

STATE OF MICHIGAN
COURT OF APPEALS

BEVERLY GARGES,

Plaintiff-Appellee,

v

PATRICIA TODD, d/b/a LAST CHANCE
PARTY STORE,

Defendant-Appellant.

UNPUBLISHED
September 12, 2006

No. 260084
Jackson Circuit Court
LC No. 03-001448-NO

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from an entry of judgment in favor of plaintiff. On appeal, defendant challenges the trial court's decisions denying her motion for summary disposition and directed verdict. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I Facts and Procedure

On December 27, 2002, which was two days after a Christmas morning five to seven inch snowfall, plaintiff parked her vehicle in a gravel lot beside defendant's building, which housed defendant's party store and plaintiff's friend, Richard Schenk's, trucking office. Defendant leased the office to Schenk, and she took responsibility for maintaining the paved parking lot located in front of the building. Plaintiff intended to play video poker at Schenk's office, but first wanted to exchange a defective lighter at the party store. Plaintiff exited her car and began walking along the front of the building toward the party store, which was on the other side of the building. As she passed by the front door of Schenk's office, she slipped and fell on a patch of ice that was covered with snow.

Plaintiff brought suit against defendant, alleging that she was an invitee and that defendant negligently maintained the premises, which caused her injury. Defendant filed a motion for summary disposition, arguing that the danger was open and obvious and no special aspects existed. The trial court denied defendant's motion for summary disposition, holding:

[T]here is no showing that [p]laintiff would have had knowledge of the existence of the ice beneath the snow covering This [c]ourt is satisfied additionally, that there are special aspects due to water discharged from the downspout unto

[sic] this area of the walkway which would then freeze and was subsequently covered by the snowfall, and this creates a genuine issue of material fact.

At trial, defendant moved for a directed verdict at the close of proofs. The trial court denied the motion, ruling that whether the patch of ice under snow would be open and obvious was a question of fact for the jury.

II Standard of Review

A grant or denial of summary disposition is reviewed by this Court de novo. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). In reviewing a decision under MCR 2.116(C)(10), this Court considers all documentary evidence in the light most favorable to the non-moving party, affording all reasonable inferences to the nonmovant, to determine whether there is any genuine issue of material fact that would entitle the non-moving party to judgment as a matter of law. *Knauff v Oscoda Co Drain Comm’r*, 240 Mich App 485, 488; 618 NW2d 1 (2000); *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357-358; 597 NW2d 250 (1999).

Further, “[a] trial court’s decision on a motion for a directed verdict is reviewed de novo to determine whether all the evidence and inferences, viewed in the light most favorable to the nonmovant, fail to establish a claim as a matter of law.” *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 455; 702 NW2d 671 (2005).

III Open and Obvious Condition

Defendant argues that the patch of ice under snow was an open and obvious condition. We agree.

This Court recently reiterated the tenets of the open and obvious doctrine, stating that:

As a general rule, a premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee¹ from an unreasonable risk of harm caused by a dangerous condition on the land. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105; 689 NW2d 737 (2004). However, this duty does not generally extend to open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). “[W]here 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 harm despite knowledge of it on behalf of the invitee.” *Id.*, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). When determining if a condition is open and obvious, we consider 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*

¹ There is no dispute that plaintiff was an invitee.

Remand), 198 Mich App 470, 475; 499 NW2d 379 (1993). [*Ververis v Hartfield (On Remand)*, 271 Mich App 61, 64; 318 NW2d 382 (2006), quoting *Ververis v Hartfield Lanes*, unpublished per curiam opinion of the Court of Appeals (Docket No. 251868), slip op at 1-2.]

In *Ververis*, the plaintiff slipped and fell in a parking lot on a patch of ice obscured by snow. *Ververis*, *supra* at 63. The Court indicated “there was no independent factor, beyond the snowy surface itself, that would reasonably have alerted [plaintiff] to the fact that it was slippery.” *Id.* at 66. After reviewing Judge Griffin’s dissent in *Kenny v Katz Funeral Home, Inc.*, 264 Mich App 99; 689 NW2d 737 (2004) (*Kenny I*), which the Supreme Court adopted in *Kenny v Katz Funeral Home, Inc.*, 474 Mich 954; 706 NW2d 743 (2005) (*Kenny II*), and three Supreme Court orders based on *Kenny II*, the Court held, “as a matter of law 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.” *Id.* at 67. The Court further stressed that the condition was open and obvious, “even though . . . there was no other factor that would have alerted [plaintiff] to that danger.” *Id.*

We conclude that the trial court erred in failing to grant defendant summary disposition in regard to the issue whether the condition was open and obvious. As in *Ververis*, *supra*, plaintiff here fell on a patch of ice that was covered by snow, and “there was no independent factor, beyond the snowy surface itself, that would reasonably have alerted [plaintiff] to the fact that it was slippery.” *Id.* at 385. Thus, under *Ververis*, the condition that caused plaintiff’s injury was, “as a matter of law,” open and obvious. *Id.* at 386. Accordingly, the trial court erred in not granting defendant summary disposition in regard to the issue whether the condition was open and obvious.

IV Special Aspects

Defendant next argues that there are no special aspects present to hold it liable for the open and obvious condition of a patch of ice covered by snow. We agree.

In *Lugo*, *supra*, at 517, our Supreme Court stated that “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.” According to *Lugo*,

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.

Ververis did not address the question whether ice under snow presented special aspects. Rather, *Ververis* noted “plaintiffs do not argue that, even assuming the parking lot presented an open and obvious danger, there was some “special aspect” of the danger that imposed a duty on defendant to take reasonable precautions.” *Id.* at n 1. However, *Ververis* does recognize “the high probability that [snow-covered surfaces] may be slippery.” *Ververis*, *supra* at 386. Given this recognition, the question here is whether there are truly ‘special aspects’ of this open and

obvious condition that differentiate it from typical risk that snow-covered surfaces are slippery, “so as to create an unreasonable risk of harm.” *Lugo, supra*.

We consider all documentary evidence in the light most favorable to plaintiff. Accordingly, we assume that the paved parking lot and sidewalk had not been cleared as of the time of the incident.² We further accept, under the circumstances, that plaintiff properly parked

² There appears to be conflicting evidence presented on this point. Plaintiff testified at her deposition, “I think if the thing had been cleared off, the parking lot had been cleared off, I might not have fallen.” Defendant’s testimony at her deposition was initially consistent with plaintiff’s testimony:

Plaintiff Counsel. All right. Can you tell me the last time before the date of this incident, which occurred on December 27, 2002, that you had the parking lot plowed or cleaned or the sidewalk plowed or cleaned?

Defendant. No, I can’t.

Plaintiff Counsel. Any idea at all?

Defendant. No

However, defendant later testified:

Plaintiff Counsel. Do you remember the last big snowfall that we had before the date of this incident?

Defendant. I know it snowed Christmas morning.

Plaintiff Counsel. Was that about six or seven inches of snow?

Defendant. Yes.

Plaintiff Counsel. And after that snowfall, did anyone plow your driveway before the date of this incident?

Defendant. Before?

Plaintiff Counsel. Right, before this incident happened.

Defendant. Oh, before she—oh, you mean before she fell?

Plaintiff Counsel. Yeah.

Defendant. Yes.

Plaintiff Counsel. Who did?

(continued...)

on the side of the building instead of in front of it. The record reflects that defendant and

(...continued)

Defendant. I don't know.

Plaintiff Counsel. You don't know?

Defendant. It was one of those guys that come in after you have your –after you have a snowfall in the middle of the night or early morning, guys would come in the driveway. I'd have three or four, or sometimes five guys pull in. They'll say, "Do you want me to plow your drive," and I'd say "Yes." And they would plow my drive for me. But they do that after the snowfall.

Plaintiff Counsel. So we got a significant accumulation of snow, would have been on early Christmas morning through Christmas, I think, in the afternoon is pretty much it stopped.

Defendant. I don't know when it stopped.

Plaintiff Counsel. And you're saying that someone—after that accumulating someone plowed the parking lot?

Defendant. I opened up.

Plaintiff Counsel. What day?

Defendant. Day after Christmas.

Plaintiff Counsel. the 26th?

Defendant. And I had it plowed.

Plaintiff Counsel. And can you tell me who plowed it?

Defendant. No.

Plaintiff Counsel. How much did you pay this person?

Defendant. Twenty-five dollars.

Plaintiff Counsel. Do you remember anything about this person?

Defendant. Had a red truck.

Also, Schenk averred that defendant had the parking lot plowed on December 28, 2002. Given that no snow fell between December 26, 2002 and December 28, 2002, Schenk's averment calls into question defendant's testimony that she had the parking lot plowed on December 26, 2006: Had the parking lot been cleared on December 26, 2002, there would be no snow to clear on December 27, 2006.

defendant's son told plaintiff not to park in the paved parking lot. We also reject defendant's contention that plaintiff could have parked in a space reserved to Schenk or Schenk's secretary. Plaintiff admits she did not park in those spaces because she was not wearing boots, but, in referring to those parking spaces, she indicated, "sometimes I parked way out towards the road." Considered in the light most favorable to plaintiff, the parking spaces reserved to Schenk and Schenk's secretary were further away from the building than where plaintiff parked.

Nonetheless, we must conclude that there is insufficient evidence of a special aspect of the open and obvious condition. Plaintiff maintains that the open and obvious condition here presented special aspects, namely; the depressions in the parking lot and the faulty downspout allowed water to unnaturally accumulate and freeze in a high foot-traffic area. Plaintiff claims this unnatural ice formation, and defendant's failure to clear the snow that covered it, results in an unreasonably dangerous condition.

However, in explaining "special aspects," *Lugo* emphasized that,

. . . there must be something out of the ordinary, in other words, special, about a particular open and obvious danger in order for a premises possessor to be expected to anticipate harm from that condition. Indeed, it seems obvious to us that 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. We cannot imagine an open and obvious condition that is unreasonably dangerous, but lacks special aspects making it so. [*Id.* at 525.]

Here, there are no "special aspects" of the instant open and obvious condition that differentiate it from the risks typically associated with snow-covered surfaces. Even assuming that the particular patch of ice that plaintiff slipped on was very slippery, plaintiff nonetheless encountered the very risk associated with snow-covered surfaces: slipperiness. Plaintiff has not presented facts showing anything "out of the ordinary, in other words, special, about" this particular patch of ice.

Further, the risk of slipping and falling on the snow-covered patch of ice does not pose an "unreasonably high risk of *severe* harm," such as that presented by an "unguarded thirty foot deep pit in the middle of a parking lot." *Lugo, supra* at 518 (Emphasis added). Also, the condition was not "effectively unavoidable." This Court in *Robertson v Blue Water Oil Co*, 268 Mich App 588, 594; 708 NW2d 749 (2005), lv pending, addressed the question whether an open and obvious condition was effectively unavoidable." In *Robertson*, the "plaintiff slipped and fell on an ice-covered parking lot at defendant's gas station as he walked from the pump where he had fueled his truck to the station's convenience store." *Id.* at 590. The Court noted that "an unusually severe and uniform ice storm . . . covered the entire area surrounding [the] defendant's station." *Id.* The plaintiff had run out of windshield washer fluid and "intended to purchase coffee and washer fluid from the convenience store, but slipped on the ice, fell, and sustained injuries." *Id.* at 591. In addressing whether the open and obvious condition was "effectively unavoidable," the Court indicated that a "reasonable trier of fact could rationally find that [the] plaintiff was "effectively trapped" because it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield washer fluid." *Id.* at 594. Unlike *Robertson, supra*, there is no evidence presented that plaintiff was "effectively

trapped.” We conclude that the record does not show any “special aspect” of this open and obvious condition. Accordingly, defendant is entitled to summary disposition.

Reversed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra