STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW A. GAETH, Plaintiff-Appellant,	UNPUBLISHED August 21, 2018
v	No. 341540 Kent Circuit Court
TEG CENTRAL PARK PLACE LLC, Defendant-Appellee.	LC No. 17-002881-NO

Before: SAWYER, P.J., and STEPHENS and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition in favor of defendant on the basis there was no genuine issue of material fact that the icy sidewalk presented an open and obvious danger. We affirm.

For purposes of this appeal, we accept plaintiff's factual description of the incident. According to plaintiff, he left his apartment at defendant's complex at 5:20 a.m. on a cold January morning to go to work. He describes the weather as "freezing cold," but that there was no freezing rain or sleet falling. He states that, as he was walking to his car, he "walked out the door, took a left, stepped onto the sidewalk, and took a few steps. And then hit ice, and I was down." He also states that there had been melting conditions the day before and that everything had melted. He also maintains that he did not see any snow on the ground or in the parking lot and that he believed that the sidewalk was "exposed." In fact, he specifically claims that he had looked at the sidewalk before his fall and believed it to be clear and that it was about 10 steps later that he fell.

Plaintiff argues that the trial court erred in granting summary disposition because the icy sidewalk was not fit for its intended use as required by MCL 554.139(1)(a). We disagree. The relevant standards of review were set out by the Supreme Court in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424-425 ;751 NW2d 8 (2008):

> This Court reviews de novo the grant or denial of a summary disposition motion. *Saffian v Simmons,* 477 Mich 8, 12; 727 NW2d 132 (2007). Matters of statutory interpretation are also reviewed de novo. *Id.* Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of

> law, and no factual development could justify recovery. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties "fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law." *Id.* at 120; see also MCR 2.116(C)(10). There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

Furthermore, *Allison* controls the outcome in this case. In *Allison*, the plaintiff was injured when he fell while walking in the parking lot of his apartment complex, which was covered by one to two inches of snow with ice underneath the snow. 481 Mich at 423. The Supreme Court, 481 Mich at 430, rejected the applicability of MCL 554.139(1)(a), holding that that statute does not require that the common area be kept in perfect condition:

> While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes.
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> We recognize that tenants must walk across a parking lot in order to access their vehicles. However, plaintiff did not show that the condition of the parking lot in this case precluded access to his vehicle. The Court of Appeals erred in concluding that, under the facts presented, the parking lot in this case was unfit simply because it was covered in snow and ice.

If anything, the conditions in this case were significantly less exigent than in *Allison*. According to plaintiff, there was no snow cover, much less the one to two inches present in *Allison*. Plaintiff attempts to distinguish *Allison* on the basis that *Allison* involved a parking lot rather than a sidewalk. We find that to be a distinction without a difference. As the Supreme Court noted, one must walk across a parking lot to access their vehicle. Thus, while the principal use of a parking lot is to park cars, its intended use must also, of necessity, include walking across it when going to or from your car.

Plaintiff also argues that black ice cannot constitute an open and obvious danger as a matter of law, citing *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 482; 760 NW2d 287 (2008). Plaintiff's reliance on *Slaughter* is misplaced. *Slaughter* did conclude that black ice cannot be considered open and obvious as a matter of law. But it did recognize that, dependent on the circumstances, it can be open and obvious: "Consequently, we decline to extend the doctrine to black ice 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." 281 Mich App at 483.

As our Supreme Court stated in *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010):

> In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REINSTATE the summary disposition ruling of the Wayne Circuit Court. The Court of Appeals failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co,* 281 Mich App 474, 483; 760 NW2d 287 (2008), which renders alleged "black ice" conditions open and obvious when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall." Here, the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). Moreover, the alleged condition did not have any special aspect. It was avoidable and not unreasonably dangerous. *Joyce v Rubin,* 249 Mich App 231, 243; 642 NW2d 360 (2002).

In our case, plaintiff concedes that the weather conditions were below freezing and that there had been melting the day before. Melting conditions plus freezing temperatures would put a person on notice that black ice was likely. Or, as the Supreme Court put it, these "wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection." 486 Mich at 935. Plaintiff suggests that *Janson* should be strictly limited to its facts because it was merely an order. We leave it to the Supreme Court to decide whether to so limit *Janson*. And, while there are factual differences between *Janson* and this case, there are sufficient similarities to apply *Janson,* and we are not persuaded that the trial court erred in doing so.

Affirmed.

/s/ David H. Sawyer
/s/ Cynthia Diane Stephens
/s/ Michael F. Gadola