

**STATE OF MICHIGAN
IN THE SUPREME COURT**

DONNA LIVINGS,

Plaintiff-Appellee,

Docket No. 159692
Court of Appeals Docket No. 339152
Macomb Circuit Court
Hon. Edward A. Servitto
LC Case No. 2016-00180-NI

-vs-

SAGE'S INVESTMENT GROUP, LLC, a
Michigan limited liability company,

Defendant-Appellant.

**PLAINTIFF-APPELLEE'S
SUPPLEMENTAL BRIEF**

ORAL ARGUMENT REQUESTED

and

T&J LANDSCAPING & SNOW
REMOVAL, INC., a Michigan
Corporation and GRAND DIMITRE'S OF
EASTPOINTE FAMILY DINING, a
Michigan Corporation,

Defendants.

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Photo, front



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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

- - -

DONNA LIVINGS,

Plaintiff,

vs.

Case No. 16-1819-NI

SAGE'S INVESTMENT GROUP, LLC, a Michigan limited liability company, T & J LANDSCAPING & snow removal, Inc., a Michigan corporation and GRAND DIMITRE'S OF EASTPOINTE FAMILY DINING, a Michigan Corporation,

Defendants.

PROCEEDINGS

BEFORE THE HONORABLE EDWARD A. SERVITTO, JR., JUDGE

Mount Clemens, Michigan - June 19, 2017

APPEARANCES:

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Mount Clemens, Michigan
June 19, 2017
At about 9:17 a.m.

- - -

THE COURT: Livings versus Sage's Investment Group.

MR. BARATTA: Chris Barratt for plaintiff.

MR. STEINER: Mike Steiner on behalf of Sage's Investment.

THE COURT: All right. You had a slip and fall, is that what we have?

MR. STEINER: That's correct. This is a premises liability action arising out of a February 2014 slip and fall incident that occurred in a parking lot at Grand Dimitre's Family Dining. The slip and fall occurred in the early morning of the plaintiff as a waitress at that location.

THE COURT: Right. Didn't she park -- this was designated parking for the staff in this area.

MR. STEINER: According to her, it's designated parking for the staff.

THE COURT: Wasn't it also to the gentleman who opened the door who allowed her entry after she had fallen.

MR. STEINER: Debra Buck testified that she

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1 also parked in the back. However, Chef Robert Spear
2 (ph) parked in the front. It's also noteworthy that
3 while she parked her car in the back she did enter the
4 premises in the front when she called Debra Buck after
5 her fall, so she did have access to the front door.

6 THE COURT: She had access to the front door
7 but that was not, according to her, and it's a factual
8 issue, permissible parking for employees. It's a
9 question of fact for the jury.

10 MR. STEINER: Okay.

11 THE COURT: The other issue that you
12 presented to the Court was whether or not this was
13 ownership and occupancy or control -- possession and
14 control by defendant. Plaintiff points out that there
15 was a contract informally for all of the Sage's
16 property group can including this property and the
17 relationship between Sage -- I'm sorry -- T & J
18 Landscaping was independent of the Grand Dimitre's
19 dining facility and but rather between Sage T & J.

20 MR. STEINER: That's true, and we would argue
21 that the contract between T & J and ultimately,
22 whether you classified it as Sage's or Grand
23 Dimitre's, was done on behalf of Grand Dimitre's
24 through the contractual requirement in the lease.

25 THE COURT: The lease was, what, 2004?

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1 MR. STEINER: That's correct.

2 MR. BARATTA: Yes, your Honor.

3 THE COURT: My recollection, hadn't been
4 renewed. Dimitre's didn't assume the responsibility.
5 All they did is put salt on the sidewalk at the
6 entrance what they considered their responsibility.
7 The motion is denied. There is a factual basis to
8 support a claim.

9 MR. STEINER: May I?

10 THE COURT: You want to supplement the
11 record, go ahead.

12 MR. STEINER: I would argue even in the back
13 parking lot was designated parking as plaintiff points
14 out on page three of her brief. She indicates it was
15 water and ice near a drain that she walked in that
16 caused her fall. There were other employees, Debra
17 Buck, namely who parked away from that drain as per
18 the testimony of Tom Shakani (ph). The whole back
19 parking lot was not near this drain.

20 With regard to the lighting conditions, the
21 Ragnoli (ph) case, the Supreme Court order indicates
22 that while lighting conditions do not make black ice
23 patches open and obvious, given that there are
24 recognitions of winter weather conditions. In this
25 case the plaintiff testified that she was aware there

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was snow on the ground, there was ice on the ground and it was slippery.

THE COURT: She also testified that snow was never fully removed from the parking lot, that the removal process always left a coating of snow and ice in the parking lot and it was unavoidable because it was the employee parking lot. The Court has ruled.

MR. STEINER: Thank you.

MR. BARATTA: Judge, I'll rely on my brief and thank you.

THE COURT: Very well.

(Proceedings concluded at 9:22 a.m.)

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CERTIFICATION

STATE OF MICHIGAN)
) SS
COUNTY OF MACOMB)

I, Mary T. Nader-Cimini, Official Court Reporter of the Sixteenth Judicial Circuit, State of Michigan, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Donna Livings versus Sage's Investment Group, LLC, et al, Case Number 16-1819-NI, on June 19, 2017.

/s/ Mary T. Nader-Cimini, CSR-2643
Official Court Reporter

Date: July 12, 2017
Mount Clemens, Michigan

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Citation	Date	Defect alleged	Location	Holding
<i>Baten v. 231 MAC, LLC</i> , unpublished opinion of the Court of Appeals (Docket nos. 276755, 280035, 280109, rel’d 7/15/08)	2008-07-15	Ice, black	Parking lot, church	“[P]laintiff could have avoided the ice altogether by walking around it.” At *2
<i>Becker v. Glaister</i> , unpublished opinion of the Court of Appeals (Docket no. 281481, rel’d 1/22/09)	2009-01-22	Water, wooden ramp	Construction site, ramp	“[P]laintiff could have decided to make the delivery a different day or drop off the samples in the garage without utilizing the ramp.” At *4.
<i>Blue v. St. John Hosp. and Medical Center</i> , unpublished opinion of the Court of Appeals (Docket no. 284769, rel’d 10/13/09)	2009-10-13	Ice/snow	Parking structure, hospital	“[P]laintiff could have taken other stairwells to reach defendant’s hospital.” Plaintiff did not offer evidence “that these other routes presented the same slipping hazard . . .”
<i>Brennan v. CBP Fabrication, Inc.</i> , unpublished opinion of the Court of Appeals (Docket no. 267094, rel’d 6/20/06)	2006-06-20	Ice/snow	Walkway,	“[P]laintiff had a number of alternatives available to him to avoid the risk . . . including, foregoing the inspection, performing the inspection when conditions were more favorable, asking defendant’s employees, who were present, to inspect the bin, or waiting until defendant’s employees had cleared and salted the ramp.” At *2

<i>Brownlee v. General Motors Corp</i> , unpublished opinion of the Court of Appeals (Docket no. 252867, rel’d 8/30/05)	2005-08-30	Water, floor	Large puddle “around dishwasher.”	“[P]laintiff could have set the dishes in another area without adverse employment repercussions.” At *2
<i>Burlak v Lautrec, Ltd</i> , unpublished opinion of the Court of Appeals (Docket no. 290616, rel’d 6/15/10)	2010-06-15	Crack	Concrete slab 2 inches above roadway to mailbox	“[P]laintiff could have chosen to walk around the uneven concrete crack or watched where he stepped, the uneven concrete crack was not effectively unavoidable. At *2.
<i>Cameron v. J&J Hospitality, Inc</i> , unpublished opinion of the Court of Appeals (Docket no. 275380, rel’d 12/20/07)	2007-12-20	Water	Tile floor, restaurant Leaking roof	“[P]laintiff could . . . have avoided the wet areas on the tile while walking into the restaurant . . .” At *3
<i>Compton v Mirac, Inc</i> , unpublished opinion of the Court of Appeals (Docket no. 316662, 316671 , rel’d 9/23/14)	2014-09-23	Trench	Plaintiff followed employees of building undergoing renovations	“Two alternate routes existed. . .” At *3
<i>Cruchon v. Baro Mini Storage</i> , unpublished opinion of the Court of Appeals (Docket no. 326522, rel’d 5/24/16)	2016-05-24	Ice, snow	Parking lot Plaintiff attempted to walk around a sheet of ice	“Plaintiff could have chosen a path to the office where there was no ice, she could have chosen not to exit her vehicle, or she could have chosen not to come to the facility on that day.”

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<i>Danayan v. Heritage Square Apartments</i> , unpublished opinion of the Court of Appeals (Docket no. 265807, rel’d 3/16/06)	2006-03-16	Ice, snow	Plaintiff slipped on sidewalk on the way out	“[P]laintiff could have avoided the walkway by walking on the grass.” At *5.
<i>Dover v. Westchester Ltd. Dividend Housing Ass’n, L.L.C.</i> , unpublished opinion of the Court of Appeals (Docket no. 258654, rel’d 4/25/06)	2006-04-25	Garden hose	Sidewalk	“Plaintiff could have stepped over the garden hose or moved it to the side of the walkway before proceeding.” At *4.
<i>Duffy v. Kinnamon</i> , unpublished opinion of the Court of Appeals (Docket no. 333578, rel’d 11/21/17)	2017-11-21	Gravel	Surround of fire pit	“Plaintiff could have avoided the risk . . . by not standing so close to the fire pit or by exercising caution . . .” At *4
<i>Eckhout v Kroger Corp.</i> , unpublished opinion of the Court of Appeals (Docket no. 267102, rel’d 3/20/07)	2007-03-20	Ice	Parking lot	“There were other cars parked elsewhere in the lot and customers were safely exiting the store.”
<i>Faustina v Town Center</i> , unpublished opinion of the Court of Appeals (Docket no. 311385 , rel’d 8/7/14)	2014-08-07	Debris	Steps of apartment building.	Plaintiff “could have simply chosen not to confront that open and obvious danger” or taken precautions At * 4.

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<i>Forner v. Speedway Superamerica, L.L.C.</i> , unpublished opinion of the Court of Appeals (Docket no. 226907, rel’d 2/1/02)	2002-02-01	Pavement, uneven		“[P]laintiff could have easily stepped over and thus avoided injury.” At *2.
<i>Fuller v Shooks</i> , unpublished opinion of the Court of Appeals (Docket no. 269886, rel’d 10/24/06)	2006-10-24	Snow	Construction site	“[P]laintiff could have chosen to make the delivery at another time . . .” At *3
<i>Gibson v Anderson</i> , unpublished opinion of the Court of Appeals (Docket no. 293830, rel’d 12/14/10)	2010-12-14	Object (pole fence)	Ice on adjoining road	Plaintiff “could have could have taken a different route while crossing the street or waited until the condition of the street improved.” At *3
<i>Gleaves v Deleon</i> , unpublished opinion of the Court of Appeals (Docket no. 312523, rel’d 3/27/14)	2014-03-27	Ice	Sidewalk, apartment complex, only exit	“[P]laintiff could have chosen different footgear, used other precautions to avoid slipping, or used the readily available salt on the rear porch of the house.” At *3
<i>Harper v Ashgrove Apts</i> , unpublished opinion of the Court of Appeals (Docket no. 345299, rel’d 9/24/19)	2019-09-24	Tree roots, dirt	Construction area outside only door	Plaintiff could have “walk[ed] through snow and dirt. . . . [or] avoided the walkway by walking around it.” At *6.

<i>Holcomb v GWT, Inc</i> , unpublished opinion of the Court of Appeals (Docket no. 325410, rel’d 3/1/16)	2016-03-01	Trees	Obstructed view	Plaintiff “could have turned around” or “simply stopped and looked around the trees . . .” At *7
<i>Holland v State Farm Mut Auto Ins Ass’n</i> , unpublished opinion of the Court of Appeals (Docket no. 322438, rel’d 9/10/15)	2015-09-10	Ice	Driveway of car wash	Plaintiff “was not inescapably required to confront the hazard.” At *7
<i>Klausing v Uptown Grille</i> , unpublished opinion of the Court of Appeals (Docket no. 311945 , rel’d 12/17/13)	2013-12-17	Water	Restaurant floor	“Plaintiff could have immediately exited the restaurant [or] could have asked restaurant staff to remove the slippery condition or provide her with mats to walk on.” At *2
<i>Koss v A&A Transportation Servs</i> , unpublished opinion of the Court of Appeals (Docket no. 269411, rel’d 9/21/06)	2006-09-21	Ice	Parking area	“[A]lthough the front area was icy also, usually people parked in the front because it was closer to a sidewalk.” At *4
<i>LaRue v. Richard E. Jacobs Group</i> , unpublished opinion of the Court of Appeals (Docket no. 211741, rel’d 10/29/99)	1999-10-29	Snow	Snow bank in parking lot	“[P]laintiff chose to walk over the snow bank rather than around it.” At *2.

<i>Milton v. Joe Randazzo’s Fruit and Vegetable, Inc.</i> , unpublished opinion of the Court of Appeals (Docket no. 323521, rel’d 12/17/15)	2015-12-17	Water	Wet steps in dark area	“[P]laintiff could have chosen not to use the restroom, or could have asked an employee to turn on a light before she went inside.” At *3.
<i>Muskovin v. Asmaro</i> , unpublished opinion of the Court of Appeals (Docket no. 270170, rel’d 11/20/06)	2006-11-30	Ice, black	Parking lot, store	“Plaintiff could have walked on the sidewalk to the front entrance of the party store, . . . walked around the rear parking lot, or . . . traveled in the van to the front . . .” At *4
<i>Ottman v. Great Lakes Gaming of Michigan, LLC</i> , unpublished opinion of the Court of Appeals (Docket no. 309188, rel’d 12/11/12)	2012-12-11	Ice, black	Sidewalk in parking area	“Plaintiff could . . . have chosen to not cross snow to the sidewalk and instead walked through the parking lot . . . At *4.
<i>Patterson v. Knollwood Village Associates Ltd. Partnership</i> , unpublished opinion of the Court of Appeals (Docket no. 314806, rel’d 7/1/14)	2014-07-01	Ice	Parking lot, apartment building	“[P]laintiff could have asked her husband to park in another location [or] asked to be dropped off at a different spot or any number of alternatives . . .” At *3

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<i>Paxton v. Best Western Sterling Inn</i> , unpublished opinion of the Court of Appeals (Docket no. 272506, rel’d 2/8/07)	2007-02-08	Water	Bathroom, tile floor	“[P]laintiff could have avoided any hazard posed by the threshold by simply stepping over it as she exited the bathroom.” At *2
<i>Rogers v. Pontiac Ultimate Auto Wash, L.L.C</i> , unpublished opinion of the Court of Appeals (Docket no. 308332, rel’d 2/19/13)	2013-02-19	Ice, black	Car wash	“Plaintiff could have driven away from the car wash and turned into the first available parking lot to adjust his mirrors. . .” At *3.
<i>Salinas v. Omar’s Mexican Restaurant, Inc</i> , unpublished opinion of the Court of Appeals (Docket no. 263845, rel’d 12/20/05)	2005-12-20	Step	Restaurant take-out area	“[T]he restaurant had a second door that plaintiff could have used.” At *2
<i>Scott v. Independence Green Associates, LLC</i> , unpublished opinion of the Court of Appeals (Docket no. 335929, rel’d 4/12/18)	2018-04-12	Snow	Parking lot, apartment complex	“[P]laintiff could have walked across the grass to the driver’s side of her vehicle. . .” At *2, n 1.

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<p><i>Shattuck v. Hotel Baronette, Inc</i>, unpublished opinion of the Court of Appeals (Docket no. 281065, rel’d 2/10/09)</p>	<p>2009-02-10</p>	<p>Water</p>	<p>Tile step next to bathtub</p>	<p>“[P]laintiff could have avoided any slippery surface she was about to encounter as she finished bathing . . .” At *3</p>
<p><i>Snell v. Avalon Properties of Grand Rapids, L.L.C</i>, unpublished opinion of the Court of Appeals (Docket no. 327658, rel’d 5/24/16)</p>	<p>2016-05-24</p>	<p>Ice/snow</p>	<p>Driveway, apartment complex</p>	<p>Plaintiff could have “reschedul[ed] a pre-surgical consultation for a hysterectomy . . . and remain[ed] home.” At *4.</p>
<p><i>Stanton v. Fitness Management Corp</i>, unpublished opinion of the Court of Appeals (Docket no. 267623, rel’d 8/17/06)</p>	<p>2006-08-17</p>	<p>Ice</p>	<p>“Sloped area”</p>	<p>“[O]nce a visitor is aware of a danger, it is their [<i>sic</i>] responsibility to determine whether to face it or avoid it.” At *2.</p>
<p><i>Vanwyk v. Potter’s Enterprises, Inc</i>, unpublished opinion of the Court of Appeals (Docket no. 294134, rel’d 12/14/10)</p>	<p>2010-12-14</p>	<p>Ice</p>	<p>Parking lot, restaurant</p>	<p>“If plaintiff had chosen to enter through the front he would not have had to traverse the parking lot.” At *2</p>

<i>Walder v. St. John Evangelist Parish</i> , unpublished opinion of the Court of Appeals (Docket no. 298178, rel’d 9/27/11)	2011-09-27	Ice	Parking lot, church	“Plaintiff could have parked in a different spot and used a different entrance.” At *2
<i>Walk v. Baker College of Auburn Hills</i> , unpublished opinion of the Court of Appeals (Docket no. 299925, rel’d 11/15/11)	2011-11-15	Hole	“Pin hole” in door frame	Plaintiff “could also have used an alternative entrance and hallway to reach her classroom.” At *4.
<i>Walker v Kikpatrick</i> , unpublished opinion of the Court of Appeals (Docket no. 293626, rel’d 3/1/11)	2011-03-01	Ice, black	Driveway	“[P]laintiff could have avoided the ice patch by walking on surrounding snow.” At *5
<i>Weeks v Menard, Inc.</i> , unpublished opinion of the Court of Appeals (Docket no. 294208, rel’d 1/6/11)	2011-01-06	Object	Pallet broke when stepped on	“[P]laintiff could have asked for help in getting a bag of fertilizer.” At *3
<i>Wilson v BRK, Inc.</i> , ___ Mich App ___ (Docket no. 342449, rel’d 5/30/19)	2019-05-30	Step	Step at threshold	“[P]laintiff was not compelled to patronize the bar . . .” At *4.

UNPUBLISHED CASES CITED

- Becker v Glaister*, unpublished opinion of the Court of Appeals (Docket no. 281481, rel'd 1/22/09)
- Brownlee v General Motors Corp*, unpublished opinion of the Court of Appeals (Docket no. 252867, rel'd 8/30/05)
- Clogg v JNL Ventures, Inc*, unpublished opinion per curiam of the Court of Appeals, issued 2/16/12 (Docket No. 303197)
- Doezema v Bay Harbor Yacht Docks*, unpublished opinion per curiam of the Court of Appeals, issued 11/21/06 (Docket No. 267681)
- Fuller v Shooks*, unpublished opinion of the Court of Appeals (Docket no. 269886, rel'd 10/24/06)
- Holland v State Farm Mut Auto Ins Ass'n*, unpublished opinion of the Court of Appeals (Docket no. 322438, rel'd 9/10/15)
- Milton v Joe Randazzo's Fruit and Vegetable, Inc*, unpublished opinion of the Court of Appeals (Docket no. 323521, rel'd 12/17/15)
- Patterson v Knollwood Village Associates Ltd. Partnership*, unpublished opinion of the Court of Appeals (Docket no. 314806, rel'd 7/1/14)
- Shattuck v Hotel Baronette, Inc*, unpublished opinion of the Court of Appeals (Docket no. 281065, rel'd 2/10/09)
- Snell v Avalon Properties of Grand Rapids, L.L.C*, unpublished opinion of the Court of Appeals (Docket no. 327658, rel'd 5/24/16)
- Williams v Holiday Ventures Apartments, Inc*, unpublished opinion per curiam of the Court of Appeals, issued 3/1/11 (Docket No. 296051)

2009 WL 153289

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.Deborah BECKER, Plaintiff-Appellant,
v.
Patricia GLAISTER, Troy Braman, and Braman
Construction, Inc., Defendants-Appellees.

Docket No. 281481.

|
Jan. 22, 2009.

West KeySummary

- 1 **Negligence**
 ➤Steps, Stairs and Ramps
Negligence
 ➤Accidents and Injuries in General

A premises liability plaintiff failed to prove that a ramp leading to a house under construction contained special aspects creating an unreasonable risk of harm. The ramp was one foot in width with dry dirt on the surface, and the plaintiff chose to walk up the ramp to deliver carpet samples. Walking on such a ramp was an open and obvious danger, and the homeowner was not liable for injuries sustained when the plaintiff fell off the ramp.

Clinton Circuit Court LC; No. 06-010053-NO.

Before: MURRAY, P.J., and O'CONNELL and DAVIS,
JJ.**Opinion**

PER CURIAM.

*1 Plaintiff appeals as of right the October 12, 2007, order granting summary disposition to defendant Patricia Glaister and the October 15, 2007, order granting summary disposition to defendants Troy Braman and Braman Construction, Inc. We affirm.

This case arises out of injuries plaintiff sustained when she slipped and fell while visiting plaintiff's house, which was under construction and for which Troy Braman's company, Braman Construction, was the general contractor. Plaintiff, a medical receptionist, testified that Glaister, who had hired plaintiff as a decorating consultant, called plaintiff on April 5, 2004, requesting plaintiff to deliver carpet samples to the house. When plaintiff arrived at the house around 5:30 p.m., it was still daylight. Upon her arrival, plaintiff noticed that the front door was nailed shut and that standing water and construction debris blocked the entrance to the walkout basement. Thus, plaintiff elected to enter the house by walking up a ramp, approximately one foot in width, leading to the laundry room. Plaintiff dropped off the samples and while walking down the ramp, fell and injured her rotator cuffs and knees. Plaintiff testified that she decided to use the ramp, which was covered with dry dirt and did not have a railing,¹ despite her misgivings because Glaister was "very adamant" that the samples be delivered that night. Glaister, who was not present because she was attending class at a nearby community college, denied that she asked plaintiff to deliver carpet samples that night or that she paid plaintiff, who was her friend.

On appeal, plaintiff first argues that there is a genuine issue of material fact concerning whether special aspects of the ramp rendered the risk of harm unreasonably dangerous and unavoidable thereby precluding application of the open and obvious doctrine. We disagree. This Court reviews de novo an appeal from an order granting a motion for summary disposition brought pursuant to MCR 2.116(C)(10). *Dressel v. Ameribank*, 468 Mich. 557, 561, 664 N.W.2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden v. Rozwood*, 461 Mich. 109, 120, 597 N.W.2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v. Gen. Motors Corp.*, 469 Mich. 177, 183, 665 N.W.2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v. Detroit Bd. of Ed.*, 470 Mich. 274, 278, 681 N.W.2d 342 (2004).

To establish premises liability, a plaintiff must prove the following: "(1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages." *Hampton v. Waste Mgt. of Michigan, Inc.*, 236

Appendix Vol. IV: Unpublished cases cited in brief
Becker v. Glaister

Mich.App. 598, 602, 601 N.W.2d 172 (1999). Where a condition on the land is open and obvious, a premises possessor owes no duty to an invitee² unless special aspects exist making the condition unreasonably dangerous. *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 614-617, 537 N.W.2d 185 (1995). Two types of open and obvious conditions may render a condition unreasonably dangerous: unavoidable conditions and those creating a severe risk of harm. *Lugo v. Ameritech Corp.*, 464 Mich. 512, 518-519, 629 N.W.2d 384 (2001). *Lugo* provides two examples illustrating these conditions. First, a commercial building with its only exit for the general public covered in standing water would be an unavoidable condition because a customer wishing to leave the store must depart through the standing water. *Id.* Second, a 30-foot deep hole in a parking lot would create a severe risk of harm because although one could avoid the condition, it would present a uniquely high likelihood of severe injury or even death absent remedial measures. *Id.*

*2 At the outset, we note that plaintiff does not challenge whether the conditions causing her fall were open and obvious. Rather, plaintiff asserts the ramp was unreasonably dangerous because the ramp was too narrow, was slippery due to the presence of dry dirt, and was unsafe because it lacked handrails. However, even viewing the facts in the light most favorable to plaintiff, none of these conditions was unreasonably dangerous. On the contrary, these conditions are similar to other types of conditions that, while potentially causing one to slip and fall, are not unreasonably dangerous. For example, this Court has found that an icy stairway elevated only a couple of feet did not create the severe risk of harm envisioned by *Lugo* because “[u]nlike falling an extended distance, it cannot be expected that a typical person [falling a distance of several feet] would suffer severe injury’ or a substantial risk of death.” *Corey v. Davenport College of Business (On Remand)*, 251 Mich.App. 1, 6-7, 649 N.W.2d 392 (2002), quoting *Lugo, supra* at 518, 520, 629 N.W.2d 384.

Here, plaintiff testified she fell approximately four feet. The ramp was nearly one foot in width with dry dirt on the surface. These conditions are akin to the icy stairs of *Corey* rather than the 30-foot deep pit of *Lugo*. Moreover, while the ramp contained no handrails, the absence of a handrail on a construction ramp, which was *at most* four feet high, is hardly a unique condition of unreasonable risk. *Lugo, supra* at 519, 629 N.W.2d 384. We note that while plaintiff injured her rotator cuffs and knees as a consequence of the fall, the risk posed by the conditions must be considered *a priori, i.e.*, without examining a plaintiff’s injuries in hindsight. *Id.* at 518-519 n. 2, 629 N.W.2d 384. Thus, plaintiff’s injuries are not relevant to our conclusion. Consequently, plaintiff has failed to demonstrate that the ramp contained special aspects creating an unreasonable risk of harm.

Plaintiff relies upon her expert’s conclusion that the ramp

contained special aspects that were unreasonably dangerous and that the conditions causing plaintiff’s fall violated the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.* This reliance, however, is unavailing. First, despite the expert’s repeated conclusions that the conditions constituted special aspects rendering the ramp unreasonably dangerous, whether special aspects exist is a legal conclusion, and “[t]he opinion of an expert does not extend to legal conclusions.” *Maiden, supra* at 130 n. 11, 597 N.W.2d 817. Only after a condition is deemed a special aspect may the factual determination of whether the aspect was unreasonably dangerous be made. *O’Donnell v. Garasic*, 259 Mich.App. 569, 578, 676 N.W.2d 213 (2003); *Woodbury v. Bruckner*, 248 Mich.App. 684, 694, 650 N.W.2d 343 (2001). Moreover, “if an open and obvious condition lacks some type of special aspect regarding the likelihood or severity of harm that it presents, it is not unreasonably dangerous.” *Lugo, supra* at 525, 629 N.W.2d 384. Consequently, because the conditions at issue are not special aspects as a matter of law, the expert’s opinion that they are unreasonably dangerous is irrelevant.

*3 Second, plaintiff’s reliance on MIOSHA standards is misplaced. While plaintiff is correct that a violation of statute may create a rebuttable presumption of negligence, *Kennedy v. Great Atlantic & Pacific Tea Co.*, 274 Mich.App. 710, 720-721, 737 N.W.2d 179 (2007), plaintiff did not premise her negligence claim on a violation of statute. Rather, plaintiff alleges MIOSHA violations to support her common law theory of negligence—specifically, that special aspects existed. In any event, even when premising a negligence claim on violation of MIOSHA standards, MIOSHA does not create a statutory duty in favor of third parties in premises liability cases because “MIOSHA and the regulations enacted under MIOSHA apply only to the relationship between employers and employees....” *Id.* at 721, 737 N.W.2d 179. Consequently, as the ramp was in place for Braman Construction’s workers, the alleged violation of MIOSHA does not support plaintiff’s action. In light of this, even if the ramp were defective as plaintiff’s expert opined, this conclusion fails to create a genuine issue of material fact regarding the existence of special aspects.³

Plaintiff also cites *O’Donnell* and *Woodbury*, in which this Court found that despite an open and obvious condition, special aspects existed rendering the condition unreasonably dangerous, in support of her argument. Both cases, however, are distinguishable. In *O’Donnell*, this Court found special aspects existed where the plaintiff fell from an upstairs loft while attempting to alight down a partially unguarded narrow staircase. *O’Donnell, supra* at 571, 676 N.W.2d 213. Besides the incomplete guardrail, the Court noted the following factors that supported its conclusion:

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an open unguarded area existed between the loft guardrail and the edge of the steps; the stairway was unguarded on the open side opposite the wall; the stair treads were irregularly narrow; the stairs were unusually steep and the risers were of insufficient height; the handrail was an uneven tree branch that did not extend the length of the stairs; the loft had a low ceiling that forced adults to walk in an unnatural manner; and the stairway lacked a light switch at the top of the stairs. [*Id.* at 577, 676 N.W.2d 213.]

Similarly, in *Woodbury*, this Court found special aspects existed where the plaintiff fell “an extended distance” from a rooftop porch lacking guardrails outside her second story apartment. *Woodbury*, *supra* at 694, 650 N.W.2d 343.

Regarding the situation at hand, while the ramp lacked guardrails, a fall from a maximum height of four feet is hardly comparable to falling from an upstairs loft or a second story apartment. Further, plaintiff encountered no lighting problems and provided no testimony that the ramp caused her to walk in an awkward fashion or was unusually steep. Thus, reliance on these cases is not persuasive.

Next, plaintiff contends that because the ramp constituted the only means of ingress and egress into the house, use of the defective ramp was unavoidable rendering her effectively trapped. However, even assuming the ramp constituted the only means of ingress and egress, plaintiff has failed to show the ramp was unavoidable.⁴ In making her argument, plaintiff correctly observes that a court should “focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.” *Lugo*, *supra* at 524, 629 N.W.2d 384. However, an unreasonably high risk of harm caused by an effectively unavoidable condition “must be more than merely imaginable or premised on a plaintiff’s own idiosyncrasies.” *Robertson v. Blue Water Oil Co.*, 268 Mich.App. 588, 593, 708 N.W.2d 749 (2005) (citation omitted).

*4 Here, nothing in the record suggests plaintiff, upon observing the ramp, could not have delayed her delivery of carpet samples until another time or simply dropped off the carpet samples in the garage without going up the ramp. Indeed, while plaintiff noted that Glaister sounded desperate and “very adamant” that she deliver the samples, underlying plaintiff’s decision to make the delivery was because, as plaintiff described, “I’m just the type of person, when somebody asks me to do something, I try to follow through with it.” Such an idiosyncrasy is insufficient to render plaintiff effectively trapped in this situation. *Id.*

Moreover, this case differs markedly from *Lugo*’s example of a store customer facing a pool of standing water at the only exit. The difference is that, here, plaintiff was aware of the danger before entering the house in the first place, and as a consequence had a choice of whether to enter or not. Had plaintiff encountered the ramp only after making the delivery, she may have been effectively trapped, but that is not what happened.

Contrary to plaintiff’s argument, *Robertson* is unhelpful to her cause. In *Robertson*, the plaintiff slipped on ice in a gas station parking lot while walking toward the station’s convenience store to purchase windshield washer fluid. *Id.* at 591, 708 N.W.2d 749. In finding the open and obvious doctrine inapplicable, this Court rejected the defendant’s argument that the condition was not unavoidable because the plaintiff could have gone to a different gas station. Specifically, the Court held that not only was the icy condition effectively unavoidable, but the plaintiff was also effectively trapped because the weather conditions rendered it unsafe for the plaintiff to drive away without windshield washer fluid. *Id.* at 593-594, 708 N.W.2d 749.

In contrast to *Robertson*, plaintiff here was not effectively trapped. Indeed, plaintiff could have decided to make the delivery a different day or drop off the samples in the garage without utilizing the ramp. Further, no evidence in the record shows plaintiff was contractually bound to make any delivery. Rather, her decision was an idiosyncratic one for which, although a kind gesture, she may not now in retrospect decide was a bad idea.⁵

Finally, plaintiff asserts Troy Braman and Braman Construction owed her a duty of care because it was foreseeable she would use the ramp. Even assuming plaintiff’s claim is premised solely on ordinary negligence, her argument fails.⁶ The elements of negligence are 1) a duty; 2) a breach of that duty; 3) causation; 4) and damages or injuries. *Henry v. Dow Chemical Co.*, 473 Mich. 63, 71-72, 701 N.W.2d 684 (2005). In determining the existence of a duty, the Court considers not only the foreseeability of the risk, but most importantly the relationship of the parties. *Schultz v. Consumers Power Co.*, 443 Mich. 445, 450, 506 N.W.2d 175 (1993).⁷

Here, plaintiff failed to establish any relationship between herself and Troy Braman and Braman Construction that would impose a duty. Rather, plaintiff focuses exclusively on whether any danger was foreseeable. However, where there is no relationship between the parties, liability may not be imposed on a defendant, *In re Certified Question*, 479 Mich. 498, 507, 740 N.W.2d 206 (2007), and it is not our responsibility to search for case law to craft plaintiff’s argument on this issue, *Mudge v. Macomb Co.*, 458 Mich. 87, 105, 580 N.W.2d 845 (1998). While plaintiff cites *Clark v. Dalman*, 379 Mich. 251, 150 N.W.2d 755 (1967), and *Johnson v. A & M Custom Built Homes*, 261 Mich.App. 719, 683 N.W.2d 229 (2004), the plaintiffs in

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DAVIS, J. (concurring).

I concur in the result only.

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those cases had some contractual relationship with the defendants. Similarly, although plaintiff relies on *Schultz, supra*, that case involved a special relationship because the defendant was engaged in a unique activity with inherently dangerous properties. Consequently, plaintiff's claim against Troy Braman and Braman Construction fails.

*5 Affirmed.

Footnotes

- 1 Although Troy Braman testified that a support beam for a sump pump line and a stud wall near the ramp could be used for support, he admitted that no handrail was constructed because the ramp was designed only for use by construction workers.
- 2 We note that Glaister maintains that even if there were a commercial relationship, plaintiff's status at the time of her fall was one of licensee because any commercial relationship extended only to plaintiff's assistance at the home furnishing store. However, no evidence in the record supports this assertion. Thus, given plaintiff's and Glaister's contrary assertions regarding whether any commercial relationship existed, a genuine issue of fact exists on this point. Regardless, assuming without deciding that plaintiff is an invitee as she claims, her claim still fails.
- 3 While plaintiff asserts the trial court failed to distinguish between the objective nature of the conditions and plaintiff's subjective degree of care, her reliance on the court's finding that the ramp was defective does nothing to support this contention. Indeed, whether the ramp was defective does not account for plaintiff's subjective degree of care. Thus, such conclusive reasoning is of no assistance to plaintiff's case.
- 4 Troy Braman testified that a walkout basement permitted an alternative entry to the house. However, after Braman's deposition, plaintiff filed an affidavit claiming that standing water and debris blocked this entrance. It is worth noting that plaintiff's affidavit was filed after plaintiff gave her deposition in which she made no mention of a walkout basement. Regardless, an issue of fact exists concerning whether the walkout basement was a viable means of entry. In any event, because plaintiff's claim fails even if the walkout basement were not a viable means of entry, resolution of this issue is unnecessary.
- 5 Plaintiff also cites *Wiater v. Great Lakes Recovery Ctrs, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2005 (Docket No. 250384). However, we decline to address this unpublished opinion, which is not binding under stare decisis. [MCR 7.215\(C\)\(1\)](#).
- 6 Assuming plaintiff's claim against Troy Braman and Braman Construction is premised upon ordinary negligence rather than premises liability, the open and obvious doctrine is inapplicable. [Laier v. Kitchen](#), 266 Mich.App. 482, 490, 702 N.W.2d 199 (2005).
- 7 Although the determination of whether contractors owe duties to third parties is premised upon whether "the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations," [Fultz v. Union-Commerce Associates](#), 470 Mich. 460, 467, 683 N.W.2d 587 (2004), plaintiff's claim against Troy Braman and Braman Construction is not based in contract.

2005 WL 2086139

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Court of Appeals of Michigan.

Pamala BROWNLEE and Paul Brownlee,
Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

No. 252867.

|
Aug. 30, 2005.

Before: ZAHRA, P.J., and GAGE and MURRAY, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition under [MCR 2.116\(C\)\(10\)](#). We affirm. This case is being decided without oral argument pursuant to [MCR 7.214\(E\)](#).

Plaintiffs commenced this action after plaintiff Pamela Brownlee slipped on a puddle of water while clearing dishes in a kitchen at a General Motors Proving Grounds facility in Milford, Michigan.¹ The trial court granted summary disposition in favor of defendant, concluding that the puddle did not create an unreasonable risk of harm because it was open and obvious, and that there were no special aspects to the condition because plaintiff could have avoided it.

A trial court's decision granting summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. [Maiden v. Rozwood](#), 461 Mich. 109, 118; 597 NW2d 817 (1999). When reviewing a motion under [MCR 2.116\(C\)\(10\)](#), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of

the nonmoving party, determine whether a genuine issue of material fact exists. [Quinto v. Cross & Peters Co](#), 451 Mich. 358, 361-362; 547 NW2d 314 (1996). A question of fact exists when reasonable minds could differ on the conclusions to be drawn from the evidence. [Glittenberg v Doughboy Recreational Industries \(On Rehearing\)](#), 441 Mich. 379, 398-399; 491 NW2d 208 (1992).

Plaintiff, an employee of Aramark Food Services, was on defendant's premises for business purposes that benefited defendant. Therefore, plaintiff was defendant's invitee. See [White v. Badalamenti](#), 200 Mich.App 434, 436; 505 NW2d 8 (1993). Plaintiff's responsibilities included serving food, bussing tables, mopping floors and general cleaning. On the date of the incident, plaintiff was assigned to clean the food service line. A co-worker was assigned to the dishwasher. Plaintiff was injured when she slipped on the water while taking a dirty cup and dish to the dishwasher.

A "landowner has a duty of care, not only to warn [an] invitee of any known dangers, but also to make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." [Stitt v Holland Abundant Life Fellowship](#), 462 Mich. 591, 597; 614 NW2d 88 (2000). A premises possessor is not required to protect an invitee from open and obvious dangers, but "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." [Lugo v. Ameritech Corp, Inc](#), 464 Mich. 512, 517; 629 NW2d 384 (2001).

In this case, plaintiff admits that she was aware of the large puddle of water in front of and around the dishwasher, because the pipes under the dishwasher had been leaking for months. Thus, the only question is whether there were "special aspects" to the puddle that made it unreasonably dangerous, notwithstanding that it was open and obvious. In [Lugo, supra](#) at 518-519, our Supreme Court cautioned that in considering whether special aspects exist, the risks posed by the condition ought not be considered after the fact. A risk ought not be deemed to have special aspects because, in hindsight, the risk of serious injury is apparent. Rather, special aspects exist only where the open and obvious condition is effectively unavoidable or where the conditions "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided..." *Id.*

*2 In this case, the trial court determined that the risk of harm was avoidable, observing that plaintiff could have set the dishes in another area without adverse employment

repercussions. Plaintiff admitted she would not have suffered any adverse employment action had she simply set the plates in another area of the kitchen. Thus, plaintiff was not required to traverse the wet floor in order to comply with the demands of her employment. Because the condition was avoidable, we agree with the trial court that the hazardous condition in the kitchen did not have any special aspects that precluded application of the open and obvious danger defense to plaintiff's premises liability claim.

Affirmed.

All Citations

Not Reported in N.W.2d, 2005 WL 2086139

Footnotes

- 1 Plaintiff Paul Brownlee brought a claim for loss of consortium. As used in this opinion, the term "plaintiff" refers only to Pamela Brownlee.

2012 WL 516088

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.

Anne CLOGG, Plaintiff–Appellant,

v.

JNL VENTURES, INC., d/b/a Shield’s of Warren,
Defendant–Appellee.

Docket No. 303197.

|
Feb. 16, 2012.

Macomb Circuit Court; LC No.2009–004657–NO.

Before: [SERVITTO](#), P.J., and [TALBOT](#) and K.F. KELLY,
JJ.**Opinion**

PER CURIAM.

*1 Plaintiff appeals as of right from an order granting summary disposition to defendant in this premises liability action. We affirm.

I. BASIC FACTS

This action arises out of injuries sustained by plaintiff when she tripped and fell on the sidewalk on defendant’s premises. Plaintiff, her husband, and her daughter were walking into defendant’s restaurant on November 24, 2007. The ground was covered with leaves at the time, and the sidewalk underneath was not visible. There is an approximately two-inch lip in the sidewalk in the area where plaintiff tripped, just in front of the stairs leading up to the restaurant’s entrance. No one was exactly sure what plaintiff tripped on at the exact moment it happened. However, upon inspection, plaintiff’s husband and

daughter saw the lip and assumed it was what caused plaintiff to trip. Plaintiff testified at her deposition that she did not know what tripped her, just that her foot “bumped into something,” that she “hit something,” “stubbed something,” and that she “now know[s] there was a lip there.” Plaintiff had been to the restaurant at least three times previously and had never fallen before.

Defendant filed a motion for summary disposition under MCR 2.166(C)(8) and (10). Defendant claimed that the condition was open and obvious and that it had no duty to repair or warn against. Defendant maintained that the condition did not possess any special aspects that made it unavoidable or highly likely to cause severe harm. Defendant also claimed plaintiff’s deposition testimony regarding the cause of her fall was pure speculation.

In response, plaintiff asserted that the sidewalk lip hidden under the leaves was not open and obvious upon casual inspection and, therefore, defendant owed a duty to plaintiff to either warn her of the risk or make repairs.

The trial court issued a written opinion and order, granting defendant summary disposition. The court found the sidewalk lip covered by leaves was an open and obvious condition and, on that basis alone, summary disposition was appropriate. Nevertheless, the trial court went on to find plaintiff’s causation evidence was, as defendant averred, purely speculative. The trial court denied plaintiff’s motion for reconsideration. She now appeals as of right.

II. STANDARD OF REVIEW

Defendant moved for summary disposition pursuant to [MCR 2.116\(C\)\(8\)](#) and [2.116\(C\)\(10\)](#). Although the trial court did not explicitly state the rule under which it was granting summary disposition, the trial court considered the exhibits attached to both motions, thus, the order was entered pursuant to [MCR 2.116\(C\)\(10\)](#).¹ A trial court’s judgment on a motion for summary disposition is reviewed de novo. *Allen v. Bloomfield Hills Sch Dist*, 281 Mich.App 49, 52; 760 NW2d 811 (2008). A motion based on [MCR 2.116\(C\)\(10\)](#) tests the factual sufficiency of a claim. *Maiden v. Rozwood*, 461 Mich. 109, 120; 597 NW2d 817 (1999). Summary disposition is proper if “there is no

genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” *Maiden*, 461 Mich. at 120; MCR 2.116(C)(10). We must review the evidence in the light most favorable to the nonmoving party in determining whether a genuine issue of material fact exists. *Maiden*, 461 Mich. at 120. A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *West v. Gen Motors Corp*, 469 Mich. 177, 183; 665 NW2d 468 (2000).

III. ANALYSIS

*2 Plaintiff argues that the condition was not open and obvious because the defect—a lip in the sidewalk leading up the stairs to defendant’s premises—was completely covered in leaves. We disagree.

To prove a claim for negligence, a plaintiff must show: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) that the breach was the proximate cause of plaintiff’s harm, and (4) damages. *Loweke v. Ann Arbor Ceiling & Partition Co.*, — Mich. —; — NW2d — (Docket No 141168, issued June 6, 2011) (slip op at 2). The duty a landowner owes to a person on its property varies depending on the person’s classification as a trespasser, a licensee, or an invitee. *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 596; 614 NW2d 88 (2000). “An ‘invitee’ is a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception.” *Wymer v. Holmes*, 429 Mich. 66, 71 n 1; 412 NW2d 213 (1987), overruled on other grounds 470 Mich. 661 (2004)). To be an invitee, a person must be present on the landowner’s premises for commercial purposes. *Stitt*, 462 Mich. at 604. Here, plaintiff was on defendant’s premises as a customer visiting a restaurant. This is clearly a commercial purpose, justifying plaintiff’s classification as an invitee.

“[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

Footnotes

1 See *Hughes v. Region VII Area Agency on Aging*, 277 Mich.App 268, 273; 744 NW2d 10 (2007) (when a trial court considers facts outside the pleadings, summary disposition is treated as having been based on MCR 2.116(C)(10)).

on the land.” *Lugo v. Ameritech Corp*, 464 Mich. 512, 516; 629 NW2d 384 (2001). A landowner must not only warn an invitee of dangers known to the landowner, but also maintain the premises, including inspecting the premises and, if necessary, making repairs or warning of hazards the landowner discovers. *James v. Alberts*, 464 Mich. 12, 19–20; 626 NW2d 158 (2001). “Thus, an invitee is entitled to the highest level of protection under premises liability law.” *Id.* at 20. However, this duty does not extend to conditions that are known to the invitee, or which are open and obvious such that the invitee can reasonably be expected to discover them. *Lugo*, 464 Mich. at 516. A condition is only open and obvious if it is “ ‘readily apparent or easily discoverable upon casual inspection by the average user of ordinary intelligence.’ ” *Novotney v. Burger King Corp*, 198 Mich.App 470, 473; 499 NW2d 379 (1993). Still, where special aspects of a condition make even an open and obvious risk unreasonably dangerous, the possessor must take reasonable steps to protect invitees from harm. *Lugo*, 464 Mich. at 517. Special aspects are those that “give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided.” *Id.* at 519. Neither a common condition nor an avoidable condition is uniquely dangerous. See *Corey v. Davenport College of Business (On Remand)*, 251 Mich.App 1, 8–9; 649 NW2d 392 (2002).

*3 We conclude that a leaf-concealed sidewalk lip was an open and obvious danger and the trial court correctly granted defendant summary disposition. Plaintiff’s fall occurred during autumn in Michigan when leaf-covered sidewalks are neither remarkable nor unexpected. Casual observation would alert the average individual of the potential danger posed from slipping on the leaves or tripping over something hidden under the leaves.²

Given our conclusion that summary disposition was properly granted under the “open and obvious” doctrine, we decline to address plaintiff’s remaining issue on appeal wherein she argues that the trial court erred in concluding that the cause of her injury was mere speculation.

Affirmed.

All Citations

Not Reported in N.W.2d, 2012 WL 516088

- 2 We also note that this Court reached the same conclusion on similar facts in *Haden v. Walden Pond Condo Assn*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2004 (Docket No 249476), and *Williams v. Holiday Ventures Apts, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2011 (Docket No 296051). Although unpublished opinions of this Court are not binding precedent, they may be considered instructive or persuasive. [MCR 7.215\(C\)\(1\)](#); [Paris Meadows, LLC v. City of Kentwood](#), 287 Mich.App 136, 145 n 3; 783 NW2d 133 (2010).

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2006 WL 3375315

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Court of Appeals of Michigan.

Douglas DOEZEMA, Plaintiff-Appellant,

v.

BAY HARBOR YACHT DOCKS and Bay Harbor
Company, LLC, Defendants-Appellees.

Docket No.

267681

|
Nov. 21, 2006.

Emmet Circuit Court; LC No. 05-008569-NO.

Before: FORT HOOD, P.J., and BANDSTRA and
DONOFRIO, JJ.

Opinion

PER CURIAM.

*1 In this premises liability action, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants. We affirm.

While docked at defendants' premises, plaintiff and his fellow crewmen were engaging in routine boat-cleaning procedures, including a pump out¹ of the boat. In preparation for the pump out, a dockhand removed a cover from a hatch in the dock, exposing the piping to which the pump out hose would be connected. Plaintiff sustained injuries when he walked backward into the open hatch. Plaintiff brought suit against defendants, and the trial court granted summary disposition in favor of defendants under [MCR 2.116\(C\)\(10\)](#).

On appeal, plaintiff argues that the trial court erred in determining that the dangerous condition on the docks was open and obvious and that there were no special aspects of the condition that created an unreasonable risk of harm. We review de novo a trial court's decision on a motion for summary disposition, examining the entire record to determine whether the moving party was entitled to judgment as a matter of law. [Stopczynski v. Woodcox](#), 258

[Mich.App 226, 229; 671 NW2d 119 \(2003\)](#). "A motion under [MCR 2.116\(C\)\(10\)](#) tests the factual sufficiency of the complaint and, after considering the evidence in the light most favorable to the nonmoving party, summary disposition is appropriate if the proffered evidence fails to establish a genuine issue regarding any material fact." *Id.*

"To establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages." [Teufel v. Watkins](#), 267 Mich.App 425, 427; 705 NW2d 164 (2005). "A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Id.* An invitor is liable for injuries resulting from unsafe conditions caused by the invitor's active negligence or, if otherwise caused, where the invitor knew of the unsafe condition or the condition is of such a character or has existed a sufficient length of time that the invitor should have had knowledge of it. [Berryman v. Kmart Corp.](#), 193 Mich.App 88, 92; 483 NW2d 642 (1992). "The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it." [Teufel, supra](#) at 427; [Bertrand v. Alan Ford, Inc.](#), 449 Mich. 606, 609-610; 537 NW2d 185 (1995).

"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 the danger on casual inspection." [Teufel, supra](#) at 427; [Novotney v. Burger King Corp. \(On Remand\)](#), 198 Mich.App 470, 474-475; 499 NW2d 379 (1993). "If special aspects of a condition make an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk." [Teufel, supra](#) at 428; [Lugo v. Ameritech Corp., Inc.](#), 464 Mich. 512, 517; 629 NW2d 384 (2001). "But where no such special aspects exist, the 'openness and obviousness should prevail in barring liability.'" [Teufel, supra](#) at 428, quoting [Lugo, supra](#) at 517-518. "[I]f the particular ... condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." [Bertrand, supra](#) at 611.

*2 In [Millikin v. Walton Manor Mobile Home Park, Inc.](#), 234 Mich.App 490, 491, 497-498; 595 NW2d 152 (1999),

this Court found that summary disposition in favor of the defendant was appropriate on the basis of the open and obvious doctrine where the plaintiff tripped over a utility wire while she was washing windows outside her mobile home. The plaintiff admitted that “if [she] was looking for [the wire she] would have seen it,” but that she did not because “[she] was looking at windows and where [she] was putting [her] stuff.” *Id.* at 492. This Court determined that the plaintiff failed to establish a genuine issue of material fact regarding the open and obvious nature of the utility wire, based on pictures of the wire in its surroundings as well as the plaintiff’s deposition testimony that “she would have seen the wire if she had looked up from her work.” *Id.* at 497-498.

Similarly, in this case, plaintiff failed to establish a genuine issue of material fact that the open hatch was not open and obvious.³ Plaintiff’s argument that the danger posed by the open hatch was not open and obvious is based on his assertion that the dockhand opened the hatch cover within seconds of plaintiff falling into it. Plaintiff asserts that he could not have seen the open hatch under these circumstances, and thus the danger was not open and obvious. However, plaintiff admits that even though the hatch cover had been taken off mere seconds before he fell into it, he would have seen the open hatch if he had been walking forward rather than backward. Further, plaintiff acknowledged that he was aware that the boats needed to be pumped out and that the procedure required opening the hatch cover. He also admitted that a boat dock is a busy place with many people performing various tasks. Many of those could conceivably result in risks of tripping and falling for those not keeping an eye out for changing conditions and associated dangers. In these circumstances, the open and obvious doctrine required that plaintiff continually glance over his shoulder while walking backward to avoid dangers that may not have been there even seconds before. Accordingly, the trial court properly granted summary disposition in favor of defendant.

Plaintiff also argues that the trial court erred in determining that there were no special aspects of the open and obvious condition that created an unreasonable risk of harm so as to justify the imposition of liability on defendants. “[O]nly 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 doctrine.” *Lugo, supra* at 519.

The evidence established that the hole exposed by the open hatch was not particularly large and that the hatch contained a network of pipes that would prevent anyone stepping into the hatch from falling to the water below. Although falling into the hatch and hitting the pipes might

cause injury, the risk of harm created by the open hatch was neither particularly severe nor uniquely high. Additionally, the hatch opening was not unavoidable. Finally, the fact that the environment was changed when the hatch cover was opened is immaterial and does not operate to remove the case from analysis under the open and obvious doctrine. As in *Millikin, supra* at 499, plaintiff’s only asserted basis for finding that the open hatch was dangerous was that he did not see it. Because plaintiff failed to establish anything unusual about the open hatch and failed to present any facts that the open hatch posed an unreasonable risk of harm, notwithstanding its open and obvious nature, the trial court properly granted summary disposition in favor of defendant. *Id.*

*3 We affirm.

FORT HOOD, J. (dissenting).

*3 I respectfully dissent.

When reviewing a motion for summary disposition, we consider the evidence presented in the light most favorable to the nonmoving party. *DeBrow v. Century 21 Great Lakes, Inc. (After Remand)*, 463 Mich. 534, 538-539; 620 NW2d 836 (2001).

To establish a prima facie case of negligence, the plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation, that includes cause in fact and legal or proximate cause; and (4) damages. *Case v. Consumers Power Co.*, 463 Mich. 1, 6 n 6; 615 NW2d 17 (2000). Duty is any obligation owed by the defendant to the plaintiff to avoid negligent conduct, and whether a duty exists generally presents a question of law for the court. *Simko v. Blake*, 448 Mich. 648, 655; 532 NW2d 842 (1995). The application of the open and obvious doctrine is contingent upon the theory of liability at issue. A defendant may rely on the open and obvious doctrine in response to a premises liability claim for failure to warn. *Laier v. Kitchen*, 266 Mich.App 482, 489, 502; 702 NW2d 199 (2005) (Neff, J., Hoekstra, J., concurring in part). The general rule is that a duty is owed to an invitee by the premises possessor 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). This duty does not extend to open and obvious conditions on the land that the invitee should have discovered and realized its danger. *Id.* If the risk of harm remains unreasonable despite the apparent obviousness or knowledge, then the invitee

may be required to undertake reasonable precautions. *Id.* at 516-517.

However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to preclude harm to invitees from the risk. *Id.* at 517. The critical question becomes “whether there is evidence that creates a genuine issue of material fact regarding whether there are truly ‘special aspects’ of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the ‘special aspect’ of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.” *Id.* at 517-518. Special aspects of an open and obvious condition may impose an unreasonably high risk of severe harm. By way of example, an unguarded thirty-foot deep pit in the middle of a parking lot might be deemed an open and obvious condition for which one could conceivably avoid the danger. However, this pit would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonable to maintain the condition without undertaking precautions such as providing a warning or taking other remedial measures. *Id.* at 518-519.

*4 In the present case, plaintiff testified that he was captaining a boat for a family, which was docked at defendants’ establishment. At the time of the fall, plaintiff was hosing the soap from a boat that was being washed. Plaintiff testified that a pumpout was not occurring at the time of the fall, and the hose had not been connected to the fitting on the dock. He recalled that a pumpout was occurring halfway down the dock. Plaintiff acknowledged that he was walking backwards at the time of his fall, and the hatch was behind him at the time of the fall. He denied the allegation that he was merely focused on spraying the boat with the hose at the time of the fall. Rather, plaintiff testified that each time he changed positions while walking backwards up the ramp, he would look down to see where he was going to ensure that he was on steady footing. He would target a specific area on the boat. When he needed to address a new spot on the boat, he would reroute the hose, if necessary, and look behind to see where he was standing to adjust for his incremental moves in position. Plaintiff testified that he did not see the hatch open and opined that the hatch was opened seconds before he stepped into the pit. It was estimated that the hatch opening was approximately fourteen inches by forty inches with a fifteen-foot drop to the water. However, beneath the hatch opening, the area was partially blocked on one side by pipes.

Under the circumstances, plaintiff testified that he was aware of the presence of the conditions on the dock. However, at the time of his observation, he was taking precautions to address a *closed* hatch. His predominant concern was maintaining steady footing on the dock and preventing excessive slack in the hose. Viewing the evidence in the light most favorable to plaintiff, *DeBrow, supra*, there was no indication that a pumpout near plaintiff was about to occur. Despite the fact that there were other dockworkers present in the near vicinity of plaintiff, dockworkers did not alert plaintiff or others to the opening of the hatch. While a large fluorescent pipe would have been attached to the open pipe under the hatch for the pumpout, it was not attached at the time of the fall. Consequently, plaintiff did not merely trip on the pipe or the cart, but partially fell into the hatch opening and struck his head. Review of the photographs of the open hatch reveal that the pipe opening that served as an attachment for the pumpout was only a few inches in diameter. Despite the fact that hatch opening was significant in comparison to the pipe used in the pumpout, the dock did not have a procedure and practice for opening the hatch. That is, orange safety cones were not placed around the area to prevent someone from falling in the open hatch. Additionally, there could have been fencing or a grid placed around the pipe opening to prevent someone from falling through when the hatch was opened.

As set forth in *Lugo, supra*, the critical inquiry is whether evidence creates a genuine issue of material fact regarding whether there are truly special aspects of the open and obvious condition that differentiate the risk from typical open and obvious risks that result in the creation of an unreasonable risk of harm. Viewing the evidence in the light most favorable to the plaintiff, *DeBrow, supra*, the nature of the hatch and the photographs create a genuine issue of material fact. Plaintiff was aware of the presence of the hatch on the dock. However, he testified that he believed his predominant risk was maintaining footing on the dock in relationship to the operation of the hose. He did not anticipate that the *nature of the hatch* would change without warning. That is, he allegedly was not alerted to the fact that hatch was opened. There were no cones or other safety precautions put into place to alert plaintiff to the change in condition. Similar to the example of the thirty-foot pit in a parking lot, the open hatch caused plaintiff to partially fall through the hatch and strike his knee and his head. Although there is piping in the hatch opening, a person of a smaller stature could conceivably fall through the hole and suffer serious harm. Based on these circumstances, I would hold that a genuine issue of material fact existed that precluded summary disposition in favor of defendants.

All Citations

Not Reported in N.W.2d, 2006 WL 3375315

Footnotes

- 1 A pump out is a procedure in which a boat's waste holding tank is emptied using a vacuum-like process. One end of a hose is connected to a fitting on the holding tank, and the other end is attached to a pipe located through a hatch under the dock that is linked to the sewer system.
- 2 For purposes of reviewing the trial court's decision on a motion for summary disposition, we consider the evidence in the light most favorable to plaintiff, as the nonmoving party. *Stopczynski, supra* at 229. Accordingly, we give no credence to the following evidence proffered by defendants: the dockhand's testimony that he removed the hatch cover "at least a couple [of] minutes" before plaintiff fell; testimony from a crew captain as well as the ship's mechanic that plaintiff was potentially inebriated when he fell, "moving around erratically just all over the place," "highly animated," "sweating profusely, [] reeked of Altoids ... pupils [] dilated," "spraying [] dramatically ... [a]nd not spraying off one part of a boat before moving off to the next"; and testimony from a crew captain that because plaintiff overslept the previous day and had not refueled his boat, the crew was irritated with plaintiff shirking his responsibilities, leading plaintiff, on the evening of the incident, to "put[] on a show in front of everybody ... 'Look at me, I'm working. I've got the hose. We've got to clean these boats, guys. Let's get moving' like [plaintiff] was in charge or something."

2006 WL 3019486

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Court of Appeals of Michigan.

Lance FULLER, Plaintiff-Appellant,

v.

Thomas SHOOKS, Defendant-Appellee.

Docket No. 269886.

|

Oct. 24, 2006.

Kent Circuit Court; LC No. 05-002704-NO.

Before: CAVANAGH, P.J., BANDSTRA and OWENS,
JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition based on the open and obvious doctrine. We affirm. This appeal is being decided without oral argument pursuant to [MCR 7.214\(E\)](#).

Defendant, a self-employed building contractor, served as the general contractor for the construction of his own home. On January 7, 2004, plaintiff, a truck driver for a plumbing supply company, delivered an order of toilets and other plumbing fixtures to the site. There was an accumulation of snow on the driveway when plaintiff arrived. Using a hand truck, plaintiff transported several loads of items up the drive, across a sidewalk, and into the side service entrance of defendant's garage. While in the process of hauling the third load, plaintiff slipped on the snow, fell, and suffered injury. Plaintiff filed suit, alleging negligence. Defendant moved for summary disposition pursuant to [MCR 2.116\(C\)\(10\)](#). The trial court granted the motion on the ground that defendant did not have a duty to protect plaintiff from open and obvious hazards such as the snow-covered driveway.

The decision to grant or deny summary disposition presents a question of law that we review de novo. [Veenstra v.](#)

[Washtenaw Country Club](#), 466 Mich. 155, 159; 645 NW2d 643 (2002). Under [MCR 2.116\(C\)\(10\)](#), summary disposition is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [West v. General Motors Corp.](#), 469 Mich. 177, 183; 665 NW2d 468 (2003). A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

Parties in possession of land generally have a duty to use reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on their premises. [Bertrand v. Alan Ford, Inc.](#), 449 Mich. 606, 609; 537 NW2d 185 (1995). But under most circumstances, a possessor of land "is not required to protect an invitee from open and obvious dangers." [Lugo v. Ameritech Corp, Inc.](#), 464 Mich. 512, 517; 629 NW2d 384 (2001). A hazard is open and obvious if the court determines that an ordinary person of average intelligence would "have been able to discover the danger and the risk presented upon casual inspection." [Novotney v. Burger King Corp \(On Remand\)](#), 198 Mich.App 470, 475; 499 NW2d 379 (1993).

Plaintiff concedes that the snow in the instant case presented an open and obvious hazard. But he contends that defendant may be found liable as a general contractor because, by failing to remove the snow from his driveway, defendant subjected plaintiff to a high degree of risk in a common work area.

We find the common work area doctrine inapplicable to the current situation. The doctrine provides an exception to the general common law rule that property owners and general contractors "could not be held liable for the negligence of independent subcontractors and their employees." [Ghaffari v. Turner Const Co](#), 473 Mich. 16, 20; 699 NW2d 687 (2005). Because general contractors have responsibility for coordinating an array of subcontractors, they must take reasonable steps "to guard against readily observable, avoidable dangers in common work areas." *Id.*, 21, 23, quoting [Funk v. General Motors Corp](#), 392 Mich. 91, 104; 220 NW2d 641 (1974). But the duties owed under the common work area doctrine are distinct from the general duties of a premises possessor. *Id.*, 23-24, citing [Perkoviq v. Delcor Homes-Lake Shore Pointe, Ltd](#), 466 Mich. 11, 19; 643 NW2d 212 (2002).

*2 Plaintiff correctly contends that, in [Ghaffari](#), *supra*, 29-30, our Supreme Court held that the fact that a hazard is open and obvious cannot defeat a claim under the common work area doctrine. But plaintiff does not contend that his

injury occurred due to the negligence of defendant's subcontractors or their employees. Rather, he asserts that a dangerous condition present on defendant's premises caused the accident. No issue concerning the common work area doctrine arises out of the facts alleged by plaintiff. Thus, the doctrine cannot prevent his premises liability claim from being dismissed on the ground that the hazardous condition that existed on defendant's driveway was open and obvious.

Even if we were to find the common work area doctrine applicable, plaintiff's claim would fail. To recover under the doctrine, a plaintiff must establish that:

- (1) the defendant, either the property owner or the general contractor, failed to take reasonable steps within its supervisory and coordinating authority
- (2) to guard against readily observable and avoidable dangers
- (3) that created a high degree of risk to a significant number of workmen
- (4) in a common work area. [*Ormsby v. Capital Welding, Inc*, 471 Mich. 45, 57; 684 NW2d 320 (2004).]

Here, defendant testified that the construction of the house, with the exception of the installation of some tile and a few fixtures, had been completed by January of 2004. Further, there were no workers at premises on day of plaintiff's accident. Similarly, plaintiff testified that there was no one else at the home when he made the delivery. Regardless of whether defendant failed to take reasonable steps to guard against the danger presented by a snow-covered driveway, the parties agree that plaintiff was the only person present. Consequently, the hazardous condition could not have created a high degree of risk to a significant number of workmen and plaintiff cannot recover under the common work area doctrine.

In his second issue on appeal, plaintiff contends that, although the hazard presented by the snow was open and obvious, special aspects making the condition unreasonably dangerous existed and prevented defendant from being entitled to summary disposition.

Although a landowner does not generally have a duty to protect invitees from open and obvious dangers, he must take reasonable steps to protect invitees from harm where "special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Lugo, supra*, 517.

When determining whether such special aspects exist, courts must "focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Id.*, 523-524. But "an open and obvious accumulation of snow and ice, by itself, does not feature any 'special aspects.'" *Robertson v. Blue Water Oil Co*, 268 Mich.App 588, 593; 708 NW2d 749 (2005), citing *Mann v. Shusteric Enterprises, Inc*, 470 Mich. 320, 332-333; 683 NW2d 573 (2004).

*3 Special aspects are found in two sets of circumstances. The condition must give rise to (1) a uniquely high likelihood of harm, or (2) cause a severe harm if the risk is not avoided. *Lugo, supra*, 519. The first of these occurs when a person cannot effectively avoid the dangerous condition. *Id.*, 518. In explaining this situation, our Supreme Court provided the example of a business in which standing water covers the only exit and traps a customer inside. *Id.* The second circumstance occurs when the open and obvious condition imposes "an unreasonably high risk of severe harm." *Id.* Here, the Court gave the example of an unguarded thirty-foot pit in the middle of a parking lot. *Id.*

In the instant case, plaintiff does not argue that the snow created an unreasonably high risk of severe harm. Rather, plaintiff asserts that the danger presented by driveway, like the hazardous condition in *Robertson*, was effectively unavoidable because his instructions dictated that he deliver the fixtures as soon as possible and place them in defendant's garage using the side service entrance.

In *Robertson, supra*, 591, the plaintiff slipped on ice in the parking lot of the defendant's gas station as he walked to the station's convenience store to purchase windshield washer fluid. In rejecting the defendant's argument in favor of summary disposition based on the open and obvious doctrine, this Court stated that the hazard presented by the icy conditions was effectively unavoidable because no ice-free path to the service station existed and it would have been unsafe, given the weather conditions, to drive away without windshield washer fluid. *Id.*, 593-594. This Court further stated that the defendant's contention that the plaintiff could have gone elsewhere was inconsistent with its purpose in operating a gas station and inviting the public onto its premises for commercial purposes. *Id.*, 594-595.

Contrary to plaintiff's assertions, *Robertson* does not require reversal of the trial court's order. While both plaintiff and his counterpart in *Robertson* were licensees, their situations can be distinguished. In *Robertson, supra*, 594-595, the defendant made a general invitation to all members of the public to shop at its service station. Here, plaintiff was not a "paying customer" who came to

defendant's premises on a weekly basis. *Id.*, 591. Rather, plaintiff went to defendant's home a single time to deliver goods defendant had purchased from his employer.

More importantly, unlike the plaintiff in *Robertson*, the snow-covered driveway did not effectively trap plaintiff. Rather than being unable to safely leave the premises, plaintiff could have chosen to make the delivery at another time after the driveway had been cleared of snow. Plaintiff's work order does state that defendant's fiancé wanted the fixtures delivered as soon as they arrived. But plaintiff testified that he had already put off delivering the goods until his last delivery of the day and that no one was present at the home when he arrived. Nothing in the record suggests that plaintiff, upon observing the hazard presented by the snow, could not have simply delayed making the delivery until some later time.

*4 Further, a decision reversing the trial court's order granting defendant motion for summary disposition would be at odds with our Supreme Court's recent decision in *Kenny v. Kaatz Funeral Home, Inc.*, 472 Mich. 929; 697 NW2d 526 (2005). In *Kenny v. Kaatz Funeral Home, Inc.*, 264 Mich.App 99, 101; 689 NW2d 737 (2004), this Court reversed the trial court's order granting the defendant's motion for summary disposition. In lieu of granting leave to appeal, our Supreme Court reversed this Court's decision for the reasons stated in Judge Griffin's dissenting opinion. *Kenny, supra*, 472 Mich. 929.

In *Kenny, supra*, 264 Mich.App 115, the plaintiff and four companions drove to the defendant's funeral home to attend the funeral of a co-worker. After they parked the car in defendant's snow-covered parking lot, plaintiff attempted to walk around behind the vehicle, slipped, and

fell. Plaintiff argued that the icy condition was unavoidable because there was only one vacant parking space available and, as a passenger in the car, she had no control over where the driver parked. *Id.*, 122. But Judge Griffin noted, "Neither a common condition nor an avoidable condition is uniquely dangerous." *Id.*, 117, citing *Corey v. Davenport College of Business (On Remand)*, 251 Mich.App 1, 8-9; 649 NW2d 392 (2002). He found that the plaintiff's circumstances did "not rise to the level of making her encounter with the allegedly icy condition 'effectively unavoidable' such that it constituted an unreasonable risk of harm." *Id.*, 122. Judge Griffin therefore held that, because the condition of the parking lot was both common and avoidable, no special aspects existed and the trial court's decision granting the funeral homes motion for summary disposition should be affirmed. *Id.*

Like the hazard encountered by the plaintiff in *Kenny*, the snow-covered driveway in the instant case did not present any special aspects making it unreasonably dangerous. Rather, the condition was both common and avoidable. Consequently, the trial court did not err in granting defendant's motion for summary disposition on the basis of the open and obvious doctrine.

Affirmed.

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

James R. HOLLAND, Jr., Plaintiff–Appellant,
v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO, Defendant,
and

Northville City Car Wash, LLC, Defendant–
Appellee,
and

John Doe, Defendant–Appellee.

Docket No. 322438.

|
Sept. 10, 2015.

Wayne Circuit Court; LC No. 13–001676–NI.

Before: [TALBOT](#), P.J., and [WILDER](#) and FORT HOOD,
JJ.

Opinion

PER CURIAM.

*1 Plaintiff, James R. Holland, Jr., appeals as of right an order granting summary disposition in favor of defendant Northville City Car Wash, LLC.¹ We affirm.

I

This case arises out of the injuries sustained by plaintiff, a letter carrier, when he slipped and fell on a patch of ice on a sidewalk that intersects defendant’s driveway during his mail route. For approximately 20 years before the incident, plaintiff walked across the same portion of sidewalk “virtually every day” without slipping and falling. According to plaintiff, “[t]here [were] issues from time to time at this location because ... ice forms on the sidewalk”

where water from cars exiting the carwash, and water from the carwash itself, flows down the driveway. Accordingly, plaintiff typically followed “a sequence of events” when he crossed defendant’s driveway: he “walk[ed] up, s [aw] if there’s a car there, s[aw] if it’s icy, and pick[ed] a path.”

On February 6, 2010, the weather was cold and clear. When plaintiff approached the sidewalk that crosses defendant’s driveway,² he noticed that ice was on the pathway. He followed his usual “sequence of events,” but he testified at his deposition that the following events transpired:

The vehicle that was coming out of the car wash ... stopped. I was, like, okay, I’m going to pick my path through the ice on the sidewalk, and I noticed out of the corner of my eye that he’s pulling forward. I look up and he’s looking over his shoulder.... [T]he attendant was drying his car. [The driver] was looking over his right shoulder out—like, looked like he was looking out the back window, and he was going to run into me. I tried to quickly step out of the way. That’s when I fell. I had to pull myself backwards to keep him from running over me. He actually did drive over my satchel.

Plaintiff later clarified that he started to cross the driveway after he looked at the vehicle and saw that it was stopped, and he subsequently noticed the movement of the vehicle out of the corner of his eye, observing that the driver “[was] not looking where he’s going.” Plaintiff explained that he did not stop and wait for the vehicle to pass because he was standing directly in front of the vehicle when the driver was looking over his shoulder.

As plaintiff fell, he twisted his left ankle and collapsed onto his left leg. On the ground, he used his arms to “pull [him]self out because [the vehicle] was still coming forward.” The vehicle brushed against plaintiff’s arm, but it did not drive over plaintiff. When plaintiff was lying on the ground, the driver of the vehicle looked out his window at plaintiff and “just sh[ook] his head and took off.” Plaintiff sustained significant injuries to his left ankle from the fall, which required surgery and other treatment.

At his deposition, plaintiff stated that he did not know when the ice had accumulated on the sidewalk, but he believed that it was the type that “builds up” because he observed layers of ice in one of the photographs marked as an exhibit during the deposition. He also explained that the basis of his claim is that defendant did not attempt to keep the sidewalk free of ice prior to the accident, as he believed that there was no salt in the area when he fell, and the area has been free of ice since the incident because defendant

now salts the area regularly. Additionally, plaintiff acknowledged that he may refuse to deliver mail if he believes that it is unsafe to do so, and that it would have physically possible to cross the street and deliver mail to businesses located on the other side, but “things have to be delivered in a sequence to make sense.”

*2 Nehme Jaafar, an employee of defendant, testified at his deposition that he was working at the carwash when plaintiff fell. In the half-hour before the incident, he was “drying [off the cars] and salting.” As Jaafar was drying a vehicle outside of the carwash, he observed plaintiff walking toward him on the sidewalk. Jaafar gestured and verbally indicated to the driver of the vehicle that plaintiff was approaching, and the driver came to a complete stop. Jaafar believed that the driver saw plaintiff because he looked at plaintiff, nodded at Jaafar, and gave a “thumbs up” gesture. Additionally, he “kn[e]w that [the driver] wasn’t moving” because he had not finished drying the car. Jaafar also indicated that he told plaintiff that he could cross the driveway. He explained that plaintiff started walking while the car was at a complete stop, but plaintiff “got nervous, started moving his foot fast [sic] and slipped.” Jaafar stated that plaintiff never crossed in front of the vehicle, and when plaintiff fell on the ground, he was still on the passenger side of the vehicle. Jaafar confirmed that the vehicle left the premises while plaintiff was still on the ground.

During his deposition, Jaafar also acknowledged that water from the carwash crosses the sidewalk and flows down the slope of the driveway into the street, but he testified that the water was not freezing immediately as it washed out of the carwash on the day of the incident because they “had salt, a lot of salt,” and they were “instructed to salt every half-hour or if needed.” He testified that they put salt “all over the property,” including the sidewalk. However, Jaafar testified that he did not remember whether there was ice directly in front of the carwash when plaintiff fell.

On February 4, 2013, plaintiff filed a complaint against defendant in which plaintiff raised a negligence claim and a nuisance claim. As to the negligence claim, plaintiff alleged that (1) defendant owed a duty to plaintiff to clear or remedy hazards of ice and snow on defendant’s premises; (2) defendant breached this duty by failing to clear the accumulation of ice or snow on the premises and failing to prevent the unnatural accumulation of ice that was known to develop due to the operation of defendant’s business in subfreezing temperatures; (3) defendant’s negligent acts or omissions were the legal and proximate cause of plaintiff’s injuries; and (4) plaintiff suffered significant injuries due to defendant’s negligence. Regarding the nuisance claim, plaintiff alleged that (1)

defendant’s improper operation and maintenance of its premises—consisting of the slope in the driveway, which causes liquid to drip from the carwash onto the sidewalk and freeze in the winter, and the fact that drips of water from vehicles exiting the carwash accumulate on the sidewalk and freeze in the winter—resulted in a hazardous condition that constitutes a nuisance and poses an unreasonable risk of injury for plaintiff and members of the general public; (2) defendant failed to abate the nuisance despite its knowledge of the condition; and (3) “[a]s a result of [d]efendant’s negligent maintenance of the nuisance,” plaintiff suffered severe injuries.

*3 On March 4, 2013, defendant filed an answer to plaintiff’s complaint and notice of affirmative defenses. Defendant denied that it was liable to plaintiff and requested that the trial court dismiss plaintiff’s claims with prejudice. On March 4, 2013, defendant also filed a notice of affirmative and special defenses. On April 1, 2013, plaintiff filed an answer to defendant’s affirmative defenses. Apart from acknowledging that defendant may be entitled to some set-off, plaintiff denied all of defendant’s defenses and raised several arguments regarding his claims, which he later reiterated in his response to defendant’s motion for summary disposition.

On April 29, 2014, defendant filed a motion for summary disposition. Under [MCR 2.116\(C\)\(8\)](#) and [\(C\)\(10\)](#), defendant argued that plaintiff failed to state a claim upon which relief may be granted, and that plaintiff’s claims must fail as a matter of law, because plaintiff’s negligence claim is meritless due to the fact that an icy condition on a winter day is open and obvious, and plaintiff’s allegations of ice on a sidewalk cannot constitute a nuisance. Under [MCR 2.116\(C\)\(10\)](#), defendant also asserted that it was entitled to summary disposition as a matter of law because there was no genuine issue of material fact that defendant did not owe a duty to plaintiff.

In particular, defendant asserted that it is undisputed, based on plaintiff’s deposition testimony and the photographs of the sidewalk taken shortly after plaintiff fell, that “the icy condition as alleged was open and obvious and no special aspects existed as contemplated under Michigan law.” Defendant argued that the two exceptions to the open and obvious doctrine under [Lugo v. Ameritech Corp., Inc.](#), [464 Mich. 512; 629 NW2d 384 \(2001\)](#)—i.e., (1) when the open and obvious condition is effectively unavoidable, and (2) when the open and obvious condition presents an unreasonably high risk of severe harm—were not present in this case as a matter of law, citing caselaw indicating that icy conditions are not uniquely or unreasonably dangerous, and noting that plaintiff observed the icy condition “and could have walked around it, over it [,] or even delivered

[mail] to the [d]efendant's address at a later time." Additionally, defendant asserted that plaintiff's nuisance claim must fail as a matter of law because ice on a sidewalk as alleged does not constitute a nuisance and, under Michigan law, a nuisance is a condition, not an act or failure to act, and the basis of plaintiff's claim is that defendant did not distribute any salt, or enough salt, on the sidewalk, which is an alleged failure to act. Finally, defendant contended that plaintiff had failed to establish that defendant had actual or constructive notice of the condition, which is a required element of a premises liability claim.

On May 23, 2014, plaintiff filed a response to defendant's motion for summary disposition. Plaintiff conceded that the ice was an open and obvious condition, but argued that the hazardous condition falls under the effectively unavoidable exception to the open and obvious doctrine because plaintiff was required to hurry across the ice while he was "pick[ing] his way through the hazard"—and, therefore, was required to confront the hazardous condition—in order to avoid being struck by a vehicle leaving the carwash. As such, plaintiff argued that the exiting car constituted an extenuating circumstance that made the ice effectively unavoidable under *Hoffner v. Lanctoe*, 492 Mich. 450; 821 NW2d 88 (2012). Likewise, he disputed defendant's argument that he could have crossed the street to continue delivering the mail or refused to deliver the mail by providing a detailed explanation of his route and explaining why crossing the street was impractical or impossible, such that the condition was effectively unavoidable for "all practical purposes." *Hoffner*, 492 Mich. at 468–469.

*4 Plaintiff also asserted that he had stated a viable nuisance claim under *Betts v. Carpenter*, 239 Mich. 260, 265; 214 NW 96 (1927), *Morton v. Goldberg*, 166 Mich.App 366, 368–369; 420 NW2d 207 (1988), *Skogman v. Chippewa Co. Rd. Comm.*, 221 Mich.App 351, 354; 561 NW2d 503 (1997), and *Williams v. Dep't of Transportation*, 206 Mich.App 71, 73; 520 NW2d 342 (1994), because "[d]efendant created the unnatural accumulation of ice which represents a known and ongoing nuisance" to anyone who walks on the sidewalk. Additionally, plaintiff contended that summary disposition was improper because genuine issues of material fact exist regarding his premises liability claim and his nuisance claim, including whether plaintiff was compelled by extenuating circumstances to cross the hazard, whether plaintiff reasonably feared that the vehicle was about to strike him, whether defendant was negligent, whether defendant took reasonable measures to abate the hazard, and whether the accumulation of ice was natural or unnatural. Finally, plaintiff argued that defendant had

notice of the condition in light of the photographic evidence, Naafar's deposition testimony, and the police report from the incident.

On June 3, 2014, the trial court held a hearing on defendant's motion for summary disposition, and the parties presented arguments consistent with those raised in their briefs. The trial court granted defendant's motion "on both counts" and provided the following reasoning: "It is unfortunate that he had the injury to his leg, severe injury to his leg; however, the case law on open and obvious, I mean this is A, daylight; B, it's clear there's ice, cars coming out of the car wash. I mean it's clearly open and obvious." On June 10, 2014, the trial court entered an order granting defendant's motion for summary disposition for the reasons stated on the record and dismissed plaintiff's claims against defendant.

II

This Court reviews de novo a trial court's grant or denial of summary disposition. *Moraccini v. Sterling Hts.*, 296 Mich.App 387, 391; 822 NW2d 799 (2012). Although defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), it is apparent from the trial court's statements on the record that the court considered evidence outside of the pleadings. As such, we review the trial court's decision as though it was made under MCR 2.116(C)(10). *Haynes v. Vill. of Beulah*, 308 Mich.App 465; — NW2d — (2014) (Docket No. 317391); slip op at 2.

When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court may only consider, in the light most favorable to the party opposing the motion, the evidence that was before the trial court, which consists of "the affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties." " *Calhoun Co. v. Blue Cross Blue Shield Michigan*, 297 Mich.App 1, 11–12; 824 NW2d 202 (2012), quoting MCR 2.116(G)(5). Under MCR 2.116(C)(10), "[s]ummary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v. Barton Malow Co.*, 480 Mich. 105, 111; 746 NW2d 868 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419, 425; 751 NW2d

8 (2008). “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v. Shupe*, 282 Mich.App 1, 5; 763 NW2d 1 (2008).

III

*5 Plaintiff first argues that the trial court erred in granting summary disposition with regard to his premises liability claim because there were, at a minimum, genuine issues of material fact regarding whether the facts of this case fall under the effectively unavoidable exception to the open and obvious doctrine.³ We disagree.

“A plaintiff who brings a premises liability action must show (1) the defendant owed [him] a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of [his] injury, and (4)[he] suffered damages.” *Bullard v. Oakwood Annapolis Hosp.*, 308 Mich.App 403, 408; 864 NW2d 591 (2014) (quotation marks and citation omitted). “The duty owed to a visitor by a landowner depends on whether the visitor was a trespasser, licensee, or invitee at the time of the injury.” *Id.* (quotation marks and citation omitted). The parties do not dispute that plaintiff was an invitee on defendant’s premises.

With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner’s land. Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect. [*Hoffner*, 492 Mich. at 460 (footnote omitted).]

However, “[t]he possessor of land ‘owes no duty to protect or warn’ of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid.” *Id.* at 460–461. Here, the parties do not dispute that the ice on which plaintiff slipped and fell was

open and obvious. Accordingly, the viability of plaintiff’s premises liability claim turns on whether the claim includes “special aspects” and, therefore, falls under the “limited exception to the circumscribed duty owed for open and obvious hazards,” which allows “liability [to] be imposed ... for an ‘unusual’ open and obvious condition that is ‘unreasonably dangerous’ because it ‘present[s] an extremely high risk of severe harm to an invitee’ in circumstances where there is ‘no sensible reason for such an inordinate risk of severe harm to be presented.’” *Id.* at 462 (second alteration in original).

There are only two types of situations when the special aspects of an open and obvious hazard may give rise to liability:

[(1)] when the danger is *unreasonably dangerous* or [(2)] when the danger is *effectively unavoidable* . In either circumstance, such dangers are those that “give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided” and thus must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards. Further, we have recognized that neither a common condition nor an avoidable condition is uniquely dangerous.... [*Id.* at 462–63 (footnotes omitted).]

*6 Specifically regarding effectively unavoidable hazards, the Court stated:

The “special aspects” exception to the open and obvious doctrine for hazards that are effectively unavoidable is a *limited* exception designed to avoid application of the open and obvious doctrine only when a person is subjected to an unreasonable risk of harm. Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. Our discussion of unavoidability in *Lugo* [, 646 Mich. 512,] was tempered by the use of the word “effectively,” thus providing that a hazard must be unavoidable or inescapable in effect or for all practical purposes. *Accordingly, the standard for “effective unavoidability” is that a person, for all practical purposes, must be required or compelled to confront a*

dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so. [*Hoffner*, 492 Mich. at 468–469 (footnotes omitted; first and last emphases added).]

This Court recently considered whether an icy condition was effectively unavoidable in *Bullard*. As in this case, the ice at issue was an open and obvious hazard, and, as a result, the only issue before the Court was “whether the ice on which [the plaintiff] slipped was (1) unreasonably dangerous in and of itself, or (2) effectively unavoidable for him.” *Bullard*, 308 Mich.App at 405. With regard to the effectively unavoidable exception, the Court stated:

Put simply, the plaintiff must be “effectively trapped” by the hazard. *Joyce v. Rubin*, 249 Mich.App 231, 242; 642 NW2d 360 (2002). The mere fact that a plaintiff’s employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable. See *Perkoviq [v. Delcor Homes–Lake Shore Pointe, Ltd.]*, 466 Mich. 11, 18; 643 NW2d 212 (2002)]; *Hoffner*, 492 Mich. at 471–472. [*Bullard*, 308 Mich.App at 411–412 (emphasis added).]

The Court found that the ice on which the plaintiff slipped was not effectively unavoidable because the plaintiff “had ample opportunity to avoid the ice.” *Id.* at 412. The Court noted that the plaintiff “confronted the ice after making multiple decisions, any one of which he could have decided differently and thus avoided the hazard.” *Id.* In particular,

[the plaintiff’s] fall was the end result of choices he made that could have been made differently. In no way was he “effectively trapped” by the ice—he consciously decided to put himself in a position where he would face the ice. After informing the hospital staff of the roof’s snowy condition on February 22, [the plaintiff] could have refused to inspect the generator the next day, and instead waited until the weather improved—the inspection was a monthly occurrence and not necessitated by an emergency. On February 23, he could have waited to inspect the generator until later in the morning, when daylight might have alerted him to the possible hazards of doing so. When he reached the roof, he could have turned back—but he did not. He could have returned inside at any point on his journey to the generator—at the stone walkway, at the second ladder, at the catwalk—and sought assistance. And, again, because his job duties entailed monthly inspections, he

had the option of speaking with his employer or to the hospital staff—as he did on February 22—regarding the conditions on the roof.

*7 In sum, there is nothing inescapable or inevitable about [the plaintiff’s] accident. His argument to the contrary, which is that he was required to face the ice by virtue of his employment, is unavailing, and similar arguments have been rejected by the Michigan Supreme Court. His job duties did not mandate that he encounter an obvious hazard. [*Id.* at 412–413 (citations and footnote omitted).]

We find that the facts of this case are analogous to *Bullard*. Here, as he did in the trial court, plaintiff provides an extensive explanation in his brief on appeal regarding why it was not practical for him to take another path in order to deliver mail to the businesses subsequent to defendant on his mail route. Specifically, he explains that he had already delivered mail to the carwash and, therefore, needed to walk westbound to the apartment building next to the carwash in order to continue on his route, opining that it was “impractical[,] if not impossible[,]” to take the alternate route delineated in his brief on appeal. However, plaintiff’s deposition testimony acknowledges that he was not inescapably required to confront the hazard under the circumstances of this case. *Hoffner*, 492 Mich. at 456. Plaintiff stated the following in response to defense counsel’s questions:

Q. [Y]ou could have gone across the street and delivered to those businesses as well, right?

A. Would it be physically possible?

Q. Yes.

A. Yes, but it would make no sense.

Q. But[,] in any event, you still had to deliver to businesses across the street from the car wash as well, correct?

A. Yes, but things have to be delivered in a sequence to make sense. I mean, I wouldn’t deliver, for instance, here and then drive to another part of the town and deliver there. That doesn’t make sense.

Plaintiff also expressly stated that he could refuse to deliver mail if he believed that it was unsafe, an acknowledgement by plaintiff that he was not required to continue on his usual route if he believed that it was too dangerous. Further, in light of plaintiff’s explanation of his route, it is apparent that plaintiff could have walked back to his vehicle and driven to safer location in order to continue his route

instead of crossing the sidewalk in front of the carwash, even if deviating from his usual course did not “make sense.”

Additionally, plaintiff argues that this case clearly falls under the “effectively unavoidable” exception because he was inescapably required to attempt to cross the ice in order to avoid being suddenly struck by a vehicle. As such, plaintiff asserts that the point in time at which this Court should determine whether the condition was effectively unavoidable is the time at which plaintiff was “confronted by the extenuating circumstance,” i.e., the time at which “the car almost struck [p]laintiff full-on and he had to either stay or move.” Plaintiff cites no authority in support of this position, and we decline to establish a bright-line rule in accordance with plaintiff’s argument. Nothing about the hazardous condition, i.e., the ice on which plaintiff fell, changed between the time at which plaintiff began to cross the ice and the time at which plaintiff believed that he would be struck by the vehicle exiting the carwash. As in *Bullard*, it is clear that plaintiff “confronted the ice after making multiple decisions, any one of which he could have decided differently and thus avoided the hazard.” *Bullard*, 308 Mich.App at 412. The record shows that plaintiff decided to encounter the icy condition after employing his typical thought process to determine whether to cross the sidewalk: each day, including on the day of the incident, he “walk[ed] up, s [aw] if there[] [was] a car there, s[aw] if it[] [was] icy, and pick[ed] a path.” (Emphasis added.) Therefore, it is apparent that plaintiff specifically considered the ice, which was open and obvious, and the possibility of the “extenuating circumstance” in this case, a car that was already emerging from the carwash, before choosing to cross the sidewalk in front of the carwash. As the Michigan Supreme Court stated in *Hoffner*, “situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so.” *Hoffner*, 492 Mich. at 468–469 (footnotes omitted). Therefore, we reject plaintiff’s argument that the icy condition subsequently became effectively unavoidable due to the alleged conduct of a car exiting the carwash.

*8 Therefore, on the record before us, reasonable minds could not differ in concluding that plaintiff was not “‘effectively trapped’ by the hazard,” *Bullard*, 308 Mich.App at 412, and that the ice on which plaintiff slipped was not characterized “by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome,” *Hoffner*, 492 Mich. at 468. Likewise, there is no genuine issue of material fact that the ice did not “give rise to a *uniquely* high likelihood of harm or severity of harm if the risk [was] not avoided,” especially given that, based on plaintiff’s deposition testimony, the situation that occurred in this case resulted from “risks posed by ordinary

conditions” at this particular location, i.e., vehicles exiting the carwash and ice that developed from water coming from the carwash. See *id.* at 462–463 (footnotes omitted). Accordingly, we conclude that the trial court properly granted defendant’s motion for summary disposition because it is undisputed that the ice was open and obvious and there is no genuine issue of material fact regarding whether the circumstances of this case fall under the effectively unavoidable exception to the open and obvious doctrine.⁴

Given our conclusions regarding the applicability of the effectively unavoidable exception, we need not address the additional genuine issues of material fact identified by plaintiff in his brief on appeal because these issues of fact are not sufficient to preclude summary disposition of plaintiff’s premises liability claim, as they have no effect on whether the ice was open and obvious or effectively unavoidable.

IV

Next, plaintiff argues that the trial court erred in granting summary disposition with regard to his public nuisance claim.⁵ We disagree.

Michigan courts have historically recognized two basic categories of nuisance: private nuisance and public nuisance. *Adkins v. Thomas Solvent Co.*, 440 Mich. 293, 302; 487 NW2d 715 (1992). “A private nuisance is a nontrespassory invasion of another’s interest in the private use and enjoyment of land,” *id.* at 302, while “[a] public nuisance is an unreasonable interference with a common right enjoyed by the general public,” *Cloverleaf Car Co v. Phillips Petroleum Co.*, 213 Mich.App 186, 190; 540 NW2d 297 (1994). In his brief on appeal, plaintiff acknowledges that he raised a public nuisance claim.

With regard to a public nuisance,

[t]he term “unreasonable interference” includes conduct that (1) significantly interferes with the public’s health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature

that produces a permanent or long-lasting, significant effect on these rights. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. [*Id.* (citations omitted).]

*9 The Michigan Supreme Court has defined a public nuisance “as involving not only a defect, but threatening or impending danger to the public,” and “an act [that] offends public decency.” *Michigan ex rel Wayne Co. Prosecutor v. Bennis*, 447 Mich. 719, 731; 527 NW2d 483 (1994) (quotation marks and citations omitted). “[T]he activity must be harmful to the public health, ... create an interference in the use of a way of travel, ... affect public morals, or prevent the public from the peaceful use of their land and the public streets.” *Id.*, quoting *Garfield Twp. v. Young*, 348 Mich. 337, 342; 82 NW2d 876 (1957) (quotation marks omitted). “A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise.” *Cloverleaf*, 213 Mich.App at 191.

Even if we assume, without deciding, that the trial court erred in granting summary disposition of plaintiff’s public nuisance claim on the basis that the condition was open and obvious, we conclude that summary disposition was proper under MCR 2.116(C)(10) because there is no genuine issue of material fact regarding whether plaintiff has a viable public nuisance claim. See *Gleason*, 256 Mich.App at 3. Contrary to plaintiff’s characterization of the harm that he suffered, plaintiff has failed to show that he suffered a type of harm that is different from the type of harm that the general public would have suffered when encountering the icy sidewalk. *Cloverleaf*, 213 Mich.App at 190; see also *Towne v. Harr*, 185 Mich.App 230, 232; 460 NW2d 596 (1990) (“However, our Supreme Court has long recognized the propriety of private citizens bringing actions to abate public nuisances, arising from the violation of zoning ordinances or otherwise, when the individuals can show damages of a special character distinct and different from the injury suffered by the public generally.” [Emphasis added.]). Plaintiff argues that the nature of his injury was different because he suffered a shattered ankle that resulted in multiple surgeries, additional therapy, continuing pain, and ongoing dysfunction, and the public only experienced the inconvenience of having “to avoid or try and walk across or around the icy condition .” However, this appears to be a false distinction that is not supported by the record,

as the deposition testimony indicates that plaintiff sustained his injuries while he was attempting to walk across or “pick [a] path” around or through the icy condition, which demonstrates that that the nature of plaintiff’s harm was not different from that experienced by the general public. Likewise, a patch of ice on the sidewalk creates a danger of sustaining injuries by slipping and falling on the slippery surface, which is the danger that causes the public’s “inconvenience” of attempting to avoid the condition, and is exactly the type of harm experienced by plaintiff in this case. Therefore, we find that plaintiff does not have standing to raise a public nuisance action against defendant. See *Cloverleaf*, 213 Mich.App at 190.

*10 However, even we assume, arguendo, that plaintiff has standing to bring a public nuisance claim and that defendant’s conduct is proscribed by law, there is no genuine issue of material fact regarding whether the ice “significantly interferes with the public’s” safety or convenience, or whether the ice was “of a continuing nature that produces a permanent or long-lasting, significant effect on the rights of the public.” *Id.* (emphasis added). There is no dispute that the icy condition only develops when water on the driveway freezes in the winter; thus, the condition is not permanent. Likewise, there is nothing in the record that rebuts plaintiff’s own testimony indicating that the ice did not cause a significant interference with, or significantly affect, the public’s health, safety, or convenience in utilizing the sidewalk at issue, even if the ice was “long-lasting” during the winter months. Plaintiff expressly stated that had walked across the sidewalk at issue on an almost-daily basis for 20 years, even though there were “issues from time to time at this location because ... ice forms on the sidewalk.” Moreover, plaintiff’s own characterization of the harm experienced by the public in his brief on appeal also indicates that the harm was not significant: “Here, the general public exercising its right to use the sidewalk merely had to avoid or try and walk across or around the icy condition. Its only harm was this inconvenience.” Therefore, viewing the record in the light most favorable to the plaintiff, we conclude that reasonable minds could not differ in concluding that plaintiff has failed to demonstrate a viable public nuisance claim. See *Allison*, 481 Mich. at 425.⁶

Given our conclusion that there is no genuine issue of material fact that precludes summary disposition of plaintiff’s premises liability and public nuisance claims, we need not address the other arguments raised by the parties on appeal, including, *inter alia*, whether defendant’s conduct constitutes a nuisance in fact and whether plaintiff demonstrated that defendant had notice of the icy condition.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to [MCR 7.219](#).

Not Reported in N.W.2d, 2015 WL 5311590

All Citations

Footnotes

- 1 Plaintiff's appeal does not involve any of his claims against John Doe, the unidentified driver who was exiting the carwash when plaintiff sustained his injuries. Additionally, plaintiff has not appealed the trial court's order granting summary disposition in favor of defendant State Farm, which dismissed with prejudice plaintiff's claims against State Farm, and his claims against State Farm are not relevant to this appeal. As such, we will refer to defendant Northville City Car Wash, LLC, as "defendant," and we do not discuss the allegations or procedural history related to the other defendants.
- 2 The parties did not dispute whether the sidewalk was part of defendant's premises or a public sidewalk in the trial court.
- 3 Because we find that the trial court granted summary disposition under [MCR 2.116\(C\)\(10\)](#), we need not consider plaintiff's argument that plaintiff stated a claim upon which relief may be granted, such that summary disposition was improper under [MCR 2.116\(C\)\(8\)](#).
- 4 Even if the trial court erred in failing to decide on the record whether the facts of this case fall under the effectively unavoidable exception, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v. Michigan Dep't of Transp.*, 256 Mich.App 1, 3; 662 NW2d 822 (2003).
- 5 As stated above, because we find that the trial court granted summary disposition under [MCR 2.116\(C\)\(10\)](#), we need not consider plaintiff's argument that plaintiff stated a claim upon which relief may be granted, such that summary disposition was improper under [MCR 2.116\(C\)\(8\)](#).
- 6 In light of our conclusion that plaintiff failed to demonstrate a genuine issue of material fact with regard to the requisite elements of a public nuisance claim, we need not address the additional genuine issues of material fact identified by plaintiff in his brief on appeal because these issues of fact are not sufficient to preclude summary disposition.

2015 WL 9257937

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Faye MILTON, Plaintiff–Appellant,

v.

Joe RANDAZZO’S FRUIT AND VEGETABLE,
INC., Defendant–Appellee.

Docket No. 323521.

|

Dec. 17, 2015.

Wayne Circuit Court; LC No. 12–015423–NO.

Before: SAWYER, P.J., and BECKERING and
BOONSTRA, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals by right the trial court’s order granting defendant’s motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of an incident that occurred on May 11, 2010 at a grocery store owned by defendant. The facts are largely undisputed. Plaintiff visited the store on a rainy day, and after shopping for roughly five minutes, she asked an employee to direct her to the restroom. To access the restroom, plaintiff had to proceed through an area she described as a “small hallway” or “open area.” The restroom was located at the top of two steps at the end of the hallway. According to plaintiff, the hallway was dark, so plaintiff walked slowly, feeling along the wall for a light switch. As she moved forward in the dark, she encountered the steps that led to the restroom. She stepped up and fell. Her complaint does not allege the cause of her fall, but does reference both the inadequate nature of the lighting in the area and alleged “hazards and dangerous conditions, including hazards unknown slippery substances.”

However, at her deposition, she testified that she tripped over the steps at the end of the hallway, and noticed that the floor was wet when she attempted to rise.

Plaintiff suffered injuries from the fall. She filed suit, alleging that defendant was negligent in failing to maintain safe conditions in the area leading to the restroom. Defendant moved for summary disposition on the ground that plaintiff’s claim was barred by the open and obvious doctrine, which motion the trial court granted. Plaintiff then filed a motion for reconsideration, arguing that there was at least a genuine issue of material fact regarding whether the alleged dark condition of the hallway and the alleged slippery condition of the steps were open and obvious. The trial court held in its order denying reconsideration that plaintiff had failed to identify the cause of her fall, having argued both that she “tripped” on the step and that her feet “slipped,” merely speculating that “[i]t must have been a liquid.” The trial court further held that the dark condition of the hallway was open and obvious. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court’s decision on a motion for summary disposition. *Moser v. Detroit*, 284 Mich.App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment ... as a matter of law.” “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v. Gen. Motors Corp.*, 469 Mich. 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc. v. Gen. Shale Brick, Inc.*, 284 Mich.App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v. Wexford County*, 287 Mich.App 406, 415; 789 NW2d 211 (2010). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

*2 “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.” *Sanders v. Perfecting Church*, 303 Mich.App 1, 4; 840 NW2d 401 (2013), citing *Benton v. Dart Props. Inc.*, 270 Mich.App 437, 440; 715 NW2d 335 (2006). Plaintiff was an invitee, because she visited defendant’s store for business purposes. See *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 597; 614 NW2d 88 (2000). A possessor of land is liable to an invitee for injuries when the possessor: “(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, (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.” *Prebenda v. Tartaglia*, 245 Mich.App 168, 169; 627 NW2d 610 (2001).

Notwithstanding these duties, a premises possessor has no duty to warn invitees of dangers that are open and obvious. *Lugo v. Ameritech Corp, Inc*, 464 Mich. 512, 517; 629 NW2d 384 (2001). A danger is open and obvious when an “invitee might reasonably be expected to discover them.” *Id.* at 516. However, “if special aspects of a condition make even an open and obvious danger unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.” *Id.* In deciding whether there are such special aspects:

the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly ‘special aspects’ of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the “special aspect” of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517–518.]

Examples of unreasonable risks of harm include situations in which the risk is effectively unavoidable, or where a danger, though open and obvious, carries a “substantial risk of death or severe injury,” such as a thirty-foot deep pit in a parking lot. *Id.* In contrast, a pothole in a parking lot does not impose a duty, because it is open and obvious, and because “unlike falling an extended distance, it cannot be

expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury.” *Id.* at 520.

Plaintiff seems to argue that the dark condition of the hallway was not open and obvious. As the trial court pointed out, an average person of ordinary intelligence who conducted a casual inspection of a hallway would notice the darkness. See *Price v. Kroger Co of Michigan*, 284 Mich.App 496, 499; 733 NW2d 739 (2009) (holding that there is no liability where “an average person of ordinary intelligence [would] discover the danger and the risk it presented on casual inspection[.]” (Citation omitted)). Therefore, the dark condition was open and obvious and defendant owed plaintiff no duty absent special aspects. *Id.* at 517–518.

*3 While not clear from her brief, plaintiff may be endeavoring to argue, notwithstanding that the dark condition of the hallway was open and obvious, that the danger was unavoidable, or that the steps and the slippery condition of the steps made the hallway unreasonably dangerous. As the trial court noted, however, the hallway leading to the restroom was avoidable, because plaintiff could have chosen not to use the restroom, or could have asked an employee to turn on a light before she went inside. *Lugo* expressly held that tripping and falling to the ground, unlike falling a long distance into a pit, does not typically carry a risk of severe injury, meaning an area that poses a risk of such a fall is not unreasonably dangerous. *Lugo*, 464 Mich. at 519–20. Regardless of whether plaintiff slipped on water or tripped on a step, plaintiff has presented no issue of material fact regarding whether the dangers she faced were avoidable.

Plaintiff also appears to argue that it was unreasonably dangerous for steps to be present in the hallway leading to the bathroom. However, steps are “an everyday occurrence,” and a reasonable person will take “appropriate care for his own safety” when encountering them. *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 616; 537 NW2d 185 (1995). We thus conclude the trial court did not err in holding that the darkened condition of the hallway, regardless of the presence of steps, was open and obvious.

Further, with regard to the liquid allegedly on the steps, plaintiff has not established that the liquid was a proximate cause of her fall. See *Sanders*, 303 Mich.App at 4 (“[i]n a premises liability action, a plaintiff must prove the elements of negligence”). Causation cannot be proven with mere conjecture. *Skinner v. Square D. Co.*, 445 Mich. 153, 164; 516 NW2d 475 (1994).

On appeal, plaintiff argues that the slippery condition of the steps caused her fall: “my feet slipped out from under me because the floor and steps had a slippery substance that made me fall face forward.” However, appellate review of a motion for summary disposition under *MCR 2.116(C)(10)* “is limited to the evidence that had been presented to the circuit court at the time the motion was

decided.” *Innovative Adult Foster Care, Inc. v. Ragin*, 285 Mich.App 466, 476; 776 NW2d 398 (2009), citing *Peña v. Ingham Co. Rd. Comm.*, 255 Mich.App 299, 313 n 4; 660 NW2d 351 (2003). In her deposition testimony, plaintiff stated that she walked into a step that she could not see because of the darkness, which caused her fall. Although she also made reference to the floor being “slippery,” she could not establish that she fell because of a liquid on the steps or floor; rather, she stated that she noticed that the floor was slippery while trying to get up after her fall. Thus, even taking the evidence in the light most favorable to the plaintiff, *Liparoto Constr., Inc.*, 284 Mich.App at 29, she did not establish a genuine question of material fact regarding whether the liquid allegedly on the steps or floor was the cause of her fall, but merely speculates on appeal

that it was the cause.

*4 The trial court did not err in granting summary disposition to defendant on the ground that the hazard was open and obvious.

Affirmed.¹

All Citations

Not Reported in N.W.2d, 2015 WL 9257937

Footnotes

- ¹ In her brief on appeal, plaintiff appears to allege misconduct on the part of the trial court and defense counsel, and violations of the Michigan Professional Rules of Conduct by both attorneys and the trial judge. We have reviewed the record in this case and, as best as this Court can understand plaintiff’s claims, find them to be without evidentiary support.

2014 WL 2983357

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Ruth PATTERSON, Plaintiff–Appellant,

v.

KNOLLWOOD VILLAGE ASSOCIATES LIMITED
PARTNERSHIP, d/b/a [Knollwood Village
Apartments](#), Defendant–Appellee.

Docket No. 314806.

|
July 1, 2014.

Genesee Circuit Court; LC No. 11–097345–NO.

Before: [MURRAY](#), P.J., and [JANSEN](#) and [SHAPIRO](#), JJ.

Opinion

PER CURIAM.

*1 In this premises-liability action, plaintiff appeals by right the trial court’s order granting defendant’s motion for summary disposition. We affirm.

This case arises out of injuries sustained by plaintiff, visiting her daughter at an apartment building owned by defendant. On appeal, plaintiff argues that the trial court erred by granting defendant’s motion for summary disposition and dismissing her negligence claim, and in doing so, erred in its application of the “open and obvious danger” doctrine. We disagree.

“This Court reviews de novo a trial court’s ruling on a motion for summary disposition.” [Anzaldua v. Neogen Corp](#), 292 Mich.App 626, 629; 808 NW2d 804 (2011). A motion for summary disposition under [MCR 2.116\(C\)\(10\)](#) tests the factual sufficiency of the complaint. [Joseph v. Auto Club Ins Ass’n](#), 491 Mich. 200, 206; 815 NW2d 412 (2012). “This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” [Auto Club Group Ins Ass’n v. Andrzejewski](#), 292 Mich.App 565, 569; 808 NW2d 537 (2011). Summary disposition “is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” [McCoig Materials, LLC v. Galui Const, Inc](#), 295

[Mich.App 684, 693; 818 NW2d 410 \(2012\)](#). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ.” [Bronson Methodist Hosp v. Auto–Owners Ins Co](#), 295 Mich.App 431, 441; 814 NW2d 670 (2012).

Defendant filed a motion for summary disposition under [MCR 2.116\(C\)\(10\)](#), contending that plaintiff’s negligence claim should be dismissed because the snow and ice on which plaintiff slipped was an open and obvious condition, there were no “special aspects” which rendered the open and obvious condition unreasonably dangerous, the snow-covered curb and black ice complained of were not “effectively unavoidable,” and that it had no notice of the alleged “defect.” Plaintiff countered by asserting that the condition which led to her injuries was not open and obvious, but did not respond to the balance of defendant’s arguments. The trial court ruled that the condition was “clearly open and obvious,” and granted defendant’s motion.

The duty that an owner or occupier of land owes to a visitor depends on the status of the visitor at the time of the injury. [Stitt v. Holland Abundant Life Fellowship](#), 462 Mich. 591, 596; 614 NW2d 88 (2000); [Sanders v. Perfecting Church](#), 303 Mich.App 1, 4; 840 NW2d 401 (2013); [Bialick v. Megan Mary, Inc](#), 286 Mich.App 359, 362; 780 NW2d 599 (2009). A visitor can be a trespasser, a licensee, or an invitee. [Stitt](#), 462 Mich. at 596; [Sanders](#), 303 Mich.App at 4. Here, it is undisputed by the parties that plaintiff was an invitee when she was at defendant’s premises on the night of her injuries.

*2 Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. [Hoffner v. Lanctoe](#), 492 Mich. 450, 460; 821 NW2d 88 (2012). However, this duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious that an invitee can be expected to discover them himself. [Ghafari v. Turner Constr Co](#), 473 Mich. 16, 21; 699 NW2d 687 (2005). An invitor is not required to protect against or warn of open and obvious dangers unless he should anticipate the harm despite the invitee’s knowledge of it. [Hoffner](#), 492 Mich. at 460–461; [Ghaffari](#), 473 Mich. at 21–22; [Buhalis v. Trinity Continuing Care Servs](#), 296 Mich.App 685, 693; 822 NW2d 254 (2012). Whether a danger is open and obvious depends upon whether an average user with ordinary intelligence would have been able to discover the danger upon casual inspection. [Hoffner](#), 492 Mich. at 461.

A premises owner has a duty to use reasonable care to diminish the hazards of ice and snow accumulation. [Id.](#) at

464. However, wintry conditions can be open and obvious such that a reasonably prudent person would foresee the danger and the premises owner's duties are thus narrowed. *Id.* If the condition is open and obvious, liability arises only if there were special aspects to the condition. *Id.* This is an objective standard, and the relevant inquiry is "whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v. Blarney Castle Oil Co*, 281 Mich.App 474, 479; 760 NW2d 287 (2008).

In determining whether a danger presents an unreasonable risk of harm despite being open and obvious, a court must consider whether special aspects exist, such as a condition that is unavoidable or that poses an unreasonably high risk of severe injury. *Hoffner*, 492 Mich. at 461. The determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Lugo v. Ameritech Corp*, 464 Mich. 512, 523–524; 629 NW2d 384 (2001); *Jimkoski v. Shupe*, 282 Mich.App 1, 7; 763 NW2d 1 (2008). A hazard is effectively unavoidable if a person, for all practical purposes, is required to confront the hazard. *Hoffner*, 492 Mich. at 469.

The analysis of the instant case must begin with plaintiff's admitted familiarity with the weather conditions in Michigan during the winter months. Plaintiff concedes that, having grown up in Michigan, she knows that snow and ice is slippery. As a resident of Michigan, plaintiff should have anticipated that ice frequently forms beneath snow during snowy January nights. *Kenny v. Kaatz Funeral Home, Inc*, 264 Mich.App 99, 119; 689 NW2d 737 (2004), rev'd on other grounds 472 Mich. 929 (2005). Plaintiff testified that, while there were no overhead lights in the parking lot outside the apartment building, the light of the full moon was adequate to illuminate the snow so she could see it. She described the parking lot as uneven, with mounds of snow of varying depths where cars had been parked. In describing the incident, plaintiff said, "there was ice underneath the snow when my foot went down," and "[t]he snow covered the curb. And ... I thought I was stepping on solid ground, I actually stepped on the slant of the curb and my foot slid down."

*3 "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Buhalis*, 296 Mich.App at 694 (quotation marks and citation omitted). "[B]y its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v. Hartfield Lanes*, 271 Mich.App 61, 67; 718 NW2d 382 (2006).

In the present case, plaintiff observed the weather conditions on the night of the incident leading to her injuries. Although she knew of the potential hazards

presented by a visibly snowy and perhaps icy parking lot and surrounding area, she chose to ignore them when she put her foot onto what she thought was the snow-covered curb, intending to "step outside where the path was shoveled as far as I could reach." As she did so, plaintiff instead stepped on the "slant of th[e] curb." A reasonable person in plaintiff's position would have foreseen the danger and made a different decision. No genuine issue of material fact exists regarding whether the "mounds of snow," and the ice underneath, involved an open and obvious risk of harm.

In addition to her general awareness of the winter weather, plaintiff was familiar with the apartment building and environs, having been to it "once or twice a month" during the previous year to visit. Although plaintiff and her husband usually parked on a particular side of the building, on the evening of her injury, they chose to park on the other, unfamiliar, side of the building because they wanted to save their daughter the trouble of coming down the stairs to let them inside. While plaintiff's motive in parking where she did might have been altruistic, it cannot be said that she was without alternatives, such that the snow and ice that caused her fall was unavoidable. A hazard is effectively unavoidable if a person, for all practical purposes, is required to confront the hazard. *Hoffner*, 492 Mich. at 469. Here, when confronted with the snowy parking lot, plaintiff could have asked her husband to park in another location. She could have asked to be dropped off at a different spot or any number of alternatives to avoid the open and obvious conditions she observed. Plaintiff has not established a genuine issue of material fact concerning whether the snowy condition of the walkway was effectively unavoidable.

Plaintiff attempts to "refine" her argument on appeal, contending that the hazard that caused her fall was a parking lot curb, "hidden" within a snow bank, and not, as pleaded in her complaint and argued in the trial court, "black ice" and "mounds" or accumulation of snow and ice. The analysis is unchanged, as plaintiff knew of the existence of the curb and, more importantly, testified that she believed there was ice on it also: "it was very slippery." A condition is open and obvious if "it is reasonable to expect that an average person with ordinary intelligence would have discovered the condition upon a casual inspection." *Hoffner*, 492 Mich. at 461. A reasonable person, having casually inspected the area, would have perceived the mounds of snow and would have anticipated the underlying ice before disregarding the danger and stepping into it.

*4 In sum, it was beyond genuine factual dispute that the snow and ice was an open and obvious condition and did not have any "special aspects" that precluded application of the open and obvious danger doctrine. The trial court properly granted summary disposition in favor of

defendant.

Given our resolution of the issue, we need not address defendant's alternative argument that it lacked actual or constructive notice of the allegedly dangerous condition.

Affirmed. As the prevailing party, defendant may tax costs pursuant to [MCR 7.219](#).

[SHAPIRO](#), J. (concurring).

I concur in the result only.

All Citations

Not Reported in N.W.2d, 2014 WL 2983357

2009 WL 323390

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Cathy S. SHATTUCK and Daniel P. Shattuck,
Plaintiffs-Appellants,

v.

HOTEL BARONETTE, INC., Defendant-Appellee.

Docket No. 281065.

|
Feb. 10, 2009.

West KeySummary

1 Innkeepers
🔑 Bathrooms

A hotel patron could not recover in negligence from the hotel owner/operator for a broken wrist she suffered after allegedly slipping and falling while climbing out of the hotel room's bathtub. Slippery surfaces in the hotel bathroom were open and obvious dangers without any special aspects.

Oakland Circuit Court; LC No.2006-079093-NO.

Before: WILDER, P.J., and CAVANAGH and MURRAY, JJ.

Opinion

PER CURIAM.

*1 Plaintiffs appeal as of right the trial court's granting of defendant's motion for summary disposition in this premises liability case. We affirm.

Plaintiff's¹ claim arises from a November 29, 2003 stay at

the Hotel Baronette in Novi, Michigan, during which she broke her wrist after she slipped and fell climbing out of her hotel room's bathtub. Plaintiff brought a negligence suit on a premises liability theory, alleging that defendant breached its duty to plaintiff as an invitee by negligently installing a hard tile step next to an extra-deep bathtub. Plaintiff's complaint alleged that she slipped on the hard tile step abutting the exterior of the bathtub. However, during her deposition testimony plaintiff could not state with certainty whether she slipped on the interior of the bathtub, or the tile step on the exterior of the bathtub. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), contending that plaintiff failed to create a genuine issue of material fact as to causation, and alternatively that any wet, slippery surface near or inside of the bathtub constituted an open and obvious danger. The trial court granted defendant's motion on both grounds. On appeal plaintiff contends that the danger presented by either the interior of the bathtub or the exterior step was not an open and obvious hazard, and even if the danger was open and obvious, special aspects of the bathtub and tile floor made the hazard unreasonably dangerous. In addition, plaintiff argues there was sufficient evidence presented to the trial court to create a genuine issue of material fact regarding causation.

We review de novo a trial court's decision on a motion for summary disposition. *Brown v. Brown*, 478 Mich. 545, 551, 739 N.W.2d 313 (2007). When reviewing a motion brought under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* at 551-552, 739 N.W.2d 313. A moving party is entitled to summary disposition pursuant to MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." See *Lugo v. Ameritech Corp.*, 464 Mich. 512, 520, 629 N.W.2d 384 (2001). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ." *Campbell v. Kovich*, 273 Mich.App. 227, 229-230, 731 N.W.2d 112 (2006). The existence of a disputed fact must be established by admissible evidence as opposed to a mere possibility that the claim might be supported by evidence at trial. *Maiden v. Rozwood*, 461 Mich. 109, 121, 597 N.W.2d 817 (1999). Our review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Pena v. Ingham Co. Rd. Comm.*, 255 Mich.App. 299, 313, 660 N.W.2d 351 n4; 255 Mich.App. 299, 660 N.W.2d 351 (2003).

*2 In a negligence action a plaintiff must prove "(1) that defendant owed [plaintiff] a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4)

that defendant's breach caused plaintiffs' injuries." *Henry v. Dow Chem. Co.*, 473 Mich. 63, 71-72, 701 N.W.2d 684 (2005). The duty an owner or occupier of land owes to a guest is dependent on the status of that guest. *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 596, 614 N.W.2d 88 (2000). One who enters another's land on invitation for a commercial purpose where the essence of the relationship is a pecuniary interest on the part of a landowner is considered an invitee. *Id.* at 596-597, 604-605, 614 N.W.2d 88. Generally, "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, supra* at 516, 629 N.W.2d 384. "However, this duty does not generally encompass removal of open and obvious dangers." *Id.* An open and obvious danger is a danger and risk presented by that danger that an "average user of ordinary intelligence [would] have been able to discover ... upon casual inspection." *Novotney v. Burger King (On Remand)*, 198 Mich.App. 470, 475, 499 N.W.2d 379 (1993). This test is objective, and we look "not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in [plaintiff's] position would foresee the danger." *Hughes v. PMG Bldg., Inc.*, 227 Mich.App. 1, 11, 574 N.W.2d 691 (1997). Only if special aspects of a condition make an open and obvious risk unreasonably dangerous does the premises possessor have a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517, 629 N.W.2d 384.

Although plaintiff's complaint alleges she slipped on the hard "glazed" tile step on the exterior of the bathtub, during deposition testimony plaintiff offered conflicting testimony as to the surface on which she slipped. Plaintiff first stated that she slipped on the exterior step, then, when asked what caused her to fall, she stated "[t]he tub was slippery, the floor was slippery, the step was slippery." She also stated "I don't know if it was [the exterior step] or if it was the step inside the tub that caused [the fall]." Regardless whether plaintiff slipped on the floor, the exterior step, or the interior step, we find that all three surfaces posed open and obvious dangers without special aspects.

Plaintiff testified that when she was entering the bathtub, the floor, the exterior step and the interior of the bathtub were dry and not slippery. When plaintiff finished bathing she pulled the plug on the bathtub's drain. She did not wait for the water to fully empty before exiting the tub, and she did not dry off before stepping out of the bathtub. Plaintiff further testified that she was aware the exterior step was constructed of hard tile and that it did not have a non-slip surface on it; yet despite this awareness, she did not place a towel on the exterior step or floor surrounding the bathtub to absorb water and help protect her from slipping. Instead, plaintiff stepped out of the bathtub with wet feet and with water still on her body. Wet hard tile and a wet interior

bathtub step, each present an open and obvious hazard. Plaintiff acknowledged this hazard when she admitted during her testimony that stepping on a hard "glazed" tile surface with a wet foot increases one's chances of slipping. An "average user of ordinary intelligence [would] have been able to discover ... upon casual inspection" the risk posed by hard wet tile or the wet interior of a bathtub. *Novotney, supra* at 475, 499 N.W.2d 379. In addition, "a reasonable person in [plaintiff's] position would foresee the danger" posed by stepping out of a bathtub of water with wet feet onto a hard tile step or floor, or a hard interior bathtub step in a wet bathtub without waiting for the bathtub to fully drain or drying oneself off, or placing a towel or other apparatus in place to absorb the water. *Hughes, supra* at 11, 574 N.W.2d 691. No genuine issue of material fact existed on the issue whether the alleged dangerous conditions were open or obvious.

*3 Plaintiff also did not present evidence to create a genuine issue of fact as to whether the hard tile surrounding the exterior of the bathtub, and the interior bathtub step had special aspects that served to create an "unreasonably dangerous" condition. *Lugo, supra* at 517, 629 N.W.2d 384. In *Lugo*, the Michigan Supreme Court stated that special aspects "might involve" an open and obvious danger that is "effectively unavoidable" or possesses characteristics that "impose an unreasonably high risk of severe harm." *Id.* at 517-518, 629 N.W.2d 384. Here, plaintiff could have avoided any slippery surface she was about to encounter as she finished bathing by simply waiting for the tub to drain, drying her feet off before exiting the bathtub, or placing a towel on the step next to the bathtub to absorb water and provide a non-slip surface to step onto. Furthermore, the risk posed by the slippery surfaces did not pose an unreasonably high risk of severe harm. The *Lugo* Court provided an illustration of such a condition, "consider an unguarded thirty foot deep pit in the middle of a parking lot ... this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous ..." *Lugo, supra* at 518, 629 N.W.2d 384. In the instant case, while a slippery floor or step presents a danger, unlike a thirty-foot fall, plaintiff only faced a short fall to the ground and "[f]alling [even] several feet to the ground is not the same as falling an extended distance such as into a thirty-foot deep pit." *Corey v. Davenport College of Bus*, 251 Mich.App. 1, 7, 649 N.W.2d 392 (2002). Accordingly, we conclude on the record before us, the risk did not present an unreasonably high risk of severe harm. Because there were no special aspects making the risks posed by either the hard tiled surface, or the interior bathtub step unreasonably dangerous, these conditions were not removed from the open and obvious doctrine. *Lugo, supra* at 518, 629 N.W.2d 384.

We conclude that any risk posed by the slippery surfaces in the hotel bathroom were open and obvious dangers without any special aspects. Plaintiff's claim was therefore

barred, and the trial court properly granted defendant's motion for summary disposition on this basis. See *Lugo, supra* at 520-521, 629 N.W.2d 384. Because we affirm summary disposition on this ground, we need not address the issue of whether plaintiff presented sufficient evidence to create a genuine issue of material fact with respect to causation.

Affirmed.

All Citations

Not Reported in N.W.2d, 2009 WL 323390

Footnotes

- 1 Because Daniel Shattuck's interest in this case is derivative of that of his wife, Cathy Shattuck's case, the use of the singular word "plaintiff" will refer to Cathy Shattuck only.

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2016 WL 3004446

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Lashanda SNELL, Plaintiff–Appellant,
v.

AVALON PROPERTIES OF GRAND RAPIDS,
L.L.C. and Turf Plus Lawn Care and Plowing,
L.L.C., Defendants–Appellees.

Docket No. 327658.

|
May 24, 2016.

Kent Circuit Court; LC No. 14–003401–NO.

Before: O'BRIEN, P.J., and K.F. KELLY and FORT
HOOD, JJ.

Opinion

PER CURIAM.

*1 Plaintiff, Lashanda Snell, appeals as of right the circuit court's order granting summary disposition to defendants, Avalon Properties of Grand Rapids, L.L.C. and Turf Plus Lawn Care and Plowing, L.L.C., pursuant to [MCR 2.116\(C\)\(10\)](#) and denying her motion to amend her complaint. We affirm.

This premises-liability lawsuit arises out of plaintiff's slip and fall in the driveway of her apartment. Plaintiff rented an apartment from Avalon Properties during the time period at issue in this case. On the morning of December 20, 2013, plaintiff exited her apartment at approximately 8:00 a.m. to attend a pre-surgical consultation for a [hysterectomy](#) that was scheduled on January 6, 2014. Although she admittedly recognized the snowy and icy condition of her driveway—describing the snow and ice accumulation as “[l]ots of snow,” “past [her] ankles,” “[a]t least 3 inches,” and “mid-calf”—plaintiff nevertheless chose to attempt to access her vehicle, which she had parked in the driveway. While trying to do so, she slipped and fell. According to her deposition testimony, plaintiff's “[l]eft leg/foot planted in the snow, right leg/knee came down on the pavement.” Plaintiff subsequently filed this

lawsuit against Avalon Properties and Turf Plus, the snow-removal company, alleging that both failed to properly maintain her driveway.

Avalon Properties and Turf Plus both moved for summary disposition in response. Avalon Properties argued that plaintiff's claims were barred by the open-and-obvious-danger doctrine. Specifically, Avalon Properties argued that plaintiff's own deposition testimony demonstrated that the snowy and icy condition of the driveway was reasonably apparent upon casual inspection. Furthermore, Avalon Properties argued, plaintiff could have prevented her slip and fall entirely had she merely parked in her garage. Turf Plus argued that it owed no duty to plaintiff beyond its contractual obligations to Avalon Properties. Plaintiff responded, arguing that there remained a question of fact as to whether the snowy and icy conditions were effectively unavoidable. She also moved to amend her complaint to assert a claim under [MCL 554.139](#). In response to her motion to amend, Avalon Properties objected, contending that it should be denied in light of the fact that discovery and other filing deadlines had expired months before.

After hearing the parties' oral arguments, the circuit court granted defendants' summary-disposition motions. With respect to Avalon Properties, the circuit court concluded that the snowy and icy conditions were open and obvious. It also rejected plaintiff's argument that the conditions were effectively unavoidable in light of the fact that plaintiff could have parked in the garage. With respect to Turf Plus, the circuit court concluded that Turf Plus did not owe a separate and distinct duty to plaintiff. Thus, the circuit court granted both defendants' motions. In light of these conclusions, the circuit court additionally denied plaintiff's motion to amend her complaint. This appeal followed.

*2 On appeal, plaintiff first argues that, while the snowy and icy condition of the driveway was open and obvious, summary disposition was nevertheless improper because a question of fact remains as to whether it was effectively unavoidable. We disagree. We review a circuit court's decision on a motion for summary disposition *de novo*. [Veenstra v. Washtenaw Country Club](#), 466 Mich. 155, 159; 645 NW2d 643 (2002). In reviewing a motion for summary disposition pursuant to [MCR 2.116\(C\)\(10\)](#), courts are required to consider the pleadings, affidavits, and other evidence in a light most favorable to the nonmoving party. [Decker v. Flood](#), 248 Mich.App 75, 81; 638 NW2d 163 (2001). Summary disposition pursuant to [MCR 2.116\(C\)\(10\)](#) is appropriate “if the affidavits or other documentary evidence show that there is no genuine issue

of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

In premises-liability actions, plaintiffs must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach was the proximate cause of the plaintiff’s injury, and (4) that the plaintiff suffered damages, i.e., the elements of negligence. *Benton v. Dart Props, Inc.*, 270 Mich.App 437, 440; 715 NW2d 335 (2006). While a land possessor owes a duty of reasonable care to protect an invitee from unreasonable risks of harm posed by dangerous conditions on the land, that duty does *not* require a land possessor to protect an invitee from dangers that are open and obvious. *Id.* at 440–441. Open and obvious dangers cut off a land possessor’s duty because “there is an overriding public policy that people should take reasonable care for their own safety and this precludes the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable.” *Buhalis v. Trinity Continuing Care Servs.*, 296 Mich.App 685, 693–694; 822 NW2d 254 (2012) (citations and internal quotation marks omitted). A dangerous condition is open and obvious when “an average user with ordinary intelligence” would be “able to discover” it “upon casual inspection.” *Novotney v. Burger King Corp (On Remand)*, 198 Mich.App 470, 475; 499 NW2d 379 (1993).

For purposes of this appeal, it is undisputed that the snowy and icy condition of the driveway was, in fact, open and obvious. The only dispute raised by plaintiff is whether the condition was “effectively unavoidable.” We conclude that it was not. “The ‘special aspects’ exception to the open and obvious doctrine for hazards that are effectively unavoidable is a limited exception designed to avoid application of the open and obvious doctrine only when a person is subject to an unreasonable risk of harm.” *Hoffner v. Lanctoe*, 492 Mich. 450, 468; 821 NW2d 88 (2012). Under the “effectively unavoidable” exception, “a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*.” *Id.* (emphasis in original). Stated differently, “the standard for ‘effective unavoidability’ is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard.” *Id.* at 469 (emphasis in original). “[S]ituations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so.” *Id.* (emphasis in original).

*3 We agree with the circuit court in that the snowy and icy condition of the driveway was not effectively unavoidable under the facts and circumstances presented in this case. To begin, as the circuit court correctly recognized, plaintiff expressly admitted that she *chose* not to park in her garage. Instead, she *chose* to park in the driveway, knowing that, when she parked there, the snow-

removal company would not be able to plow around her vehicle. Furthermore, she *chose* to traverse the snowy and icy condition of her driveway rather than, for example, calling for alternative transportation. Additionally, and perhaps more importantly, there is nothing in the record to support her claim that she could not have simply rescheduled her consultation. While she frequently cited the importance of her appointment both before the circuit court and this Court, there is nothing in the record, other than her unsupported speculation, to support a conclusion that her pre-surgery consultation could not be rescheduled or needed to occur immediately. *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 213 Mich.App 186, 192–193; 540 NW2d 297 (1995) (“A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact.”). While she now claims that “[i]t is common knowledge that individuals usually wait lengthy periods of times to get into see a doctor and any rescheduling of an appointment could cause an individual to wait weeks if not months to see his or her doctor,” we do not believe that plaintiff’s subjective and unsupported views of what “common knowledge” “usually” stands for is sufficient to warrant reversal in this case.

The unavoidability of the snowy and icy condition presented in this case is analogous to the unavoidability of the snowy and icy conditions that have been presented in cases before this Court in the past. In *Joyce v. Rubin*, 249 Mich.App 231, 242; 642 NW2d 360 (2002), for example, this Court explained that a snowy and icy walkway was not effectively unavoidable when the plaintiff could have used an alternative route or used the same route on a different day. Specifically, this Court concluded that the plaintiff “was not effectively trapped inside a building so that she *must* encounter the open and obvious condition...” *Id.* (emphasis in original). Similarly, in *Hoffner*, 492 Mich. at 473, for example, our Supreme Court explained that a snowy and icy walkway was not effectively unavoidable when the plaintiff could have visited the fitness club on another day. Specifically, our Supreme Court concluded that the plaintiff “was not ‘trapped’ in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk.” *Id.* While rescheduling her appointment *might* have been inconvenient—although nothing in the record supports that claim either—plaintiff’s convenience is simply not the proper inquiry. *Cloverleaf Car Co.*, 213 Mich.App at 192–193. Instead, we look to whether she was effectively trapped in her home and compelled to encounter the snowy and icy condition of her driveway at that time. She was not.

*4 Creatively, plaintiff’s argument on appeal focuses on whether choosing to park in the garage or choosing to reschedule her appointment were practical choices. In

essence, she claims they were not. While she acknowledges them as “extreme example[s,]” she claims that “a choice always exists,” such as when “a person with a gun to their head can always say no and risk being shot,” when “[a] person could always lie down on the floor at their place of employment and not leave the premises,” or when “an individual could always stay in their apartment or home all winter and on every day there was any snow or ice around their vehicle or between their door and their car.” While we appreciate the point plaintiff is apparently trying to make, rescheduling a pre-surgical consultation for a [hysterectomy](#) in the future and remaining home presents a much more practical choice, at least in our view, than being shot in the head, sleeping at work, or winter-long hibernation. Accordingly, we conclude that the circuit court properly granted Avalon Properties’ summary-disposition motion.

On appeal, plaintiff also argues that the circuit court erred in denying her motion to amend her complaint to include a claim under [MCL 554.139](#). We disagree. Plaintiff claims that she should be able to amend her complaint to assert a claim under [MCL 554.139](#) because her counsel was “on extensive pain medication due to a [total knee replacement surgery](#) in the summer of 2014 [.]” While leave to amend pleadings “shall be freely given when justice so requires,” [MCR 2.118\(A\)\(2\)](#), a motion to amend may be denied for a variety of reasons including undue delay, bad faith, repeated failures to cure deficiencies, undue prejudice, or futility. [Diem v. Sallie Mae Home Loans, Inc.](#), 307 Mich.App 204, 216; 859 NW2d 238 (2014). A circuit court’s decision on a motion to amend is reviewed for an abuse of discretion. *Id.* at 215–216. “An abuse of discretion occurs when the trial court chooses an outcome falling outside a range of principled outcomes.” [PCS4LESS, LLC v. Stockton](#), 291 Mich.App 672, 676–677; 806 NW2d 353 (2011).

In this case, we conclude that the circuit court’s denial of plaintiff’s motion to amend did not fall outside the range of principled outcomes. First, it is important to point out that the July 21, 2014 scheduling order required all pleadings to be amended within 21 days and all motions to amend to be filed no later than August 29, 2014. Despite these clear time limitations, this motion to amend was not filed until May of the following year and after the close of discovery. Furthermore, plaintiff offers no argument against Avalon Properties’ position and the circuit court’s conclusion that any amendment to the complaint would be futile, see [Allison v. AEW Capital Mgt, LLP](#), 481 Mich. 419, 430; 751 NW2d 8 (2008) (concluding that [MCL 554.139](#) would apply “only under much more exigent circumstances than” when tenants are inconvenienced by “the accumulation of snow and ice in a parking lot”), and would prejudice Avalon Properties, see [Weymers v. Khera](#), 454 Mich. 639, 659; 563 NW2d 647 (1997) (concluding that a motion to amend may be denied when it will “prevent the opposing

party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment...”). Moreover, it is our view that in order to successfully demonstrate the circuit court abused its discretion, plaintiff is required to do more than simply state that her counsel was under the influence of pain medication during the summer of 2014. [Peterson Novelties, Inc v. City of Berkley](#), 259 Mich.App 1, 14; 672 NW2d 351 (2003). Finally, we would be remiss not to mention the fact that plaintiff’s counsel filed two amended complaints during the summer of 2014—one in June and one in August—which somewhat belies the idea that he was rendered unable to do so or unable to realize he failed to do so by his medication. Accordingly, we conclude that the circuit court properly denied plaintiff’s motion to amend.

*5 Lastly, we must briefly address plaintiff’s argument (or lack thereof) as it relates to Turf Plus’s liability in this lawsuit. Before the circuit court, Turf Plus argued that it was entitled to summary disposition pursuant to [MCR 2.116\(C\)\(8\) or \(C\)\(10\)](#) because it did not owe plaintiff a separate and distinct duty apart from its contractual duties with Avalon Properties. See, e.g., [Fultz v. Union–Commerce Assoc.](#), 470 Mich. 460, 468–470; 683 NW2d 587 (2004). The circuit court agreed, and plaintiff *does not* challenge this conclusion on appeal. Indeed, plaintiff requests only that we reverse the circuit court’s decision with respect to Avalon Properties. Thus, plaintiff has abandoned any argument that summary disposition with respect to Turf Plus was improper. [Peterson Novelties, Inc](#), 259 Mich.App at 14. Furthermore, summary disposition with respect to Turf Plus was appropriate for the same reasons as those articulated in [Fultz](#). Accordingly, we conclude that the circuit court properly granted Turf Plus’s summary-disposition motion.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to [MCR 7.219](#).

FORT HOOD, J. (dissenting).

*5 I respectfully dissent from the majority opinion. I disagree with the majority’s conclusion that plaintiff failed to establish a genuine issue of material fact in regard to her premises liability claim. Additionally, I believe that the trial court erred in denying plaintiff’s motion to amend her complaint. Accordingly, I would reverse the trial court and remand for further proceedings.

Regarding the premises liability claim, I would hold that there was a genuine issue of material fact whether the

danger at issue, the snow covered driveway, was effectively unavoidable . I agree with the majority that Michigan courts have determined that where a plaintiff has a choice whether to confront a dangerous condition, the condition is not effectively unavoidable . *Hoffner v. Lanctoe*, 492 Mich. 450, 468–269; 821 NW2d 88 (2012). Recently, our Court analyzed this issue in *Lymon v. Freedland*, — Mich.App —, —; — NW2d — (2016) (Docket No. 323926); slip op at 7–9. In *Lymon*, the plaintiff was a home health aide, who slipped on a snowy and icy driveway outside the home of an elderly patient. *Id.* at —; slip op at 8. This Court determined that there was a question of fact whether the driveway was effectively unavoidable . *Id.* at —; slip op at 8. The Court held that while the plaintiff alternatively could have “traversed the steep yard next to the driveway,” the evidence showed that this route “also contained slippery hazardous conditions.” *Id.* at —; slip op at 8. The Court concluded that there was a question of fact whether the driveway was effectively unavoidable . *Id.* at —; slip op at 9.

Here, there was an alternate route in that plaintiff had a garage in which she could park her car in lieu of parking in the driveway. However, I conclude that there was a question of whether the garage was available as an alternate route for plaintiff. Initially, I note that I am unconvinced by plaintiff’s claims that the garage was unavailable because she and her neighbor used the garage for storage. Plaintiff chose to occupy her garage with personal items instead of parking her vehicle there, and such a choice would not render the garage inaccessible. Moreover, plaintiff never asked her neighbors to move their belongings from her side of the garage. However, plaintiff also asserted that her garage door opener did not work, and claimed that her landlord knew of the malfunction but had not fixed the problem. The trial court stated that plaintiff’s deposition testimony revealed that, even assuming plaintiff’s garage door was not malfunctioning, it was clear that plaintiff had no intention of parking the car in her garage. However, that is a credibility determination not proper at summary disposition. The trial court is “not permitted to weigh the evidence or assess credibility on a motion for summary

disposition.” *Buhalis v. Trinity Continuing Care Servs*, 296 Mich.App 685, 705; 822 NW2d 254 (2012), citing *Skinner v. Square D Co*, 445 Mich. 153, 161; 516 NW2d 475 (1994). In addition, while the majority opines that plaintiff failed to prove that she could not cancel her doctor’s appointment, I would hold that whether plaintiff should have reasonably been expected to cancel her doctor’s appointment rather than encounter the snowy driveway also presented a question of fact for the jury.

*6 I would also hold that plaintiff should be entitled to amend her complaint to include a violation of MCL 554.139. Ultimately, I conclude that there was a question of fact whether the driveway was fit for the use intended pursuant to MCL 554.139(1)(a). In *Allison v. AEW Capital Management, LLP*, 481 Mich. 419, 429–430; 751 NW2d 8 (2008), the Court held that one to two inches of snow in a parking lot would not render a parking lot unfit. However, here, while plaintiff testified that she was able to park her vehicle in the driveway, she also testified that there was as much as 10 inches of snow in the driveway. Whether plaintiff could reasonably access her vehicle with 10 inches of snow in the driveway presents a question of fact appropriate for the jury. Moreover, while it was true that discovery closed and deadlines for amendment had passed, the court rules support amendment of the complaint. MCR 2.118(A)(2) (“Leave shall be freely given when justice so requires.”). Given my recommended disposition of the first issue, as well as the fact that much of the discovery already conducted pertains to this claim, I do not agree that defendants would be prejudiced by amendment of the complaint.

For the reasons stated, I would reverse and remand.

All Citations

Not Reported in N.W.2d, 2016 WL 3004446

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2011 WL 711443

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Deshean WILLIAMS, Plaintiff–Appellant,
v.
HOLIDAY VENTURES APARTMENTS, INC.,
Defendant–Appellee.

Docket No. 296051.

March 1, 2011.

Monroe Circuit Court; LC No. 08–026289–NO.

Before: [TALBOT](#), P.J., and [SAWYER](#) and [M.J. KELLY](#),
JJ.

Opinion

PER CURIAM.

*1 Deshean Williams challenges the grant of summary disposition in favor of Holiday Ventures Apartments, Inc. (hereinafter “Holiday”) in this premises liability action. We affirm.

On the evening of November 10, 2005, Williams and Rod Alford went to the Holiday apartment complex to assist another friend in moving. Williams and Alford entered the friend’s apartment building using the front entrance. Approximately 30 minutes after arriving, Williams and Alford left their friend’s apartment and exited the building using the rear entrance. The lighting at the rear entry was reported to be dim. The rear entrance was covered by an awning and contained a porch that was situated approximately one foot higher than the sidewalk that led up to the building. The sidewalk did not extend the entire width of the porch and was raised approximately three inches above the ground abutting the sidewalk. At the time of Williams’ fall, he contends that the area below the porch was covered in leaves, concealing the edge of the sidewalk and the lower ground level. Alford experienced no difficulty after stepping off the back porch. Williams

contends that he fell into a hole or a depression in the ground concealed by the leaves when he stepped off the back porch causing him to twist his ankle and incur an injury. The trial court granted summary disposition in favor of Holiday finding that the leaf covered walkway constituted an open and obvious danger, which contained no special aspects. We review the trial court’s grant of summary disposition de novo.¹

Because Williams’ legal status was that of an invitee, as the premises owner Holiday had “a duty ... to exercise reasonable care to protect [Williams] from an unreasonable risk of harm caused by a dangerous condition on the land.”² Holiday’s duty, however, “does not extend to open and obvious dangers ... unless a special aspect of the condition makes even an open and obvious risk unreasonably dangerous.”³ “Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection.”⁴ “[D]iffering floor levels, such as ... uneven pavement ... are ‘not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous.’”⁵

The leaf covered sidewalk in this circumstance is analogous to those cases involving snow covered walkways. This Court has repeatedly determined that, “by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery.”⁶ Consequently, the risk of a slip and fall due to ice concealed by a covering of snow fails to present sufficient special aspects to remove it from the open and obvious doctrine.⁷ Following the reasoning of these cases, encountering a leaf covered walkway in the autumn in Michigan is not an unusual or unexpected circumstance or condition. Such a situation would alert the average individual to the potential danger for either a slippery condition due to the presence of the leaves or the possibility of the existence of a hidden condition underneath the leaves. Williams acknowledged that he saw the leaf-covered sidewalk before stepping off the porch, thereby rendering the condition open and obvious to his casual observation. As a reasonable person would have foreseen the potential danger, the grant of summary disposition was proper.⁸

*2 We similarly reject Williams’ contention that a special aspect existed that would preclude the grant of summary disposition. Our Supreme Court has stated:

[W]ith regard to open and obvious dangers, the critical question is whether there is evidence that

creates a genuine issue of material fact regarding whether there are truly “special aspects” of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the “special aspect” of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.⁹

Examples of a “special aspect creating an unreasonable risk of harm may exist where ... the floor of the sole exit of a commercial building is covered with standing water, requiring persons to enter and exit through the water and creating an unavoidable risk” or the presence of “an unguarded 30-foot-deep pit in the middle of a parking lot.”¹⁰ As these examples illustrate, “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.”¹¹

Williams’ contention regarding the existence of a special aspect must fail for two reasons. First, the risk of injury presented by the height discrepancy between the ground level and the abutting sidewalk is not “sufficiently similar to those special aspects discussed [by our Supreme Court] to constitute a *uniquely high* likelihood or severity of harm and remove the condition from the open and obvious danger doctrine.”¹² Second, the risk was not unavoidable. Williams acknowledged accessing the building from an alternative entrance. Because Williams had a viable and convenient alternative for egress from the building, the condition of the back entry sidewalk did not present a special aspect for the imposition of liability.

Affirmed.

M.J. KELLY, J., (dissenting).

*2 This case arises out of an alleged fall that occurred on as Williams attempted to step from the porch onto the sidewalk at a building in Holiday Venture’s apartment complex. Williams and another man, Alford, had come to the apartment building in order to help a friend, who was a tenant, move. Although Williams had been to the complex before, he had never been to this particular building. The two men parked in a lot and entered through the front door.

After staying approximately one hour they decided to leave and exited through the rear door of the building because of its proximity to the parking lot. It was around 8:00 p.m. and dark outside. The area between the porch and lot, including the sidewalk, was covered heavily with leaves. Alford led the way and stepped off of the porch onto the ground without incident. As Williams stepped from the porch onto what he thought was a sidewalk abutting the bottom of the porch his foot did not land on a sidewalk, but instead an area of ground that had eroded and was approximately ten inches lower than the sidewalk. The depression could not be seen because it was covered by leaves and gave him the impression that it was, at least, level ground.¹ Williams broke his fibula when he twisted it and fell in the depression.

*3 The trial court, likening the condition to black ice under snow and a line of cases from this court that have determined that, in certain circumstances, a plaintiff can be deemed to have notice of the ice, found that the dangers posed from slipping or tripping over something concealed under the leaves presented an open and obvious condition. The majority agrees. I do not. While it cannot be seriously contested that the presence of fallen leaves on the ground in November in Michigan is an open and obvious condition, it does not follow that any hazard lurking beneath the leaves is also open and obvious. Here, Williams testified that he observed that the sidewalk and surrounding area was completely covered by leaves. But Williams did not simply slip on leaves that were in plain view or trip in an uncovered hole in the middle of a yard. Rather, he stepped from the stoop onto what he expected to be a concrete sidewalk and his foot sunk an unexpected ten inches into a depression that was unobservable due to it being covered by leaves. It would not be reasonable to expect that an average person would appreciate the danger posed by this hazard and casual inspection does not require Williams to stick an object through leaf cover to determine if his next step will be into a hole in the sidewalk.

The very quote cited by the majority from *Royce* demonstrates the lack of logic and torturing of precedent that has so plagued this doctrine: “ ‘by its very nature, a snow-covered surface presents an open and obvious danger because of the *high probability* that it may be slippery.’ ” Ante at —, quoting *Royce v. Chatwell Club Apartments*, 276 Mich.App 389, 393–394; 740 NW2d 547 (2007) (emphasis supplied). To be analogous to the present factual scenario, as the majority claims, we would have to conclude that, by its very nature, a sidewalk completely covered from view by leaves presents an open and obvious danger because of the *high probability* that there may be a ten inch deep hole underneath the leaves. This I am unwilling to do because it defies common sense and life experience. Indeed, the very opposite is true: there is a very low *possibility*, let alone *probability*, that there will be ten

inch holes in sidewalks.

The majority's extension of the open and obvious danger doctrine to a leaf-covered hole in a sidewalk is also contrary to the rule set down in *Lugo* that, "Where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition." *Lugo v. Ameritech Corp*, 464 Mich. 512, 516; 629 NW2d 384 (2001). In short, what the majority is attempting to craft is a rule whereby a premises owner may escape liability for dangerous conditions on their premises which they created or were aware of by merely showing that, if an invitee has some *general* knowledge of a potentially dangerous condition that may be present somewhere—anywhere—on the premises, he or she is charged with the *specific* knowledge of the exact condition that caused his or her injury, even if that condition is totally hidden from view.² As was recently noted in *Watts v. Michigan Multi-King*, — Mich.App —; — NW2d —

— (2010), such an expansive reading of the doctrine is essentially, "a broadened version of the assumption of risk doctrine, which, even in its narrower form, was abolished in Michigan 45 years ago." And, if this is now where the open and obvious danger doctrine has been extended in the jurisprudence of Michigan, then it really must be renamed, for it does violence to any known definitions of the words "open" or "obvious." The leaf-covered hole was not open and obvious and the trial court erred when it granted summary disposition in favor of Holiday Ventures on that basis.

*4 I would reverse.

All Citations

Not Reported in N.W.2d, 2011 WL 711443

Footnotes

1 *West v. Gen Motors Corp*, 469 Mich. 177, 183; 665 NW2d 468 (2003).

2 *Lugo v. Ameritech Corp, Inc*, 464 Mich. 512, 516; 629 NW2d 384 (2001).

3 *Royce v. Chatwell Club Apartments*, 276 Mich.App 389, 392; 740 NW2d 547 (2007) (citation omitted).

4 *Weakley v. Dearborn Hts*, 240 Mich.App 382, 385; 612 NW2d 428 (2000).

5 *Id.* at 386, quoting *Bertrand v. Alan Ford, Inc*, 449 Mich. 606, 614; 537 NW2d 185 (1995).

6 *Royce*, 276 Mich.App 393–394 (citation omitted).

7 *Id.* at 395–396.

8 *Royce*, 276 Mich.App at 392.

9 *Lugo*, 464 Mich. at 517–518.

10 *Royce*, 276 Mich.App at 395, citing *Lugo*, 464 Mich. at 518.

11 *Id.*, citing *Lugo*, 464 Mich. at 519.

12 *Id.* at 395–396.

1 A photograph submitted as documentary evidence in the summary disposition motion confirms the unorthodox design of the

sidewalk and the impression that one stepping off of the porch at that location would be landing on concrete.

- 2 Our precedents have been bedeviled by a pernicious fallacy that equates a general knowledge about the existence of certain classes of hazards with actual knowledge of the location of specific hazards within that class. The question is properly whether a reasonable person would notice the hazard under the totality of the circumstances and, after observing the hazard, would understand the nature and extent of the danger that it poses—not whether reasonable people generally understand that such hazards exist. See [Lugo, 464 Mich. at 516](#) (noting that the doctrine cuts off liability where the invitee should have discovered the condition at issue *and* realized its danger).

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