STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

THOMAS JANSON,

Plaintiff-Appellee,

v

SAJEWSKI FUNERAL HOME, INC., a Domestic Profit Corp.,

Defendant-Appellant.

_____/

Supreme Court
Case No. 140071

Court of Appeals
Case No. 284607

Wayne Circuit Court
Case No. 06-622578 NO

140071
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SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT-APPELLANT, SAJEWSKI FUNERAL HOME, INC.'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

Page

Index of Authorities ii

Supplemental Argument 1

Relief Requested 9

Proof of Service

INDEX OF AUTHORITIES

Page

Cases

Kaseta v Binkowski,
480 Mich 939; 741 NW2d 15 (2007) 1, 5, 6

Kenny v Katz Funeral Home Inc.,
472 Mich 929; 697 NW2d 526 (2005) 3

Mitchell v Premium Properties Investments Limited Partnership,
477 Mich 1060; 728 NW2d 460 (2007) 1-3, 5, 6

Slaughter v Blarney Castle Oil Company,
281 Mich App 474; 760 NW2d 287 (2008) 5, 6

Statutes / Court Rules / Other Authorities

2 Restatement Torts, §343 . . . . . 6, 7

2 Restatement Torts, §343A 7, 8

SUPPLEMENTAL ARGUMENT

The Wayne County Circuit Court entered an Order granting summary disposition in favor of defendant. That Court based its decision upon two recent Michigan Supreme Court opinions: *Kaseta v Binkowski*, 480 Mich 939; 741 NW2d 15 (2007); and *Mitchell v Premium Properties Investments Limited Partnership*, 477 Mich 1060; 728 NW2d 460 (2007). Both opinions rendered by this Court were in lieu of granting leave to appeal, and both reversed the Court of Appeals judgment for the reasons stated in the dissenting opinion. The *Mitchell* opinion reinstated the Circuit Court's order granting summary disposition in favor of defendant. The *Kaseta* opinion remanded the matter back to the Circuit Court for entry of an order granting summary disposition in favor of defendant.

In this case, this Court should enter a similar order reversing the Court of Appeals judgment and reinstating the Circuit Court's order granting summary disposition in favor of defendant. The Circuit Court relied directly upon two Orders of this Court, and those Orders' adoption of the Court of Appeals' dissenting opinions, to find that the condition of ice, without snow, was open and obvious and no special aspects existed. To the contrary, the Court of Appeals in this case failed to rely upon or even discuss and distinguish either of this Court's Orders. For this, and two other reasons mentioned briefly below, the Court of Appeals decision in this case must be peremptorily reversed.

Michigan Supreme Court Precedent

In *Kaseta*, plaintiff slipped and fell on black ice on defendant's driveway. The driveway was clear of snow and there was no other ice on the driveway that did not fit the description of black ice. Plaintiff did not notice the black ice because it was dark,

however, she felt the ice after she fell. Plaintiff did not notice any salt on the driveway despite defendants' testimony that they shoveled and salted the driveway prior to her arrival. Plaintiff testified that there was snow on the street and the lawn. The Court of Appeals found the condition of black ice, not covered by snow, to not be open and obvious. Regarding defendant's possible negligence absent an open and obvious danger or the existence of special aspects, the Court noted that a premises possessor must take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard. The Court reasoned that a question of fact existed as to whether defendants were negligent.

Judge Whitbeck, in his dissent, reasoned that there were sufficient circumstances that a reasonable person in plaintiff's position would anticipate or foresee that defendants' driveway could be icy. Those circumstances included: plaintiff's lifetime experience with Michigan winters, snow falling earlier in the day and then warming temperatures melting the snow followed by cooling temperatures freezing the melted snow, and shoveled snow in the area where plaintiff fell. Judge Whitbeck further found that there were no special aspects of the black ice which would remove the case from the open and obvious danger doctrine.

Similarly, in *Mitchell*, plaintiff slipped and fell on black ice that covered defendant's parking lot. The record indicated that defendant's employee had salted the parking lot prior to the fall but did not salt the entire parking lot. The Court of Appeals found that the Circuit Court had improperly taken from the jury the question whether defendant took sufficient reasonable steps to diminish the hazard of black ice by salting

the parking lot. The Court of Appeals found that a rational jury could conclude that failure to salt more of the lot was unreasonable because it was reasonably foreseeable that an invitee would leave the salted sidewalk and walk directly across the unoccupied parking spaces to his vehicle and therefore be subjected to an unreasonable risk of harm.

Judge Zahra dissented, noting that, in *Kenny v Katz Funeral Home Inc.*, 472 Mich 929; 697 NW2d 526 (2005), the Supreme Court concluded that black ice is an open and obvious condition. Judge Zahra further reasoned that plaintiff was not forced to cross over the icy parking lot in order to avoid some other harm, that the ice did not pose a high severity of harm or death, and that defendant took remedial measures to reduce the risks by salting a portion of the parking lot. Accordingly, the patch of black ice upon which plaintiff fell in *Mitchell* was open and obvious and no special aspects existed which removed it from the open and obvious danger doctrine.

The present case is identical to the two cases set forth above. Here, plaintiff has a lifetime of experience with Michigan winters, snow and misting rain fell earlier in the day prior to plaintiff's fall, plaintiff testified that the parking lot was "mostly clear" of snow and there was snow in the area where plaintiff fell, defendant testified that the lot was salted in the morning when the precipitation was falling, and that he had inspected the entire lot only a couple of hours before plaintiff fell finding no ice or dangerous conditions. Moreover, the patch of black ice was neither effectively unavoidable nor unreasonably dangerous.

Finally, there is no genuine issue of material fact that defendant took reasonable measures within a reasonable period of time to clear the any accumulation of snow or ice

and diminish the hazard. Defendant testified that precipitation was falling in the morning, and salt was placed on the entire lot at that time. The precipitation stopped in the afternoon and defendant inspected the entire lot at 3:00 p.m. finding no dangerous conditions. Plaintiff fell only a few hours later, with no additional snow or precipitation having fallen. Therefore, it was reasonable that defendant would not salt again, and reasonable that defendant could not have anticipated or foreseen the development of black ice under those circumstances.

In fact, to require a landowner such as defendant to inspect every inch of its premises every moment of the day, or to preemptively salt every foot of its premises in anticipation that snow or ice may develop is contrary to the test set forth by this Court. Rather, the duty owed by defendant in this case was to reasonably respond to the accumulation of snow and ice within a reasonable amount of time after its accumulation. All of the evidence of this case establishes that defendant did just that. Plaintiff provided no evidence as to how long the patch of black ice was in existence and, as a result, no evidence that defendant's efforts were unreasonable. Defendant, on the other hand, provided evidence that he inspected the premises shortly before plaintiff arrived finding no such condition.

In this case, then, as in *Kaseta* and *Mitchell*, the Circuit Court did not err in finding that defendant was entitled to summary disposition where there was no question of material fact that the patch of black ice was an open and obvious danger and no special aspects of that condition existed.

Slaughter v Blarney Castle Oil Company

Rather than rely upon the factually indistinguishable decisions of this Court addressed above, the Court of Appeals in this case relied solely on its own prior decision in *Slaughter v Blarney Castle Oil Company*, 281 Mich App 474; 760 NW2d 287 (2008) where it had found a question of fact existed as to whether the condition of black ice was open and obvious. More than simply relying upon that decision, however, this Court of Appeals took the reasoning of *Slaughter* one step further finding that in this case, the open and obvious danger doctrine should not be applied at all. Such a finding by the Court of Appeals, which contradicts all of this Court's precedent, must be reversed.

In *Slaughter*, plaintiff slipped and fell on black ice. The facts established that there was no snow on the ground and there had not been snow for a week prior to plaintiff's fall. Plaintiff did not see anyone else slip or hold onto an object to maintain balance before she fell. She did not see the ice before she fell, and could not see it readily after she fell. It had begun to rain just prior to her fall, but the Court was not convinced that rain, like snow or ice, was sufficient to wholly reveal the condition and its danger to plaintiff. The *Slaughter* court, in analyzing the facts and applying the open and obvious danger doctrine, declined to extend the open and obvious danger 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. The Court found a question of fact regarding whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection and so affirmed the denial of summary disposition.

Again, it must be noted that unlike the *Slaughter* decision, where the Court found that a question of fact existed regarding the "other indicia" surrounding the condition, the Court of Appeals in this case found that the open and obvious danger doctrine does not even apply. Such a holding is a clear departure, without any basis or justification, from the precedent of this Court. The open and obvious danger doctrine does apply to all conditions on premises, including black ice. Moreover, the other indicia mentioned in the *Slaughter* decision were present in this case and so established an open and obvious danger. The Court of Appeals' failure to acknowledge and follow *Kaseta* and *Mitchell*, and unwarranted extension of *Slaughter*, was in error and that error must be corrected.

The Restatement Approach

The application of the open and obvious danger doctrine to premises liability cases involving black ice *not* covered by snow is supported by binding decisions issued by this Court in the past few years. The test applied to determine the duty owed by a defendant in such cases, while incorporating the open and obvious danger doctrine and its special aspects analysis, also reflects and incorporates the Restatement Approach long relied upon by the courts of this State. This approach applied 2 Restatement Torts, §343 and §343A to determine when a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land. Section 343 states, in pertinent part:

> 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

> (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.

Section 343A states, in pertinent part:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Evan applying these two Restatement provisions regarding the duty owed by a landowner to his invitees, it is clear that in this case defendant was not negligent. Pursuant to §343, to be applied if the condition of black ice in this case is not deemed to be open and obvious, defendant is not liable because the condition of black ice did not involve an unreasonable risk of harm. As is well-established by this Court, the risk of falling only a few feet to the ground does not create an unreasonable risk of harm, nor does a condition which could be avoided by walking along another path. In addition, defendant established that he took reasonable care to discover the condition by inspecting the entire parking lot only hours before plaintiff's fall. Defendant could also have expected that plaintiff *would* discover or realize a possible danger, based upon the conditions surrounding the condition, and take action to protect himself against it. Moreover, the evidence presented establishes that defendant exercised reasonable care to protect plaintiff against danger by salting the lot immediately after the precipitation in the morning, and inspecting the lot in the afternoon.

Pursuant to §343A, if the condition here is deemed to be open and obvious as defendant argues and the Circuit Court found, then defendant is not liable because the condition was known or obvious to plaintiff. Furthermore, defendant could not have anticipated the harm suffered by plaintiff despite plaintiff's knowledge of the condition because no other people fell or suffered injury walking across the parking lot, defendant inspected the parking lot and found no dangerous conditions, and defendant could reasonably believe that plaintiff would take action to protect himself from any possible danger.

Accordingly, in this particular case, defendant did not owe a duty to plaintiff, did not breach a duty to plaintiff, and is not liable to plaintiff for the physical harm suffered by plaintiff as a result of a condition on defendant's premises. This is true regardless of whether the open and obvious danger doctrine is applied, or the Restatement Approach is used. While it is possible that a case of black ice, not covered by snow, might merit a different analysis and outcome, *this* case does not. In *this* case, defendant is entitled to summary disposition and the order of the Circuit Court granting summary disposition in favor of defendant should be reinstated.

RELIEF REQUESTED

For all the reasons set forth herein, Defendant-Appellant, SAJEWSKI FUNERAL HOME, INC., requests this Honorable Court to grant leave to appeal and, after full consideration of the merits, enter an order reversing the Court of Appeals' decision reversing the Circuit Court's granting of summary disposition, and reinstating the Circuit

Court's order granting summary disposition in favor of Defendant-Appellant. In the alternative, Defendant-Appellant requests that this Honorable Court enter an Order peremptorily reversing the Court of Appeals' decision and reinstating the Circuit Court's order granting summary disposition in favor of Defendant-Appellant.

Respectfully submitted,

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Dated: May 7, 2010
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PROOF OF SERVICE

Proof of Service: I certify that a copy of **SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL** and this **PROOF OF SERVICE** were served on the following attorneys of record or pro per parties by ■ regular mail or □ personal service at the addresses shown below.

Date of Service: May 7, 2010

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