that the existence of black ice was open and obvious where the plaintiff, "a lifelong Michigan resident" who had "considerable experience with [Michigan] weather," observed snow on a driveway following a day of sunshine and fluctuating temperatures, and knew that the temperature was dropping.

Here, the trial court's ruling indicates that it considered Nicholas Lawson's experience as a Michigan resident as just one factor relevant to determining whether he should have anticipated that the driveway would be icy and to foresee the danger of slipping and falling on that ice. Specifically, the trial court stated: "The weather and driveway conditions at the time of the slip and fall, *coupled with* the knowledge gained by experience would lead an average person of ordinary intelligence to anticipate that the driveway would be icy and to foresee the danger of slipping and falling on that ice."[19] Clearly, the fact that Nicholas Lawson was a lifelong Michigan resident was not the only factor that the trial court used as its foundation for disposing of this claim. Thus, we hold that the trial court did not err to the extent that it considered Nicholas Lawson's experience as a Michigan resident in determining whether he should have anticipated that the driveway would be icy.

D. NOTICE

As stated, in addition to ruling that the icy condition was open and obvious, the trial court also found that Nicholas Lawson's premises liability claim lacked merit because there was no evidence that Norton knew or should have known that the icy condition existed or that it presented an unreasonable risk of harm to invitees.

Lawson argues that the trial court erred in its finding regarding Norton's notice because there were disputed material facts regarding whether Norton had constructive notice of the icy condition of her driveway and whether she inspected the driveway. He asserts that, as a 57-year-old grandmother, it is not likely that Norton manually shoveled and salted the 200-foot-long driveway by herself. As such, Lawson contends that there is at least a question of fact regarding whether Norton properly inspected and maintained the premises.

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[17] *Kaseta v Binkowski*, 480 Mich 939; 741 NW2d 15 (2007).

[18] *Kaseta v Binkowski*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2007 (Docket No. 273215).

[19] Emphasis added.

To sustain a premises liability action, a plaintiff must show that the defendant caused the unsafe condition or that the defendant knew or should have known of the unsafe condition.[20] Constructive notice can be inferred from evidence that the condition is of such a character, or existed a sufficient length of time, that the landowner should have had knowledge of it.[21]

In this case, there is no evidence that Norton caused the ice in her driveway. Nor is there evidence that she had actual knowledge of the existence of ice. Thus, the question is whether there is a genuine issue of material fact regarding whether the icy condition was of such a character or existed a sufficient length of time that Norton should have known about it. As we have noted, there is a question of fact regarding whether there were indications of a potentially hazardous condition, such as the presence of snow, on the day of the incident. However, there is no evidence that Norton knew or should have known about the specific icy patch on which Nicholas Lawson fell. Indeed, Lawson's own argument that there were no indications of the potential for ice undercuts his argument that Norton should have known of the condition. It would not be reasonable to expect Norton to inspect every inch of her driveway for black ice. This is especially true when, according to Nicholas Lawson's claims, the ice was not visible on casual examination. Indeed, insofar as Nicholas Lawson seeks to impute knowledge of the ice to Norton, the same knowledge could be imputed to Lawson. Accordingly, we conclude that Nicholas Lawson presented no evidence that Norton caused, knew, or should have known of the unsafe condition. Therefore, summary disposition is appropriate on this basis.

We affirm.

/s/ Kurtis T. Wilder
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

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[20] *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 603-604; 601 NW2d 172 (1999).

[21] See *Clark*, 465 Mich at 419.