

STATE OF MICHIGAN
COURT OF APPEALS

DUANE SLATER,

Plaintiff-Appellant,

v

MARVIN BRANDLE, BRANDLE
INVESTMENTS, LLC, and
BRANDLE CORPORATION, INC, a/k/a
BRANDLE REAL
ESTATE,

Defendants-Appellees.

UNPUBLISHED

June 23, 2005

No. 260867

Saginaw Circuit Court

LC No. 03-048980-NO

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

BORRELLO, J. (*concurring in part and dissenting in part*).

I dissent from that portion of the majority’s decision affirming the trial court on the issue of whether or not the icy condition was open and obvious as a matter of law. I hold that plaintiff presented sufficient evidence to the trial court to create an issue of fact for trial regarding whether the black ice beneath the snow upon which plaintiff fell was an open and obvious condition. In *Mann v Shusteric Enterprises, Inc.*, 470 Mich 320; 683 NW2d 573 (2004) our Supreme Court explained:

To determine whether a condition is “open and obvious,” or whether there are “special aspects” that render even an “open and obvious” condition “unreasonably dangerous,” the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard. That is, in a premises liability action, the fact-finder must consider the “condition of the premises,” not the condition of the plaintiff. [*Id.* at 328-329 (citations omitted)].

The majority fails to give adequate weight to this Court’s most recent decision discussing the dichotomy between black ice and the open and obvious danger doctrine, *Kenny v Kaatz Funderal Home, Inc.*, 264 Mich App 99, 104-105; 689 NW2d 737 (2004). The facts in *Kenny* are analogous to the instant case. The plaintiff was injured as she slipped and fell on black ice hidden beneath the snow on the parking lot. *Id.* at 101-103. The defendant moved for summary disposition arguing, *inter alia*, that the condition was open and obvious and not unreasonably dangerous; the trial court granted the defendant’s motion. *Id.* at 103-104. The *Kenny* Court

examined our Supreme Court's latest decision discussing the open and obvious doctrine, *Mann, supra*. Specifically, the Court gleaned two legal principles from *Mann* which are significant here. First, "the language from *Mann* emphasized by us makes clear that not all snow and ice accumulation is open and obvious," and "*Mann* does not stand for the proposition that *all* accumulations of snow and ice are open and obvious." *Kenny, supra* at 106. Second, "the open and obvious danger doctrine and principles concerning special aspects are equally applicable to cases involving the accumulation of snow and ice." *Id.* at 107. Thus, according to *Kenny*, snow and ice is not open and obvious as a matter of law in all cases, but rather, it must be determined in each case whether, in light of the surrounding circumstances, reasonable minds could differ regarding the open and obvious nature of the ice. *Id.* at 108-109. Applying these legal principles to the instant case, I conclude that there is a genuine issue of fact for trial regarding whether the condition was open and obvious.

Thus, when viewing the evidence in a light most favorable to plaintiffs, the trial court improperly determined that the black ice was open and obvious as a matter of law. This determination is a factual question that should have been reserved for the trier of fact.

I concur with the majority on all other issues.

/s/ Stephen L. Borrello