

STATE OF MICHIGAN
COURT OF APPEALS

CELESTINE BORSOS,

Plaintiff-Appellant,

v

MUIRWOOD SQUARE ASSOCIATES, L.L.C.,

Defendant-Appellee,

and

NAILS BY PRO,

Defendant.

UNPUBLISHED

June 24, 2014

No. 315060

Oakland Circuit Court

LC No. 2011-122773-NO

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Plaintiff alleges that she sustained injuries on February 12, 2011, when she slipped and fell on black ice located on a sidewalk in defendant's shopping center. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), dismissing plaintiff's premises liability claim, finding defendant did not have constructive notice of the unsafe condition of the sidewalk and, alternatively, that the black ice was an open and obvious danger. Because plaintiff failed to present sufficient evidence to allow a reasonably jury to conclude that defendant had notice of the unsafe condition, we affirm.¹

¹ We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id.* at 509-510. All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled

It is undisputed that the plaintiff was an invitee during her visit to defendant's premises.² A premises owner owes invitees "the highest duty of care," i.e., he must warn "about any known dangers, but also ha[s] a duty 'to inspect the premises and, depending on the circumstances, make any necessary repairs or warn of any discovered hazards.'" *Grandberry-Lovette v Garascia*, 303 Mich App 566, 573; 844 NW2d 178 (2014), quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). Because defendant "had a duty to inspect [its] premises for latent dangers, [it] could be liable for harm caused by a latent dangerous condition if the dangerous condition was of a kind or sort that 'by the exercise of reasonable care' [it] would have discovered.'" *Grandberry-Lovette*, 303 Mich App at 573, quoting *Stitt*, 462 Mich at 597. The failure to inspect or adequately inspect may constitute constructive notice if "the dangerous conditions is of such a character or has existed for a sufficient time that a reasonable premises possessor would have discovered it." *Grandberry-Lovette*, 303 Mich App at 575.

Defendant's property manager was deposed. He stated that he inspects the property "anytime there's a snow event or a snow event that's forecasted [I] check the property before, during and after." He testified that during these inspections he drives the parking lot and walks the sidewalks looking for ice and any other dangers. Specifically regarding the day of plaintiff's fall, he testified that he inspected the property at approximately 8:00 a.m. and again on his way home from work in the afternoon. Plaintiff offered no evidence to contradict the property manager's testimony, i.e., there was no testimony that defendant failed to conduct timely inspections given the conditions.

Moreover, there was no evidence to indicate that the inspections were inadequate and that dangerous conditions should have been noted at those times. Plaintiff offered no evidence indicating when the black ice was formed; indeed, she acknowledged that it could have formed mere moments before the accident. Plaintiff's only evidence as to when the black ice formed was contained within the affidavit of a civil engineer, retained by her counsel as a safety consultant. He offered generalized observations about the conditions that give rise to black ice. However, he was unable to opine when the ice formed other than that it did so "by sunset" which was at approximately 6:00 pm. Plaintiff estimated that she fell due to the black ice sometime between 5:00 p.m. and 6:00 p.m. Thus, there was no evidence to support the contention that the black ice formed at anytime other than immediately before she fell.

to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Ernsting*, 274 Mich App at 510.

² "An invitee is a person who enters upon another's land with an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make it safe for the invitee's reception." *Grandberry-Lovette*, 303 Mich App at 573 (quotation marks, citations, and alternations omitted).

In sum, there is no evidence that defendant failed to inspect or that it had actual or constructive notice of the black ice that plaintiff asserts caused her injury. Accordingly, the trial court did not err by granting summary disposition in favor of defendant under MCR 2.116(C)(10).³

Affirmed.⁴

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro

³ Although it does not affect our ultimate decision, we note that the trial court abused its discretion by refusing to consider a recording of the 911 call made immediately after plaintiff's fall in which the caller stated that he discovered plaintiff on the ground injured, that he was present there, and that the entire area was icy. The recording was clearly admissible under the present sense impression to the general prohibition against hearsay. MRE 803(1); *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 105; 776 NW2d 114 (2009).

⁴ Because we find that defendant was properly granted summary disposition on the grounds of constructive notice, we decline to address the trial court's alternate holding – that the hazard was open and obvious.