

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BARBARA COULTER, ED.D.,

Plaintiff-Appellant/Cross Appellee,

v

MICHIGAN FIRST CREDIT UNION,

Defendant-Appellee/Cross  
Appellant.

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UNPUBLISHED

March 16, 2006

No. 257881

Wayne Circuit Court

LC No. 03-330963-NO

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition on the ground that defendant did not have notice of the icy condition that caused plaintiff's slip and fall in this premises liability action. We affirm; thus, we need not decide defendant's cross-appeal from the same order, arguing that the icy condition was open and obvious.

Plaintiff averred in her complaint that she was an invitee on defendant's premises when she slipped and fell on ice located on a sidewalk as she attempted to enter defendant's building from the parking lot. Subsequently, defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on the ground that the ice patch was open and obvious, and defendant did not have notice of the condition. Defendant indicated that it had snowed earlier in the day of plaintiff's fall and that the parking lot and sidewalks had been cleared of snow and salted. Defendant argued that plaintiff's claim that she did not see the ice before she fell because it was dark outside was unsupported by the evidence, including (1) a weather report which illustrated that it was not dark at the time of plaintiff's fall, and (2) witness testimony which indicated that it was not dark outside, the ice patch did not cover the entire sidewalk, and the ice was clearly visible. Defendant further argued that plaintiff did not present any evidence that defendant had actual or constructive notice of the patch of ice.

Plaintiff responded to defendant's motion for summary disposition, arguing that it had snowed heavily the night before the fall and that defendant's snow was shoveled at about 7:00 a.m. but the fall occurred at about 5:30 p.m., over ten hours later. Plaintiff argued that evidence revealed that during the daytime hours the temperatures had warmed up to 34 degrees which likely caused a thawing and some puddling that must have frozen in the evening hours, yet defendant did not re-inspect or salt the areas after the 7:00 a.m. maintenance. And, plaintiff argued, it was black ice or invisible ice, which is why she did not see it before she fell at this

somewhat dark time of day. Defendant's maintenance man acknowledged that puddling may have occurred because the temperature warmed during the day, but admitted that he did not recall inspecting the sidewalk to determine if additional salting was required although he had seen the phenomenon of thawing and freezing occur in the past. Thus, plaintiff argued, it should be imputed that defendant had actual or constructive knowledge of the condition because if it would have inspected the area, it would have detected the ice.

Following oral arguments, the trial court denied the motion for dismissal on the ground that the ice was open and obvious because plaintiff testified that she fell on black ice that she did not see until after the fall and the court could not hold that the condition was open and obvious as a matter of law. But, the trial court granted the motion for dismissal on the ground that plaintiff failed to establish that defendant had actual or constructive notice of the condition because, although a maintenance employee testified that there *may* have been puddles on the sidewalk earlier in the day, no one saw the puddles or advised defendant of the puddles that could have potentially re-froze to form the ice on which plaintiff fell. An order was entered accordingly and this appeal followed.

Plaintiff argues that the trial court erroneously held that there was insufficient evidence that defendant had notice of the unsafe condition on its premises. After review de novo, considering the documentary evidence submitted in a light most favorable to plaintiff, we disagree. See MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

A possessor of land is liable for injury resulting from an unsafe condition caused by active negligence or, if otherwise caused, where known to the possessor or the condition is of such a character or has existed a sufficient length of time that it should have knowledge of it. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). In other words, an invitor owes a duty to an invitee if the invitor had actual or constructive notice of the hazardous condition. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001).

Here, it is undisputed that the icy condition was not caused by defendant and that neither defendant nor its employees had actual notice of the ice patch before plaintiff's fall. Plaintiff apparently claims, however, that the jury could infer that defendant had constructive notice of the ice because of the temperature fluctuations during the day which typically cause thawing and freezing of puddles. But, we agree with the trial court, this is not sufficient evidence to establish that defendant should be charged with knowledge of the ice patch that caused plaintiff's fall. Constructive notice of a hazardous condition can be supported by reasonable inferences drawn from the evidence, but such inferences must amount to more than mere speculation or conjecture. See *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979).

With respect to the notice requirement, *McCune v Meijer, Inc*, 156 Mich App 561, 562-563; 402 NW2d 6 (1986), is instructive. There, the plaintiff slipped in a puddle of oil in a parking lot, and argued that the oil stain was larger than the puddle, and "[g]iven the naturally slow rate of evaporation . . . the oil spill must have been of long-standing duration." *Id.* This Court rejected that argument as speculative; the theory was "completely unsupported by any expert testimony, either by deposition or affidavit, and thus amounts to no more than sheer speculation and conjecture." *Id.* at 563 (footnote omitted).

Similarly, in this case, there is a lack of evidence as to when the ice patch formed and whether it was the result of a re-frozen puddle. While defendant's facilities manager testified that the ice patch may have been the result of melt-off from ice that had been in the parking lot, he was merely guessing. And, the facilities manager testified that they inspect the sidewalks on a regular basis and apply salt when necessary but, on that day, after the fall, it was noted that all the sidewalks were clear and dry but for the two-foot wide patch of ice at issue. Further, plaintiff admitted in her deposition that she did not know what caused the ice, did not know how long the ice had been there, and did not know whether any of defendant's employees were aware of the ice. Likewise, plaintiff's expert's affidavit fails to establish that defendant knew, or should have known, about the ice. In other words, the evidence presented does not cause us to conclude that the icy condition was of such a character or that it existed for such a length of time that defendant should have had knowledge of it. Thus, we agree with the trial court that plaintiff failed to show a genuine issue of material fact as to whether defendant had notice of the unsafe condition on its premises and summary disposition was properly granted.

Defendant argues on cross-appeal that the trial court erred in finding that the dangerous condition was not open and obvious. In light of our resolution of the notice issue, this issue is moot. See *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

Affirmed.

/s/ Alton T. Davis  
/s/ Mark J. Cavanagh  
/s/ Michael J. Talbot