

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT KELLY,

Plaintiff-Appellant,

v

CLAY, INC., d/b/a MARKET STREET LIQUOR,

Defendant-Appellee.

UNPUBLISHED

February 7, 2006

No. 255314

Wayne Circuit Court

LC No. 03-316458-NO

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant summary disposition. We affirm.

When plaintiff arrived to deliver beverages to defendant's business in Detroit, he parked in the store's parking lot because there were large snow banks in the street. While loading the beverages onto a dolly, he slipped on ice and snow and fell, sustaining a shoulder injury. Plaintiff had seen the snow and knew it was there, but the ice was not visible.

Plaintiff argues that the trial court erred in granting defendant summary disposition because the condition that caused his fall was not open and obvious. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* Summary disposition is appropriately granted, "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Generally, a premises possessor 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). This duty does not, however, extend to hazardous conditions that are open and obvious. "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

knowledge of it on behalf of the invitee.” *Id.* The test for an open and obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

In determining whether accumulation is open and obvious, we consider whether the plaintiff had actual knowledge of ice or snow-covered ice. *Corey, supra* at 5; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002). In the instant case, plaintiff saw the snow and exercised caution and care while traversing it to enter defendant’s store and to return to his truck to get his delivery. The parking lot had been shoveled, but there were visible patches of snow. Plaintiff is a longtime resident of Michigan who knew that snow and ice could be slippery. What caused his fall was ice under the snow, and he did not see it until after he fell.

In *Kenny v Kaatz Funeral Home, Inc (Kenny II)*, 472 Mich 929; 697 NW2d 526 (2005), the Michigan Supreme Court reaffirmed the open and obvious defense in snow and ice accumulation cases. In *Kenny II*, the Court reversed an earlier Court of Appeals decision, *Kenny v Kaatz Funeral Home, Inc (Kenny I)*, 264 Mich App 99; 689 NW2d 737 (2004), “for the reasons stated in the dissenting opinion.” Like the plaintiff in the instant case, the plaintiff in *Kenny I* slipped on snow-covered ice that she did not see until after she fell. *Id.* at 102-103. The dissenting judge concluded that the slippery condition of the parking lot was open and obvious. *Kenny I, supra* at 119 (Griffin, J, dissenting). Because plaintiff’s argument is essentially the same as the one advanced by the *Kenny* plaintiff, we conclude that the trial court correctly granted defendant summary disposition. The slippery condition was open and obvious, and an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. In fact, during his deposition, plaintiff admitted that he was being cautious and careful as he walked across the parking lot and knew that snow and ice could be slippery.

Plaintiff also argues that, even if the snow-covered ice is open and obvious, defendant should be subject to liability because there were special aspects that made the slippery condition unreasonably dangerous. Specifically, plaintiff contends that the hazard was effectively unavoidable; to deliver the beverages, he had to use the parking lot that contained snow-covered ice. We disagree.

When an accumulation of snow and ice is open and obvious, the premises possessor must take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard only if there is some aspect of the accumulation that makes the accumulation unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004). We focus on the degree of potential harm presented, and there must be special aspects that create a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Lugo, supra* at 518 n 2, 519. There was no evidence that the route plaintiff used was unavoidable because plaintiff could have delayed delivery. The situation in the instant case is not “effectively unavoidable” like the hypothetical one posited in *Lugo*, in which a customer wishing to exit a store must leave through the only exit where the floor is covered with standing water. *Id.* at 518. Further, the risk of slipping on ice does not present a high probability of harm or severity of harm. We therefore conclude that there were no special aspects removing the condition from the open and obvious doctrine.

Lastly, plaintiff contends that the trial court erred in granting summary disposition because a city of Detroit ordinance obligated defendant to remove the snow and ice within 24 hours of an accumulation. However, this issue is unpreserved because plaintiff failed to raise it before the trial court. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Moreover, plaintiff's failure to plead an ordinance violation deprived the trial court of authority to find in plaintiff's favor on this issue. See *Reid v Dep't of Corrections*, 239 Mich App 621, 630; 609 NW2d 215 (2000).

Affirmed.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Harold Hood