

STATE OF MICHIGAN
COURT OF APPEALS

JUDY HAZELTON,

Plaintiff-Appellant,

v

C.F. FICK AND SONS, INC and FICK
OPERATING COMPANY a/k/a SUNNY SPOT,

Defendants-Appellees.

UNPUBLISHED
October 25, 2012

No. 307024
Roscommon Circuit Court
LC No. 10-728915-NI

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Because we agree with the trial court that there is no genuine issue of material fact in regard to whether defendant had notice of the dangerous condition, we affirm.

This case arises out of injuries sustained by plaintiff on January 3, 2009, when she slipped and fell on a patch of black ice in defendant's parking lot. At her deposition, plaintiff testified that she is a lifelong resident of Roscommon, Michigan and that defendant's business, The Sunny Spot, is a gas station and convenience store located approximately one mile from her home. On the day she was injured, plaintiff arrived at The Sunny Spot in the early evening. She was familiar with the store, having shopped there for several years. After parking, she proceeded toward the entrance by walking along the front of the building underneath a large wooden awning. Plaintiff entered the store without incident and completed her purchase. On her way back to her vehicle, plaintiff slipped and fell on a patch of black ice near the store entrance. Plaintiff's foot and ankle were injured as a result of her fall.

According to plaintiff, the temperature that day was below freezing, the skies were clear and sunny, it had not recently snowed or rained, and the roads were clear. The weather was consistent for several days leading up to the date of plaintiff's accident. Plaintiff and another Sunny Spot customer testified that defendant generally keeps its parking lot in good condition during the winter months. The other customer also stated that there are no "trouble" areas that are often slippery, but ice can accumulate near the front doors when water drips from the roof. Similarly, plaintiff stated during her deposition that she did not recall any specific area at The Sunny Spot that was continually icy, and had never had a problem entering the store before.

During her deposition, plaintiff testified that on the date of her injury, she did not notice any ice, snow, or salt near her parking spot or on her way into the store. She stated that the concrete did not appear wet or discolored, there were no puddles, and the wooden awning did not appear to be dripping any water. She also stated that the patch of black ice she slipped on was nearly invisible. Plaintiff noticed the ice only after falling, and even then, only after touching the ice with her hands.

In her complaint, plaintiff alleged that black ice formed in front of the store because of melted snow dripping from the roof of the business. Plaintiff further alleged that defendant, through its agents or employees, had notice that ice formed in the parking lot because it knew, or should have known, that water dripped from the roof that afternoon and had previously formed ice at or near the location of the accident. Defendant answered plaintiff's complaint, and eventually filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that it did not know, and could not have known, that black ice had formed in its parking lot. The trial court granted summary disposition in favor of defendant, finding that it did not have constructive or actual knowledge of the dangerous condition on its premises.

On appeal, plaintiff argues that the trial court erred by granting summary disposition in favor of defendant. Specifically, plaintiff argues that she produced sufficient evidence to create a question of fact about whether defendant caused ice to form in the parking lot by failing to repair a gutter and about whether defendant knew or should have known that water dripped from the store's roof, causing ice to form near the front entrance.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty that a landowner owes to a visitor depends on the visitor's status at the time of the injury. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). It is undisputed that plaintiff was an invitee at the time she was injured on defendant's property.

Generally, an invitor must "exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). An invitor's liability must arise from a condition of which the invitor knew or a condition of such a character or duration that the invitor should have known of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). The plaintiff has the burden of demonstrating that the defendant had actual knowledge of the

dangerous condition or should have had knowledge of the dangerous condition due to the condition's character or duration. See *Benton*, 270 Mich App at 440; *Stitt*, 462 Mich at 597.

In this case, plaintiff has failed to produce evidence to create a genuine issue of material fact regarding whether defendant had actual knowledge of the dangerous condition or should have had knowledge of the dangerous condition due to the condition's character or duration. To the contrary, the facts in this case demonstrate that there is no genuine issue of material fact, and that defendant did not have notice of the dangerous condition. Plaintiff has not produced any evidence suggesting that the ice had existed for a length of time. Nor has plaintiff produced evidence establishing that defendant should have noticed the ice due to its character or the circumstances of its formation. The evidence shows that the weather was consistent for several days leading up to plaintiff's injury, and the skies were clear and sunny. Plaintiff stated that defendant's parking lot was visibly free of snow and ice, and the concrete did not appear wet or discolored. She also testified that she did not encounter or see any ice walking into the store. In fact, plaintiff stated that she only noticed the presence of ice after she fell and touched the ground with her hands.

Contrary to plaintiff's claim, the fact that defendant's employees admitted that they were aware that water sometimes dripped from the roof of the store and caused ice to form in front of the store does not demonstrate that defendant had notice that a dangerous condition was present on the property on the day that plaintiff was injured. Indeed, plaintiff failed to produce any evidence that snow melt was dripping from the roof on the date of her injury. If anything, plaintiff's deposition testimony suggests that there was no water drip on the day she was injured because she testified that she did not see any puddles near the entrance. Moreover, deposition testimony supports the conclusion that the parking lot does not have any specific problem area.

Similarly, we reject plaintiff's argument that defendant should be liable for her injuries because it caused ice to form in the parking lot by failing to repair a gutter. There is no evidence to support the contention that ice would not drip from the rooftop or sides of any gutter onto the pavement if a gutter were in place. Further, there is no evidence to suggest that the presence of a gutter at the time of plaintiff's injury would have prevented the formation of the black ice on which plaintiff slipped and fell.¹

Therefore, we conclude that there was insufficient evidence to create a genuine issue of material fact regarding whether defendant caused the dangerous condition or whether defendant

¹ In response to the dissent, we reiterate the significance of the evidence that for several days prior to plaintiff's fall the weather conditions were not conducive to snow melting and dripping from the awning onto the pavement below. In this case, there is no evidence that snow existed on the awning at the time of plaintiff's injury, let alone that water was dripping off the awning onto the pavement below. Thus, the fact that water dripped from the awning onto the pavement on other occasions does not establish that on this particular day defendant failed to exercise reasonable care. That a patch of ice existed is not in dispute; it is also clear that the formation of the black ice cannot be traced to the overhead awning because the record evidence establishes no connection to it except on the basis of pure speculation.

had actual notice of the dangerous condition or would have discovered the dangerous condition with the exercise of reasonable care. Thus, the trial court properly granted summary disposition in defendant's favor.

Affirmed.

/s/ David H. Sawyer

/s/ Joel P. Hoekstra