

STATE OF MICHIGAN  
COURT OF APPEALS

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TERRY BAAS and KATHERINE BAAS,

Plaintiffs-Appellants,

v

SEAWAY FOODTOWN, INC., d/b/a  
SEAWAY FOODTOWN SUPERMARKETS,

Defendant-Appellee.

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UNPUBLISHED

June 21, 2007

No. 273308

Monroe Circuit Court

LC No. 05-019680-NO

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant's motion for summary disposition pursuant to MCR 2. 116(C)(10) in this premises liability action. We affirm.

Plaintiffs contend that plaintiff Terry Baas (hereinafter plaintiff) fell on a patch of ice in defendant's supermarket parking lot. Plaintiff testified that he was unable to see the ice because it blended in with the black asphalt beneath it. Plaintiffs argue that the trial court erred in finding that the danger presented by the black ice was open and obvious. We review the trial court's order granting summary disposition to defendant de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

The question of whether ice is an open and obvious danger was addressed in *Kenny v Kaatz Funeral Home, Inc.*, 472 Mich 929, 697 NW2d 526 (2005) (*Kenny II*). In reversing this Court's decision in *Kenny v Kaatz Funeral Home, Inc.*, 264 Mich App. 99, 689 NW2d 737 (2004) (*Kenny I*), our Supreme Court, in adopting the dissent of *Kenny I*, has essentially ruled that ice, even under snow, is an open and obvious condition in the face of other warning features and knowledge as reasoned in the dissent. In *Kenny*, the plaintiff fell on snow-covered black ice. Before she fell, she saw her three companions holding on to the hood of the car for support. The dissent opined, and the Supreme Court agreed, that "after witnessing three companions exit a vehicle into the snow-covered parking lot on December 27 and seeing them holding on to the hood of the car to keep their balance, all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery." *Kenny I, supra* at 120. In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App. 61, 718 NW2d 382 (2006), this Court held that as a matter of law even ice covered by snow is open and obvious *despite the lack of any other factor that would alert a plaintiff to the danger* (emphasis added). In reviewing the *Kenny I* dissent, and while noting that the opinion mentions black ice as that is how the plaintiff characterized the

condition, the fact that the ice was or was not black or even camouflaged by the fallen snow was not determinative in the dissent's analysis. It was the other referenced factors, such as the season being winter, the plaintiff being a life-long Michigan resident, and the witnessing of others holding on to cars to maintain support, that led to the conclusion that the condition was open and obvious. The dissent further noted the absence of the *Lugo, infra*, special aspects. And, recently our Supreme Court reversed this Court's decision in *Mitchell v Premium Properties Investments Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals (Docket No. 253847, issued October 4, 2005), "for the reasons stated in the Court of Appeals dissenting opinion." *Mitchell v Premium Properties Investments Ltd Partnership*, 477 Mich 1060; 728 NW2d 460 (2007). This Court's dissenting opinion stated:

The facts of this case are virtually indistinguishable from the facts in *Kenny v Kaatz Funeral Home Inc*, 472 Mich 929; 697 NW2d 526 (2005); reversing by summary order 264 Mich App 99; 697 NW2d 526 (2004). In *Kenny*, our Supreme Court concluded that black ice is an open and obvious condition. In *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), our Supreme Court held that "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519. Here, plaintiff did not show that he was forced to cross over the icy parking lot in order to avoid some other harm. Plaintiff also did not show that the ice posed a high severity of harm or death. By salting a portion of the parking lot in question, defendant took remedial measures to reduce the risks that typically exist in Michigan winters. Given these facts, I conclude the ice on which plaintiff was injured was open and obvious. Plaintiff did not show that the ice posed a risk so hazardous as to rise to the level of removing it from the open and obvious doctrine. I would affirm the judgment of the trial court.

In light of *Kenny II* and now *Mitchell*, it is apparent that the Supreme Court opines that black ice is an open and obvious danger. There are also no special aspects about the danger presented that would render this matter actionable despite the open and obvious nature of the condition. The special-aspects doctrine provides that even though a possessor generally does not have a duty to warn of or protect an invitee from an open and obvious danger, the owner will have a duty to take reasonable precautions to prevent injury if special aspects render an open and obvious danger either "effectively unavoidable" or present "a substantial likelihood of severe injury." *Lugo, supra* at 517. Here, the condition was neither effectively unavoidable nor did it present a substantial likelihood of severe harm. Plaintiff did not show that the ice patch was unavoidable. Outdoor lighting lit the parking lot. The ice patch was of a considerable size – plaintiff described it as six feet in circumference; Grey described it as two and one half by two and one half to five feet. Plaintiff indicated that the ice was not obstructed and that "the patch of black ice was open, to my recollection . . . it wasn't hidden." After the fall, plaintiff reported the ice to defendant's manager, who escorted plaintiff near the area of the fall with plaintiff pointing out the condition from a distance of approximately three feet. There were no additional ice patches in the area between plaintiff's car and the store entrance, and there is no record of anyone else slipping in defendant's parking lot on the day in question. Given that the ice was visible from a few feet away, the ice would have been avoidable insofar as patrons presumably would have taken a different path upon seeing it. Accordingly, plaintiff's premises liability

claim is barred by the open and obvious danger doctrine as the ice patch in question was an open and obvious danger possessing no special aspects.

Plaintiffs also contend that the trial court erred in granting defendant's motion for summary disposition on the ground that defendant did not have notice of the ice patch in its parking lot. Initially, we note that this issue is irrelevant because the black ice is an open and obvious condition. Nevertheless, even if the open and obvious doctrine did not apply, the record does not show that defendant knew or constructively knew of the ice danger. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), on remand 249 Mich App 141; 634 NW2d 347 (2002).

Affirmed.

/s/ Pat M. Donofrio  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey