

STATE OF MICHIGAN
COURT OF APPEALS

OTHELA POOLE, a Legally Incapacitated Person,
by her Next Friend GLENDA POOLE JONES,

UNPUBLISHED
August 12, 2014

Plaintiff-Appellee,

v

No. 312685
Wayne Circuit Court
LC No. 12-000472-AV

FOODLAND/ATLAS MARKET,

Defendant-Appellant.

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

M. J. KELLY, J. (*dissenting*).

Because I conclude the trial court did not err when it denied defendant Foodland/Atlas Market's motion for summary disposition, I respectfully dissent.

In January 2009, a friend took plaintiff Othela Poole, who was an 81-year-old widow, to Atlas Market to shop. Poole's friend let her out by the store's front entrance and then waited in the car. It was cold and there was snow on the ground. As Poole stepped onto the handicap ramp to enter the store, she saw a patch of ice and walked around it. In addition, she noted an employee shoveling the snow around the ice. After she finished shopping, she left the store by the same entrance, but did not see the patch of ice that she had earlier avoided. She walked to her friend's car, which was next to the entrance. As she stepped off the ramped sidewalk, she slipped on snow-covered ice, fell, and was injured.

Under our case law, ice is generally considered an open and obvious hazard—even when covered by snow. *Ververis v Hartford Lanes (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006). Accordingly, had the facts presented merely been that Poole slipped on ice that was covered by snow on her way out of the market, summary disposition would have been appropriate. But the facts presented in the case are more involved. Poole not only saw ice on the ground as she entered the market, she also saw an employee taking measures that a life-long resident of Michigan knows should alleviate the hazard: the employee was removing the snow. Poole testified that she thought, not unreasonably, that the employee had cleared away the ice because, when she exited, the ice was no longer visible. These facts trigger two separate analyses under our premises liability jurisprudence.

One must first determine whether the undisputed facts demonstrate that the condition was open and obvious. “A dangerous condition is open and obvious if an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection.” *Grandberry-Lovette v Garascia*, 303 Mich App 566, 577; 844 NW2d 178 (2014) (quotation marks and citation omitted). It bears repeating that persons visiting a store are not required to “to be constantly and vigilantly scanning the premises possessor’s land for latent dangers,” he or she need only keep a *casual* lookout for obvious dangers. *Id.*

The majority concludes that the snow-covered ice was open and obvious as a matter of law because Poole acknowledged that she saw some ice when she entered the store and saw some snow when she left the store and, therefore, must be charged with knowledge that there was ice under the snow. But the body of case law addressing whether the plaintiff was on notice of the potential for ice under the snow involved facts where the condition remained unaltered while the plaintiff was on the premises. Here, as Poole entered the market, she observed the market’s employee taking measures to remove the snow and ice and when she left she no longer saw the patch of ice. Either the employee successfully removed the ice or the employee masked the ice by covering it with snow. Because the conditions were artificially altered, the presumption that occurs with naturally occurring snow and ice—namely that ice may have been covered by a recent snowfall—does not apply to this case. Under the facts, a reasonable person in Poole’s position could conclude that any ice had been removed and that any remaining snow presented only a slight risk. This evidence, I believe, is sufficient to establish a question of fact as to whether an average user with ordinary intelligence would have discovered the full danger and risk presented by the altered conditions. Therefore, the hazard was not open and obvious as a matter of law and the trial court did not err by denying the motion.

Even if the hazard could be said to be open and obvious, we must still determine whether there was evidence from which a reasonable jury could find that the hazard had special aspects that made it “effectively unavoidable” under the exception to the open and obvious danger doctrine. I believe there was such evidence. While it is clear that under the decision in *Hoffner v Lanctoe*, 492 Mich 450, 468-469; 821 NW2d 88 (2012), a plaintiff must demonstrate that he or she was *required* or *compelled* to confront a dangerous hazard before this exception will apply, this is precisely the situation that befell Poole. She was able to see the hazardous ice on her way into the market but, as a result of actions by the market’s own employee, she was not able to see it on the way out. Unlike the plaintiff in *Hoffner*, who deliberately chose to confront the visibly dangerous condition on her way into a health club, Poole was confronted with an invisible dangerous condition on her way out of the market—a condition she had no choice but to confront in order to get back to her home. She successfully avoided it on the way into the store because she was able to see it. But she could not successfully avoid it on the way out because the market’s employee had hidden it. Thus, the analysis in *Hoffner* is inapposite.

Because a reasonable finder of fact could find that the ice did not constitute an open and obvious hazard or that it was effectively unavoidable, the trial court did not err when it denied Atlas Market’s motion for summary disposition. For these reasons, I would affirm.

/s/ Michael J. Kelly