

STATE OF MICHIGAN
COURT OF APPEALS

SARKIS DANAYAN,

Plaintiff-Appellant,

v

HERITAGE SQUARE APARTMENTS and
CONSOLIDATED MANAGEMENT, INC.,

Defendants-Appellees.

UNPUBLISHED

March 16, 2006

No. 265807

Wayne Circuit Court

LC No. 04-424240-NO

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff, Sarkis Danayan, appeals as of right from the trial court's order granting summary disposition in favor of defendants, Heritage Square Apartments and Consolidated Management, Inc., in this action for damages arising out of plaintiff's slip and fall. We affirm.

The following facts are not disputed. In February 2004, plaintiff was a tenant of defendant Heritage Square Apartments, which is a six-building apartment complex with 100 total apartment units. There is a front and back door to each building. One door leads to the parking lot where the tenants park their vehicles. Upon exiting the doorway, there is a walkway leading to the parking lot, which consists of a porch, made of a concrete slab, and then a sidewalk. The walkways are common areas, provided for the use of all of the tenants in each building.

On February 3, 2004, between 8:05 and 8:10 a.m., plaintiff was leaving his apartment building. Plaintiff stated that he had not looked outside to view the weather conditions, but when he opened the door that led to the parking lot, he noticed that it was chilly but not snowing. Plaintiff admitted that some snow had melted the night before due to warmer temperatures, but the morning was "chilly." Weather records support the fact that some melting had occurred as temperatures on February 2, 2004, reached a high of 33.8 degrees Fahrenheit, and light rain and mist fell from midnight until 8:00 a.m. on February 3, 2004.

As plaintiff stepped outside, the concrete porch appeared clear and was not at all slippery. Plaintiff looked ahead at the sidewalk beyond the porch, and it looked perfectly normal. As soon as plaintiff stepped out onto the sidewalk, however, he fell on his left side, striking his left shoulder. After he fell, plaintiff felt a patch of ice on the sidewalk. No salt had been applied to the porch or sidewalk prior to plaintiff's fall. Afterwards, while plaintiff was in his car driving out of the complex, he saw one of the maintenance men, Daniel Theus, salting the sidewalk of

another building in the complex, to whom he reported the incident. Theus then inspected the area of plaintiff's fall and found that it was icy. As a result of the fall, plaintiff sustained torn ligaments in his shoulder, which caused numbness and pain and has prevented him from continuing to work as a watchmaker.

Plaintiff filed a complaint with the circuit court, alleging that defendants were negligent in failing to maintain the entrances to the premises in a safe manner for their invitees, failed to take measures to remove the ice, failed to warn of the unsafe condition, violated MCL 554.139 by failing to keep the common areas fit for their intended use, and violated MCL 125.401 *et seq.* After discovery had been completed, defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the icy condition was open and obvious, that defendants took reasonable steps to make the premises safe, and that plaintiff has produced no evidence that any negligence on the part of defendants proximately caused his injuries. After a hearing on defendants' motion, the trial court granted summary disposition in favor of defendants and entered a final order dismissing plaintiff's claim.

On appeal, plaintiff argues: (1) the trial court erred in applying the open and obvious doctrine to his claim, which was based on duty to keep the premises fit for their intended use created by MCL 554.139 and 125.401 *et seq.*; (2) the icy patch on which plaintiff fell was not open and obvious and defendants did not take reasonable measures to alleviate the dangerous condition; and (3) even if the icy patch was open and obvious, it was effectively unavoidable because none of the walkways exiting the apartment building had been salted.

"[T]his Court applies a *de novo* standard when reviewing motions for summary disposition made under MCR 2.116(C)(10), which tests the factual support for a claim." *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In evaluating a motion under MCR 2.116(C)(10), "a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *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. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). 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. "With the axiom being that the duty is to protect invitees from *unreasonable* risks of harm, the underlying principle is that even though inviters have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995) (emphasis original). 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. *Id.* at 609-610.

The open and obvious danger doctrine is a defensive doctrine that attacks the duty element that a plaintiff must establish in a *prima facie* negligence case. *Teufel v Watkins*, 267

Mich App 425, 427; 705 NW2d 164 (2005). 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 upon casual inspection.” *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, this Court “look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.” *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). 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 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.” *Id.* at 517-518.

As a general rule, and absent special circumstances, the hazards presented by snow and ice are open and obvious, and do not impose a duty on the property owner to warn of or remove the hazard. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5-6, 8; 649 NW2d 392 (2002). The danger presented by the accumulation of ice and snow is open and obvious where the plaintiff knew of, and under the circumstances an average person with ordinary intelligence would have been able to discover, the condition and the risk it presented. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329- 330; 683 NW2d 573 (2004).

Plaintiff argues that, because his claim is based on the statutory duty, created by MCL 554.139(1)(a), of a lessor to keep the premises and all common areas fit for the use intended by the parties, the open and obvious doctrine does not apply to negate the statutory duty. Section 554.139 states, in relevant part:

1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

The statute also states that its provisions “shall be liberally construed.” MCL 554.139(3).

Issues concerning the proper interpretation of statutes are questions of law that we review de novo. *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 569; 592 NW2d 360 (1999). “The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written.” *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). When reading a statute we must ascribe to every word or phrase its plain and ordinary meaning, unless otherwise defined in the statute, and also, “it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory.” *Id.* Further, we must not read a word or phrase of a statute in isolation but must allow their placement in the whole statute

to provide meaning in context. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004). See also, *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995) (“In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as ‘its placement and purpose in the statutory scheme.’”)

“The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b).” *O’Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003). However, this Court has previously held, in a footnote, that MCL 554.139 does not apply to ice and snow removal. The Court stated:

Plaintiff also argues that the trial court erred when it failed to address his argument that Springs had a statutory duty under MCL 554.139 to keep its premises and common areas in reasonable repair *and fit for their intended uses*, which negates the defense of open and obvious danger. Any error in the trial court’s failure to address this argument is harmless. The plain meaning of “reasonable repair” as used in MCL 554.139(1)(b) requires repair of a defect in the premises. Accumulation of snow and ice is not a defect in the premises. [*Teufel, supra* at 429 n 1 (emphasis added).]

Although the Court specifically addressed the duty created by subsection 1b to keep the premises in reasonable repair, which requires repair of defects, the emphasized language indicates that the Court also considered subsection 1a in its holding. When we read the statute as a whole, together with this Court’s previous interpretation of subsection 1b, we find that the statutory language in subsection 1a, “the lessor or licensor covenants . . . [t]hat the premises and all common areas *are fit for the use intended by the parties*,” applies to defects affecting habitability, not to transient conditions such as the accumulation of ice and snow. MCL 554.139(1)(a), therefore, does not operate to negate the open and obvious danger doctrine as a defense where a plaintiff is injured by a fall on snow or ice. In any event, as the accumulation of snow and ice is not a defect, *Teufel, supra* at 429 n 1, plaintiff has offered no evidence that the walkway on which he slipped was defective or otherwise unfit for the use for which it was intended.

Plaintiff also argues that the portion of subsection 1b that requires a lessor to “comply with the applicable health and safety laws of the state” also requires a lessor to remove ice and snow pursuant to MCL 125.401 *et seq.* Plaintiff cites *Feldman v Stein Bldg and Lumber Co*, 6 Mich App 180, 183; 148 NW2d 544 (1967), for the proposition that MCL 125.474 requires a lessor to remove ice and snow. This ruling, however, was expressly overruled in *Gossman v Lambrecht*, 54 Mich App 641, 649; 221 NW2d 424 (1974), where this Court stated, “We think the interpretation of [MCL 125.474] in *Feldman*, if it includes a duty to remove natural accumulations of ice and snow, was mistaken. . . . We think [MCL 125.474] requires no more of a landowner than is required by the common law with respect to removal of ice and snow.” The open and obvious danger doctrine, therefore, applies.

Applying the open and obvious doctrine, we find that, viewing the evidence in the light most favorable to plaintiff, the evidence demonstrates that a reasonably prudent person with ordinary intelligence in plaintiff's position would have anticipated that ice would be present on the sidewalk. Plaintiff admitted that he was aware that warmer temperatures overnight had caused some melting and that it was noticeably "chilly" when he walked outside that morning. Additionally, Theus observed icy spots when he inspected the walkway outside plaintiff's apartment building after plaintiff fell. For these reasons, the trial court did not err by finding that the condition encountered by plaintiff was open and obvious.

Further, plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. Contrary to plaintiff's assertion, the danger presented by the presence of ice in the area where he fell was not unavoidable. Plaintiff presented no evidence that the "condition and surrounding circumstances would 'give rise to a uniquely high likelihood of harm' or that it was an unavoidable risk." *Corey, supra* at 6, quoting *Lugo, supra* at 242. The photographs submitted to the trial court indicate that plaintiff could have avoided the walkway by walking on the grass. Also, although defendants had not yet salted the rear exit to plaintiff's building, plaintiff presented no evidence that the rear walkway was, in fact, covered with ice. Thus, plaintiff failed to establish that defendants breached any duty owed to him. As such, it is unnecessary to address plaintiff's claim that defendants acted unreasonably in removing the icy condition.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot