STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN ARMSTRONG,

Plaintiff-Appellant,

v

NATHAN BINING, MD, PLLC, and BINING FAMILY, LLC,

Defendants-Appellees,

and

FIRST ORIENTAL THERAPY and LAKNERS LANDSCAPING,

Defendants.

UNPUBLISHED
May 4, 2023

No. 358873
Wayne Circuit Court
LC No. 20-002626-NO

Before: CAVANAGH, P.J., and K. F. KELLY and GARRETT, JJ.

GARRETT, J. (*dissenting*).

Because genuine issues of material fact exist as to whether defendants had constructive notice of the icy condition and whether the condition was open and obvious, I respectfully dissent.[1] I would reverse the trial court's order granting summary disposition in favor of defendants and remand for further proceedings.[2]

I. NOTICE

[1] I agree with the majority opinion that plaintiff's claim sounds in premises liability, not ordinary negligence. See *Jeffrey-Moise v Williamsburg Towne Houses Coop*, 336 Mich App 616, 625; 971 NW2d 716 (2021).

[2] As with the majority opinion, any use of "defendants" refers only to Nathan Bining, MD, PLLC, and Bining Family, LLC.

First, the majority opinion erroneously concludes that there was insufficient evidence that defendants had constructive notice of the black ice on the sidewalk.

To prove a claim of premises liability, the plaintiff "must demonstrate that the premises possessor had actual or constructive notice of the dangerous condition at issue." *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 336 Mich App 616, 627; 971 NW2d 716 (2021) (quotation marks and citation omitted). Constructive notice requires evidence "that the hazard was of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 11-12; 890 NW2d 344 (2016). That is, a question of fact exists for the jury when the defendant "should have known" about the dangerous condition "because of its character or the duration of its presence." *Id*. at 11. "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007). "Constructive notice may arise not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Id*. at 983, citing *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1965).

While I agree that there was no record evidence that defendants had actual notice of the black ice, I believe plaintiff presented sufficient evidence of constructive notice to survive summary disposition. The evidence established that defendants did not contract anyone to salt or de-ice the sidewalk on their property where plaintiff fell. Defendants contracted with Lakners Landscaping ("Lakners") to plow and salt the parking lot, and to shovel the sidewalks, but not to salt the sidewalks after shoveling. Chris Lakner, owner of Lakners, testified that the office manager for Dr. Bining knew that Lakners did not salt the sidewalks. Thus, contrary to Dr. Bining's testimony claiming a mistaken belief that defendants had contracted with Lakners for salting of the sidewalk, there was evidence that defendants knew that they were wholly responsible to salt the sidewalks. Dr. Bining also stated that he provided his tenants with some salt but conceded that his tenants had no legal obligation to remove ice from the premises. At the very least, given Lakner's testimony that defendants never contracted for sidewalk de-icing services over several years as clients, defendants should have known that they were responsible to perform those services.

The evidence also established that it had snowed sometime before plaintiff's fall, and the sidewalk and parking lot were cleared of snow. Lakner testified that a layer of black ice often formed after shoveling a walkway. Considering the "character" of the hazard at issue, a question of fact remains whether defendants should have known about the black ice. See *Lowrey*, 500 Mich at 11. The majority opinion dismisses Lakner's testimony as "general insight on ice formation" that "bears no significance" on the question of constructive notice. But given that the constructive notice doctrine considers what a reasonable premises owner *should have known*, evidence of how black ice could form after shoveling the sidewalk, and evidence that black ice *did* form in this case, is highly relevant. Viewed in the light most favorable to plaintiff, and combined with the evidence that defendants did not contract for de-icing services, and knew or should have known of their responsibility to salt the sidewalk after snow removal, plaintiff established a question of fact on constructive notice. See *Banks*, 477 Mich at 984.

II. OPEN AND OBVIOUS DANGER

Second, I disagree with the majority's conclusion that the black ice on which plaintiff slipped and fell was open and obvious.

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). More specifically, this duty includes a responsibility that "reasonable measures be taken with a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Hoffner v Lanctoe*, 492 Mich 450, 464; 821 NW2d 88 (2012), quoting *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975). Generally, however, the duty of a premises owner evaporates when the hazard is open and obvious. *Lugo*, 464 Mich at 516. A condition is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]" *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This inquiry is objective, focusing on "whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). "[A]bsent special circumstances, Michigan courts have generally held that the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." *Id*. at 481. On the other hand, black ice—by definition, an invisible or nearly invisible layer of ice—is "inherently inconsistent with the open and obvious danger doctrine." *Id*. at 483. Thus, black ice does not present an open and obvious danger "without evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition." *Id*.

The majority opinion relies on several innocuous facts that exist nearly every day during Michigan winters to conclude that the black ice in this case was open and obvious. Namely, (1) plaintiff lived in Michigan for more than 20 years, (2) it was cold outside, (3) there was some snow on the landscaping, and (4) the sidewalk looked wet. The majority concludes that these circumstances rendered the black ice open and obvious as a matter of law, meaning defendants owed no duty to protect plaintiff from the dangerous condition. I disagree.

Plaintiff testified that the road driving to defendants' premises, as well as the parking lot and sidewalk, all looked wet. "[T]he danger and risk presented by a wet surface is not the same as that presented by an icy surface." *Id*. The sidewalk was shoveled and the parking lot was plowed, but some snow remained on the landscaping next to defendants' building. Plaintiff did not notice any salt on the sidewalk and only noticed the ice after she fell. Plaintiff also did not encounter ice outside her home, on the road to her appointment, or in the parking lot walking towards defendants' building. Besides that, it was another cold day during a Michigan winter. Those facts do not establish beyond factual dispute that "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]" *Novotney*, 198 Mich App at 475. If those facts alone render black ice open and obvious as a matter of law, then black ice would remain open and obvious for months at a time in Michigan. "[R]easonable Michigan winter residents know that each day can bring dramatically different weather conditions, ranging from blizzard conditions, to wet slush, to a dry, clear, and sunny day." *Slaughter*, 281 Mich App at 483. But under the majority's ruling, it matters little whether there is a blizzard or sunshine if unremarkable "indicia" transform the black ice into an open and obvious

hazard. In my view, there remains a genuine issue of material fact whether the cold weather and other routine conditions rendered the black ice on the sidewalk open and obvious upon casual inspection.

At its core, "the open and obvious danger doctrine requires that the hazard would be *obvious* upon *casual* inspection." *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 105; 804 NW2d 569 (2010) (quotation marks and citation omitted). Here, reasonable minds could differ on whether the black ice met that standard. Because questions of fact exist for a jury, I would reverse the trial court's order granting defendants' motion for summary disposition and remand for further proceedings.

/s/ Kristina Robinson Garrett