

STATE OF MICHIGAN  
COURT OF APPEALS

---

CANDANCE FURSTENBERG,

Plaintiff-Appellant,

v

BUBBLES GALORE and BUBBLES AND  
MORE, INC.,

Defendants-Appellees.

---

UNPUBLISHED

June 26, 2003

No. 239228

Genesee Circuit Court

LC No. 01-069543-NO

Before: Sawyer, P.J., and Meter and Schuette, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting summary disposition to defendants under MCR 2.116(C)(10) in this premises liability action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

While using defendant's car wash, plaintiff slipped and fell on ice that had formed on a sidewalk. The trial court granted defendants' motion for summary disposition, finding that the hazard was open and obvious.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

As a general rule, a landowner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm. However, the duty does not include the removal of open and obvious dangers. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3; 649 NW2d 392 (2002). A landowner is not required to protect an invitee from an open and obvious danger unless special aspects of the condition make it unreasonably dangerous. *Id.*, 4. Such special aspects are those that give rise to a uniquely high likelihood of harm or severity of the harm if the risk is not avoided. *Id.*

The test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented on

casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). The test is objective, and looks to whether a reasonable person would foresee the danger. *Id.*, 238-239.

In her deposition, plaintiff stated that she did not see the ice because she was looking at two men in front of her. A plaintiff's inattention is not a factor that removes a case from the open and obvious danger doctrine. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 522; 629 NW2d 384 (2001). The focus of the doctrine is on the objective nature of the condition, and not the subjective degree of care used by the plaintiff. *Id.*, 524. Where nothing concealed the ice, plaintiff failed to show a genuine issue of fact regarding the obviousness of the hazard.

Affirmed.

/s/ David H. Sawyer  
/s/ Patrick M. Meter  
/s/ Bill Schuette