

STATE OF MICHIGAN
COURT OF APPEALS

DUANE SLATER,

Plaintiff-Appellant,

v

MARVIN BRANDLE, BRANDLE
INVESTMENTS, LLC, and
BRANDLE CORPORATION, INC, a/k/a
BRANDLE REAL
ESTATE,

Defendants-Appellees.

UNPUBLISHED

June 23, 2005

No. 260867

Saginaw Circuit Court

LC No. 03-048980-NO

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this case involving a slip and fall accident, plaintiff appeals by right an order granting summary disposition to defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Plaintiff’s slip and fall occurred outside an office, or “depot” that was located in a mall in Bridgeport. The mall was owned by defendants who leased the office to plaintiff’s employer, GTech. Plaintiff was employed by GTech as a customer service representative. His duties included servicing Lottery and other equipment, and training customers. In the course of providing service support to customers, he and other service technicians routinely traveled to the office to obtain supplies. Plaintiff also used equipment located in the office. The lone entrance to the office was located at the back of the shopping center.¹

In the early morning of January 9, 2002, in response to a service page, plaintiff went to the office to obtain supplies. According to plaintiff, the area was unlit and dark, but not “pitch

¹ A second garage door also allowed entrance to the office but could only be unlocked from the inside of the building.

black.” Plaintiff parked near the entrance but did not leave his automobile running or his lights on. There was no snow on the ground. Plaintiff looked for ice on the ground and on the wall of the building, where it would normally be seen, but he did not see any. He approached the door, placed his key in the door and tried to open it, but could not do so.² Thinking that a box had fallen behind the door, he shoved the door with his left shoulder. The door flew open, his feet “went the opposite way,” and plaintiff fell. He continued to hold onto the door handle as he fell, and injured his left shoulder. Once he entered the building, plaintiff turned on the light and was able to observe a thin sheet of ice outside the door. He threw salt on the icy area. His subsequent inspection also revealed that a line of ice had formed on the inside of the doorjamb.

An ineffective drainage system on the roof of the building caused water to collect around the doorframe and puddle on the ground. On occasion, the lock would freeze. Under the terms of the lease, defendants were obligated to maintain and repair the exterior portions of the building. GTech employees, including plaintiff, had complained to defendants about the drainage problem, and several unsuccessful attempts had been made to fix the problem. Defendants’ attempt to repair the leaking gutter seam was likewise unsuccessful. Plaintiff and other employees were aware of the possibility of icing in front of the door and the nearby garage-style door, and GTech provided salt and other tools to remove ice, which were kept inside the office.

Plaintiff filed suit alleging negligence and public nuisance. The trial court granted summary disposition for defendants, finding that the dangerous condition involved was open and obvious and did not present any “special aspects” to allow recovery under a negligence theory. The trial court further held that plaintiff’s public nuisance claim was inappropriate because the office was not open to use by the public. The trial court refused to allow plaintiff to amend his complaint to add a claim for damages as a third-party beneficiary of the contract between defendants and GTech, finding that such an amendment would be futile.

II. STANDARD OF REVIEW

The parties and the trial court relied on matters outside the pleadings; thus, review under 2.116(C)(10) is appropriate. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). MCR 2.116(C)(10) provides for summary disposition where 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. “A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

² Plaintiff had previously had difficulty with the keyhole becoming frozen. He had not previously experienced the door failing to open after the key was inserted.

III. OPEN AND OBVIOUS

First, plaintiff argues that the trial court erred when it found that the icy condition that caused his injury was open and obvious. He further argues that, even if the condition was open and obvious, it possessed “special aspects” that rendered it “unreasonably dangerous” despite its open and obvious nature. We disagree.

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 duty caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Kosmalski ex rel Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). 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. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). 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 for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609- 610; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.* at 612. The open and obvious doctrine should not be viewed as an exception to the duty generally owed invitees, but rather, as an integral part of the definition of that duty. *Lugo, supra* at 516. Whether the unobstructed ice is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo, supra* at 517-518. But where no such special aspects exist, the "openness and obviousness should prevail in barring liability." *Id.*

While all accumulations of snow and ice are not open and obvious, "the open and obvious danger doctrine and principles concerning special aspects are equally applicable to cases involving the accumulation of snow and ice." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 106, 107-108; 689 NW2d 737 (2004). Thus, absent special circumstances, Michigan courts have generally held that when the plaintiff knew or had reason to know of the slippery conditions, the hazards presented by unobstructed ice and snow were open and obvious and did not impose a duty on the property owner to warn of or remove the hazard. See *Perkoviq v Delcor Homes-Lakeshore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002).

Here, plaintiff knew that defendant's building had a drainage problem above the door where he slipped. He knew that icing was a possibility and as a lifelong resident of Michigan, he should have been aware that ice frequently forms during cold January nights. Under these facts, the trial court correctly ruled that reasonable minds could not differ that the slippery condition of the doorway was open and obvious. *Novotney, supra*.

Finally, plaintiff has presented no evidence of the alleged "special aspects" of the icy doorway that created "a uniquely high likelihood of harm or severity of harm...." *Lugo, supra* at 518-519. This Court has previously held that a layer of snow on a sidewalk did not constitute a

unique danger creating a “risk of death or severe injury,” *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002), and that falling down ice-coated stairs likewise does not give rise to the type of severe harm contemplated in *Lugo*. *Corey v Davenport College of Business*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002). Ice in an outdoor doorway in Michigan in January is a common, not unique, occurrence. Under the *Lugo*, *supra* at 518-519, definition of "special aspects," ice and snow do not present "a *uniquely high* likelihood of harm or severity of harm." (Emphasis added.).

Plaintiff also argues that the allegedly icy condition was unavoidable because he had to enter the building to obtain supplies for his service call. However, this does not rise to the level of making his encounter with the allegedly icy condition "effectively unavoidable" such that it constituted an unreasonable risk of harm. See *Lugo*, *supra* at 518-519. Thus, plaintiff's argument that the slippery doorway presented "special aspects" is without merit because the condition was both common and avoidable. *Corey*, *supra*.

IV. PUBLIC NUISANCE

Next, plaintiff argues that the trial court improperly dismissed his claim of public nuisance.

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 (1995). “The 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.” *Id.*, citing *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990). A private citizen may file an action for a public nuisance only where he can show he suffered a type of harm different from that of the general public. *Adkins v Thomas Solvent Co*, 440 Mich 293, 306 n 11; 487 NW2d 715 (1992). A public nuisance is distinguishable from a private nuisance in that the public nuisance involves interference with the rights of the community at large, and not a civil wrong based on a disturbance in a plaintiff's rights in land. *Williams v Primary School District # 3, Green Twp*, 3 Mich App 468, 475-476; 142 NW2d 894 (1966); see also *Adkins*, *supra* at 303.

Here, the trial court found that plaintiff’s public nuisance claim was untenable because plaintiff failed to show that the “faulty gutter created an unreasonably interference in the use of a way of traveling that is used by the general public.” Plaintiff has cited numerous cases involving actions for nuisance where a claimant was injured on a defendant’s premises. However, in those cases the defendant was either a governmental entity or an entity whose premises were open to the general public. See, e.g., *Bluemer v Saginaw Oil & Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959); *Wagner*, *supra*. See also *Bishop v Northwind Investments, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2004 (Docket No. 250083). In this case, however, no question of fact was raised below concerning whether defendants’ property was open to the general public. Plaintiff admitted during deposition testimony that the depot was not manned continuously and that only six to eight service people employed by GTech used this office on an intermittent basis. The trial court correctly found that plaintiff’s affidavit did not create a question of fact on this point. A party may not create a question of fact by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition.

Downer v Detroit Receiving Hosp, 191 Mich App 232, 234; 477 NW2d 146 (1991). Plaintiff was not on defendants' premises as a member of the general public, but rather was on defendants' premises as an employee of the lessee. We agree with the trial court that plaintiff has failed to offer any evidence that the condition of the doorway interfered with an interest, i.e., a right common to the general public, that is protected by a claim for public nuisance.

V. AMENDMENT OF COMPLAINT

Finally, plaintiff argues that the trial court erred when it refused to allow him to amend his complaint to assert a claim for breach of contract as a third-party beneficiary of the lease contract between defendants and GTech. We disagree.

The grant or denial of leave to amend is within the sole discretion of the trial court and is reviewed for an abuse of discretion. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 493-494; 618 NW2d 1 (2000). Generally, a court should freely grant leave to amend a complaint when justice so requires. *Id.* at 493; MCR 2.118. However, leave to amend may be denied when such an amendment would be futile. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). An amendment is futile where it is legally insufficient on its face. *Id.*

The trial court did not err when it found that amendment in this case would be futile. Plaintiff is unable to show that he was an intended third-party beneficiary of the contract between defendant and GTech. As plaintiff admits, only intended beneficiaries, not incidental beneficiaries, have a right to sue on an underlying promise between two other parties, because only intended beneficiaries can show that the promisor has undertaken to act or refrain from acting "directly to or for said person." MCL 600.1405. For a contractual promise to be construed as inuring to the benefit of a third party to the contract, the promise must run to, at the least, a "reasonably identified" distinct class consisting of "something less than the entire universe, e.g., 'the public'." *Brunsell v Zeeland*, 467 Mich 293, 296-297; 651 NW2d 388 (2002).

In the instant case, plaintiff maintains that, because the contract specifically mentions GTech's employees, the parties intended to benefit this specific class. However, the contract does not refer to any duty owed toward GTech's employees, but rather to GTech's responsibilities for the actions of its employees. Nothing indicates an intent to benefit plaintiff or any of GTech's other employees. Plaintiff cannot show that the contract intended to benefit any particular class of which he is a member; thus, he may not maintain a claim for damages under a third-party beneficiary theory. The trial court did not err when it determined that an amendment to add such a claim would be futile.

Affirmed.

/s/ Peter D. O'Connell

/s/ Bill Schuette