STATE OF MICHIGAN

COURT OF APPEALS

JAMES G. ORLOWSKI,

Plaintiff-Appellant,

v

GEZON MOTORS, INC.,

Defendant-Appellee.

UNPUBLISHED
September 16, 2021

No. 354041
Kent Circuit Court
LC No. 19-002530-NO

Before: MURRAY, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We reverse and remand for further proceedings.

I. BACKGROUND

This case stems from a slip-and-fall accident on April 19, 2018, at approximately 6:00 a.m., in a parking lot owned by defendant. Plaintiff worked for a driving company that was occasionally hired by defendant to drive vehicles from other dealerships to defendant. On the morning of the accident, plaintiff drove to defendant's parking lot to meet up with Roger Jones, and together they were to drive to a dealership in a different city, pick up a vehicle, and bring that vehicle back to defendant. Weather reports from the two days leading up to the accident—April 17 and 18, 2018—show that there was no precipitation and that temperatures were hovering around freezing. Though no weather reports were produced for the day of the accident, testimony was unanimous that there was no snow or other precipitation on the morning of plaintiff's fall, and everyone agreed it was cold. Plaintiff testified that he saw no snow or ice accumulation during his drive to defendant's parking lot.

When plaintiff arrived at the parking lot, Jones was already there, waiting at the car that they were to take together to the other dealership. Plaintiff testified that the parking lot was poorly lit, while Jones testified that the parking lot was well lit. Neither testified to seeing any ice or snow in the parking lot that morning. After plaintiff parked his vehicle, he began making his way to where Jones waiting. While doing so, plaintiff slipped and fell, severely injuring his ankle. Plaintiff said that he felt the ground where he fell and could feel ice, though he never saw it.

Jones called 911, and first responders were dispatched. In an affidavit, John Denemy with the Plainfield Fire Department testified that he and his partner were the first to arrive at the scene. According to Denemy, the parking lot was poorly lit and he could not "recall visualizing any snow or ice in the parking lot or in the general area." Shortly after Denemy arrived, EMS showed up and took over. David Navarro was one of the EMS workers, and he testified that when he arrived, the parking lot was poorly lit, but he could clearly see ice throughout the parking lot. He said he "remember[ed] the ice being obviously visible."

Plaintiff eventually filed a one-count complaint alleging that he was an invitee on defendant's property, and that defendant was negligent and breached its duties as a possessor of land. After discovery, defendant moved for summary disposition, arguing that the ice was an open and obvious danger. Attached to defendant's motion was a photo of defendant's parking lot, taken approximately 11 hours after the accident, showing four small piles of snow near vehicles parked in the lot.

After a hearing, the trial court granted defendant's motion. In an order entered after the hearing, the court reasoned that "[t]he presence of at least some snow in [the] parking lot coupled with the ambient near freezing temperature at the time of the fall would have apprised an ordinarily intelligent person of the danger present in the parking lot." Plaintiff now appeals.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition de novo. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). Summary disposition is appropriate under MCR 2.116(C)(10) "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (quotation marks and citation omitted). When arguing that summary disposition is appropriate because the allegedly dangerous condition was open and obvious, the initial burden falls on the defendant. See *Bronson Methodist Hosp v Auto-Owners Ins Co*, Mich App 431, 440; 814 NW2d 670 (2012). If the defendant carries its burden, the burden shifts to the plaintiff, who must "come forth with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered" the existence of the hazard. *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). "If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate." *Bialick v Megan Mary, Inc*, 286 Mich App 359, 363; 780 NW2d 599 (2009).

III. ANALYSIS

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 285; 933 NW2d 732 (2019) (quotation marks and citation omitted). It is undisputed that plaintiff was an invitee on defendant's land. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v*

Ameritech Corp, Inc, 464 Mich 512, 516; 629 NW2d 384 (2001). "Absent special aspects, this duty does not extend to open and obvious dangers." *Estate of Trueblood*, 327 Mich App at 285.

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461. The test is objective, asking not whether the particular plaintiff knew of the condition but "whether a reasonable person in [her] position would foresee the danger." *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002) (quotation marks and citation omitted; alternations in original).

As relevant to the condition at issue in the instant case, this Court explained in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008):

> When applying the open and obvious danger doctrine to conditions involving the natural accumulation of ice and snow, our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months.

Accordingly, "black ice"—which is what plaintiff alleges he slipped on—is open and obvious "when there are indicia of a potentially hazardous condition," which include "the specific weather conditions present at the time of the plaintiff's fall," the temperatures at all times leading up to the fall, the presence of snow on the premises, and any precipitation leading up to and during the fall. *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935 (2010) (quotation marks and citation omitted). The "presence of wintery weather conditions and ice on the ground elsewhere on the premises" can render "the risk of a black ice patch open and obvious" even if the area is poorly lit. *Ragnoli v North Oakland-North Macomb Imaging, Inc*, 500 Mich 967, 967 (2017) (quotation marks and citation omitted). Yet our Supreme Court "has 'reject[ed] the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability' under any circumstances," and explained that Michigan courts must instead ask whether "the individual circumstances" of a case "render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger." *Hoffner*, 492 Mich at 463-464, quoting *Quinlivan v Great Atl & Pac Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975) (alteration in *Hoffner*).

A survey of Michigan cases makes clear that, in general, conditions surrounding a plaintiff's fall on snow or ice will render the snow or ice an open and obvious condition. See, e.g., *Ragnoli*, 500 Mich at 967; *Janson*, 486 Mich at 935; *Estate of Trueblood*, 327 Mich App at 286-287; *Cole v Henry Ford Health Sys*, 497 Mich 881, 881 (2014). But, as our Supreme Court explained, there will still be at least some cases in which the danger posed by snow and ice is not open and obvious. See *Hoffner*, 492 Mich at 463-464. With this in mind, we conclude that this case is one of the rare instances in which there were not sufficient indicia of wintery conditions to render the danger posed by the ice that plaintiff slipped on open and obvious as a matter of law.

It is undisputed that on the days leading up to and including the day of plaintiff's fall, the temperature was cold and likely around freezing. Defendant produced weather reports leading up to the day of the accident showing that temperatures were hovering around freezing. For whatever reason, the parties did not produce weather reports for the day of the accident, but the witnesses

unanimously testified that it was cold and possibly below freezing on the morning of plaintiff's fall.

Further, as the trial court accurately noted, there was "at least some snow in the parking lot" on the morning of plaintiff's fall, which is an apparent reference to the photo provided by defendant. That photo, which defendant represents was taken 11 hours after plaintiff's fall, depicts four small piles of snow. The piles are in front of two mid-sized cars. The largest pile appears to be roughly the length of one of the car's tires and about half the tire's height. The smallest is almost completely melted.[1] No other snow is visible in any other part of the parking lot. This single picture depicting four small piles of snow is the only evidence of any snow accumulation on the morning of plaintiff's fall: plaintiff testified that he saw no snow on his drive to the parking lot or in the parking lot; Jones never testified to seeing any snow in the parking lot or on his way to the parking lot; Denemy averred in his affidavit that he saw no snow in the parking lot or the general area; and even Navarro—who said that the presence of ice in the parking lot was "obvious" to him—testified that he did not see any accumulation of snow in the parking lot.

Also of note, the picture depicting the small piles of snow was taken in broad daylight. When plaintiff fell, it was early morning, and accounts differ about whether the parking lot was well lit. Only Jones testified that the parking lot was well lit; everyone else testified that the parking lot was either dimly lit or dark. Indeed, Navarro testified that "[i]t was very dark," and that even with the use of the extra lighting from his ambulance, he recalled "still not having sufficient light."

Accordingly, when viewed in the light most favorable to plaintiff, the evidence of wintery conditions in this case was (1) temperatures around freezing and (2) four small piles of snow in front of some cars in a dimly lit or dark parking lot. Whether these were sufficiently "wintery conditions" so as to have alerted a reasonably prudent person to the danger of slipping and falling on black ice cannot, in our opinion, be resolved as a matter of law. In other words, there are genuine issues of material fact about whether the condition in this case was open and obvious, so summary disposition was inappropriate.[2]

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[1] It seems likely that these piles had melted in the 11 hours since plaintiff's fall because there are wet marks on the pavement leading from these piles to a nearby drain. However, on the record as it now stands, we cannot determine how much bigger the piles were at the time of plaintiff's fall. We can only infer that they were there, a fact that plaintiff does not dispute.

[2] We emphasize that this is the rare case that lacks the "presence of wintery weather conditions" that are typical in slip-and-fall cases involving snow and ice—it had not snowed, sleeted, or rained in the days leading up to plaintiff's fall; it had not snowed, sleeted, or rained on the morning of plaintiff's fall; and there was no evidence of any significant accumulation of snow in the parking lot or surrounding areas on the morning of plaintiff's fall. Compare *Cole*, 497 Mich at 881 ("In addition, there were numerous indicia of a potentially hazardous condition being present, including seven inches of snow on the ground, some precipitation the previous day, and a recent thaw followed by consistent temperatures below freezing. A reasonably prudent person would foresee

In arguing against this result, defendant relies heavily on Navarro's testimony that it was "obvious" to him that there was ice in the parking lot. The trial court did not address Navarro's testimony or defendant's reliance upon it, but we will do so briefly. Defendant argues that, on the basis of Navarro's testimony, there can be no question of fact that the ice that plaintiff slipped on would have been visible to a reasonable person upon casual inspection, even if plaintiff did not see the ice himself. Yet the portions of Navarro's testimony that defendant directs our attention to all concern the condition of the parking lot in general and how ice in the parking lot was "obvious" to him. Defendant does not point to any instance—and we can find none—in which Navarro testified that *the ice that plaintiff slipped on* was obviously visible. Accordingly, we find defendant's argument unpersuasive.[3]

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

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the danger of icy conditions on the mid-winter night the plaintiff's accident occurred.") (Citation omitted); *Janson*, 486 Mich at 935 ("Here, the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection."); *Estate of Trueblood*, 327 Mich App at 287 ("The weather conditions when plaintiff fell were clearly wintry. Andresen explained that it had snowed more than three inches in the 24 hours before plaintiff went out and that it was well below freezing when plaintiff stepped outside. Indeed, plaintiff acknowledged that it had snowed the night before and testified that he was wearing winter clothing and winter boots when he left his apartment, showing that he was well aware of the wintry conditions outside. And both plaintiff and Lopenski testified that they saw a layer of snow on the sidewalk when they walked outside.").

[3] Defendant does not argue that Navarro's testimony that there was ice in the parking lot supported the trial court's finding that the conditions of the parking lot rendered the ice that plaintiff slipped on open and obvious, so we do not address that issue.