

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS MADDIX,

Plaintiff-Appellant,

v

PRIME PROPERTY ASSOCIATES, INC.,
MARCO SANTI, and RONALD RUSSELL, d/b/a
AMERICAN OAKS PROFESSIONAL CENTER,

Defendant-Appellees.

UNPUBLISHED

June 23, 2005

No. 251223

Macomb Circuit Court

LC No. 2002-003762-NO

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

GRIFFIN, J. (*dissenting*).

I respectfully dissent. I would affirm on the alternative ground¹ that, in response to defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), plaintiff failed to sustain his burden of submitting evidence that defendant knew, or should have known, of the hazardous condition on the premises – the “black ice.” *McCune v Meijer, Inc*, 156 Mich App 561, 563; 402 NW2d 6 (1986).

In *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000), our Supreme Court adopted as the duty owed by an invitor to an invitee² the standards set forth by 2 Restatement Torts, 2d, § 343. The Restatement, *id.* at pp 215-216, provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, *but only if*, he:

a) *knows or by the exercise of reasonable care would discover the condition*, and should realize that it involves an unreasonable risk of harm to such invitees, and

¹ See generally *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

² For purposes of defendant's motion for summary disposition, the parties do not dispute plaintiff's status as an invitee.

b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

c) fails to exercise reasonable care to protect them against the danger. [Emphasis added.]

See also *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 258-261; 235 NW2d 732 (1975).

In regard to the element of notice, which is necessary to establish defendant's duty to plaintiff, our Court in *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979), explained:

Thus, in order to recover from Sears, *plaintiff must show either that an employee of Sears caused the unsafe condition or that a servant of Sears knew or should have known that the unsafe condition existed*, *Anderson v Merkel*, 393 Mich 603; 227 NW2d 554 (1975), *Suci v Mirsky*, 61 Mich App 398; 232 NW2d 415 (1975). Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it, *Suci v Mirsky, supra*, *Winfrey v SS Kresge Co*, 6 Mich App 504; 149 NW2d 470 (1967). Where there is no evidence to show that the condition had existed for a considerable time, however, a directed verdict in favor of the storekeeper is proper, *Serinto v Borman Food Stores*, [380 Mich 637; 158 NW2d 485 (1968)] *supra*, *Suci v Mirsky, supra*, *Winfrey v SS Kresge Co, supra*. *Cf. Holliday v National Dairy Products Corp*, 391 Mich 816 (1974), *reversing* 50 Mich App 366; 213 NW2d 289 (1973). [Emphasis added.]

In holding that plaintiff failed to establish a prima facie premises liability case due to lack of evidence of notice of the condition, the *Whitmore* Court stated:

Plaintiff established that there was an oily substance on Sears' parking lot at the spot where she fell, from which one might be able to infer that the substance caused her fall, *cf. Stefan v White*, [76 Mich App 654; 257 NW2d 206 (1977)] *supra*. There is no testimony, however, from which one may infer that the substance came there as a result of the actions of Sears' employees; nor is there evidence that Sears had actual notice of the presence of the substance. Finally, there is no testimony that the substance had been in the parking lot for a considerable period of time, evidence from which the inference could be drawn that Sears should have known of its presence. Indeed, there is no evidence from which a jury could *infer* that the substance had been on the parking lot surface for some time (e.g., testimony that many cars appeared to have driven through the substance). Here, as was the case in *Serinto v Borman Food Stores, supra*, the substance was indisputably at the spot where plaintiff fell, but how and when it came there were matters of conjecture.

Plaintiff failed to carry the burden of establishing a prima facie case against defendants; defendants' motions for directed verdicts at the close of

plaintiff's case should therefore have been granted. [*Whitmore, supra* at 10; emphasis in original.]

Furthermore, in *McCune, supra* at 563, our Court, citing MCR 2.116(G)(4), held that the element of notice cannot be proved based on "sheer speculation" and "mere conjecture." See also *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999), and *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999).

In my view, plaintiff failed to sustain his factual burden of showing that defendant knew or should have known of the condition. *Whitmore, supra; McCune, supra*. Thus, defendant owed plaintiff no duty as a matter of law. *Id.* Plaintiff contends that the "black ice" was hidden and not readily apparent to a person exercising reasonable diligence. In this regard, plaintiff argues as follows in his brief on appeal:

The only testimony offered by the Defendants was that the Plaintiff had been aware of snow on the handicap ramp.

Defendant offered *no factual evidence that Plaintiff, or a reasonable person, would have been able to discover the condition of the concealed ice.*

* * *

The test for determining whether a condition is open and obvious is objective and focuses not on whether plaintiff should have known that the condition was hazardous, "but whether a reasonable person in his position would foresee the danger." See *Joyce [v Rubin]*, 249 Mich App 231; 642 NW2d 360 (2002), *supra* at 238-239. Applying this test to the present case, *a reasonable person would not have known or suspected that a dangerous condition harbored underneath the freshly fallen snow.* [Emphasis added.]

I agree with plaintiff that the fact it had been snowing for four to five hours with an accumulation of only two and a half to three inches is insufficient notice, in itself, to alert plaintiff *or* defendant that "black ice" may be camouflaged under the snow.³ In addition, unlike most cases, there were no previous incidents caused by the ice, which should have alerted defendant to the condition.

The majority's reliance on the pre-"open and obvious"⁴ decision *Lundy v Groty*, 141 Mich App 757; 367 NW2d 448 (1985) is misplaced. In *Lundy*, the plaintiff slipped and fell on a snow-covered driveway at approximately noon. Based on the fact that a snowstorm had begun

³ The majority does not rely on the affidavit of meteorologist Paul H. Gross. According to Mr. Gross, the snow developed between 3:00 pm and 3:30 pm and "temperatures returned back to freezing by 4:00 P.M." Accordingly, the time period for a thaw was extremely short-lived.

⁴ See generally *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-520; 629 NW2d 384 (2001), and cases cited therein.

the previous evening and snow was still falling at the time of the accident, our Court held that the defendant should have known of the snowy condition of the driveway:

The *Quinlivan* [v *The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975)] holding clearly follows the common law set forth in the Restatement and describes both the duty owed and the general standard of care involved. In the instant case, *defendant would owe plaintiff a duty because she should know that snow was falling on her property and that it would create a dangerous condition for the elderly plaintiff.* [*Lundy, supra* at 760; emphasis added.]

Unlike *Lundy*, in the present case, plaintiff claims not to have fallen on snow but on hidden “black ice.” As to an average person in plaintiff’s position, plaintiff argues that “. . . a reasonable person would not have known or suspected that a dangerous condition harbored underneath the freshly fallen snow.”

Plaintiff’s argument in this regard was adopted by our Court in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004). In *Kenny*, the majority differentiated the hazard of snow from the hazard of “black ice.” To be consistent, if such a distinction is made, it should be applied to both plaintiff and defendant. Accordingly, I would hold that defendant’s actual or constructive knowledge of snow is insufficient, in itself, to establish that defendant knew or should have known of the “black ice” underneath the snow.

For these reasons, I would affirm the summary disposition granted in favor of defendant.

/s/ Richard Allen Griffin