

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW COLE,

Plaintiff-Appellee,

v

HENRY FORD HEALTH SYSTEM,

Defendant-Appellant.

UNPUBLISHED

May 22, 2014

No. 313824

Macomb Circuit Court

LC No. 2012-000263-NO

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals on leave granted,¹ an order entered by the trial court, which denied defendant's motion for summary disposition, MCR 2.116(C)(10) (genuine issue of material fact), finding that genuine issues of material fact remained regarding plaintiff's premises liability claim. Specifically, the trial court found that an issue of fact remained whether plaintiff had an impaired ability to function from intoxication that would provide defendant with an absolute defense pursuant to MCL 600.2955a, and whether the danger presented was open and obvious. We affirm.

Plaintiff filed a complaint against defendant in the circuit court seeking damages for injuries sustained to his ankle after he slipped and fell on black ice on defendant's premises. It is undisputed that plaintiff was on the premises as a business invitee in the course of his employment to repair an elevator. It is also undisputed that plaintiff had a blood-alcohol level of 0.14 a few hours after the accident. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff's claims should be dismissed pursuant to MCL 600.2955a because plaintiff had an impaired ability to function and was 50 percent or more the cause of the accident, as evidenced by his blood-alcohol level. Additionally, defendant asserted that plaintiff's claims must be dismissed because the alleged dangerous condition was open and obvious with no special aspects that would render it unreasonably dangerous or unavoidable. The trial court denied defendant's motion, finding that plaintiff's blood-alcohol level only created a presumption of impairment, and plaintiff presented evidence to rebut this presumption.

¹ *Cole v Henry Ford Health Sys*, unpublished order of the Court of Appeals, entered March 27, 2013 (Docket No. 313824).

Further, the trial court found that the testimony was contradictory whether the ice was visible upon casual inspection and that plaintiff would not have anticipated a potentially icy condition when the weather conditions that day did not create an indicia of such potential. Subsequently, defendant appealed to this Court.

We review de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing the motion, we consider "the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Defendant first argues that the trial court erred by denying summary disposition pursuant to MCL 600.2955a, because the evidence shows that plaintiff had an impaired ability to function, and as a result, was 50 percent or more the cause of the accident. MCL 600.2955a provides in pertinent part:

(1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

* * *

(b) "Impaired ability to function due to the influence of intoxicating liquor or a controlled substance" means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, a presumption would arise that the individual's ability to operate a vehicle was impaired.

In other words, to successfully avail itself of the absolute defense of impairment, defendant must establish that plaintiff had an impaired ability to function due to the influence of alcohol, and because of that impaired ability, plaintiff was fifty percent or more the cause of the

accident that resulted in his injury. *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 456; 702 NW2d 671 (2005).

In this case, the parties concede that plaintiff's blood-alcohol level of 0.14 creates a presumption that he had an impaired ability to function, but argue whether there was sufficient evidence to rebut this presumption. Defendant presented evidence from its expert that at the time of the accident plaintiff's blood-alcohol level would have been between 0.160 and 0.168, which is twice the legal limit. Defendant's expert opined that this would cause plaintiff to have impaired fine and gross motor skills, decreased reaction times, and blurred vision. Defendant also noted that the security guard who came to plaintiff's aid detected that plaintiff was intoxicated. However, plaintiff presented evidence to show that the alcohol did not impair his ability to function. Specifically, plaintiff noted that neither the maintenance worker, who was the first to render aid, nor plaintiff's supervisor detected alcohol on plaintiff. Additionally, plaintiff's supervisor stated that plaintiff had the wherewithal to follow protocol and inform him of the accident as soon as possible, which happened to be when plaintiff arrived in the emergency room shortly after his fall. Plaintiff also pointed to the fact that upon receiving the service call to repair the elevator, he drove himself to the hospital, gathered his tools, and walked to the entrance without incident. Moreover, we note that the defense expert's opinion that plaintiff would have been impaired was based on the effect alcohol would have had on the average person with a blood-alcohol level between 0.160 and 0.168, and not actual observations of plaintiff. Thus, viewing the evidence in a light most favorable to plaintiff, the nonmoving party, we conclude that there is a genuine issue of material fact whether plaintiff had an impaired ability to function.

With regard to the second statutory requirement—whether due to plaintiff's intoxication plaintiff was 50 percent or more the cause of the accident—the only evidence defendant relied on to support this was plaintiff's blood-alcohol level and its expert's affidavit. However, because plaintiff presented evidence to show that his ability to function was not impaired, the evidence defendant relies on is insufficient to prove that plaintiff was 50 percent or more at fault. Thus, we conclude that the trial court properly denied summary disposition pursuant to MCL 600.2955a.

Defendant also argues that the trial court erred by denying summary disposition because the black ice was an open and obvious danger. "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). This duty, however, does not require the owner to protect an invitee from open and obvious dangers, unless "special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Id.* at 517. If a condition has special aspects, then the owner "has a duty to undertake reasonable precautions to protect invitees from th[e] [associated] risk." *Id.* An open and obvious danger is one that "an average person of ordinary intelligence" would discover "on casual inspection." *Price v Kroger Co of Mich*, 284 Mich App 496, 501; 773 NW2d 739 (2009).

With regard to black ice, this Court has stated that "it is either invisible or nearly invisible, transparent, or nearly transparent. Such definition is inherently inconsistent with the open and obvious danger doctrine." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483;

760 NW2d 287 (2008). Accordingly, the Court declined to extend the open and obvious 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.” *Id.* Other indicia would include the weather conditions at the time of the fall. *Id.* Where there was no snow on the ground, it had not snowed in a week, the plaintiff did not see the ice before she fell and it was not readily apparent afterwards, the black ice was not open and obvious. *Id.* This Court rejected the argument that wintertime in northern Michigan is enough to render black ice open and obvious because each day can be dramatically different. *Id.*

Further, in *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934; 782 NW2d 201 (2010), our Supreme Court, applying *Slaughter*, found black ice was open and obvious where it was winter, the temperatures were below freezing, snow was present around the premises, mist and light freezing rain fell earlier in the day and light snow fell prior to the fall. The Court held that “[t]hese wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection.” *Id.*

Finally, in *Hoffner*, the Supreme Court held:

With specific regard to ice and snow cases, this Court has reject[ed] the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability under any circumstances. Rather, a premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that reasonable measures be taken within reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. However, it is also well established that wintry conditions, like any other condition on the premises, may be deemed open and obvious. Michigan courts thus ask whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger. [*Hoffner*, 492 Mich at 463–464 (citations and quotation marks omitted).]

Additionally, in determining whether black ice is open and obvious, the amount of lighting may also be a factor. See *Abke v Vandenberg*, 239 Mich App 359, 362-363; 608 NW2d 73 (2000).

In this case, although the weather analysis indicates that there were seven inches of snow on the ground in the Detroit area, there was no precipitation that day, and there were only trace amounts of precipitation the day prior. Based on the weather analysis, the most recent thaw would have occurred two days before the accident. But since then, temperatures remained below freezing. The witnesses offered by both parties also confirmed that it was very cold. Additionally, two witnesses observed some salt on the pavement, but they did not state how much and its exact location in relation to where plaintiff fell. Most of the witnesses indicated that they were only able to see the ice because they were looking for it after being alerted to plaintiff’s fall. There was no conflicting evidence that the ice would have been visible upon casual inspection before plaintiff fell. Further, the evidence was conflicting as to whether there was enough light in the area to see the ice. Although every witness admitted that there was at least some light in the area, the evidence is unclear as to exactly how much was present. The

maintenance worker and security guard claimed that the area was well-lit and that they could see patches of ice on the pavement. Plaintiff's supervisor, however, claimed that the area was poorly lit and that it was difficult to see the ice unless you knew to look for it. Given that a cold winter day is not enough to render black ice open and obvious, and that there was no precipitation that day, there is no indication that the weather conditions would have put an average person of ordinary intelligence on notice that there was a potential for icy conditions. See *Slaughter*, 281 Mich App at 483. Thus, viewing the evidence in a light most favorable to plaintiff, we conclude that there is a question of fact whether the ice was visible upon casual inspection.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly