

STATE OF MICHIGAN
COURT OF APPEALS

LANCE FULLER,

Plaintiff-Appellant,

v

THOMAS SHOOKS,

Defendant-Appellee.

UNPUBLISHED

October 24, 2006

No. 269886

Kent Circuit Court

LC No. 05-002704-NO

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition based on the open and obvious doctrine. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, a self-employed building contractor, served as the general contractor for the construction of his own home. On January 7, 2004, plaintiff, a truck driver for a plumbing supply company, delivered an order of toilets and other plumbing fixtures to the site. There was an accumulation of snow on the driveway when plaintiff arrived. Using a hand truck, plaintiff transported several loads of items up the drive, across a sidewalk, and into the side service entrance of defendant's garage. While in the process of hauling the third load, plaintiff slipped on the snow, fell, and suffered injury. Plaintiff filed suit, alleging negligence. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted the motion on the ground that defendant did not have a duty to protect plaintiff from open and obvious hazards such as the snow-covered driveway.

The decision to grant or deny summary disposition presents a question of law that we review de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Under MCR 2.116(C)(10), summary disposition is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

Parties in possession of land generally have a duty to use reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on their premises. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). But under most

circumstances, a possessor of land “is not required to protect an invitee from open and obvious dangers.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A hazard is open and obvious if the court determines that an ordinary person of average 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).

Plaintiff concedes that the snow in the instant case presented an open and obvious hazard. But he contends that defendant may be found liable as a general contractor because, by failing to remove the snow from his driveway, defendant subjected plaintiff to a high degree of risk in a common work area.

We find the common work area doctrine inapplicable to the current situation. The doctrine provides an exception to the general common law rule that property owners and general contractors “could not be held liable for the negligence of independent subcontractors and their employees.” *Ghaffari v Turner Const Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). Because general contractors have responsibility for coordinating an array of subcontractors, they must take reasonable steps “to guard against readily observable, avoidable dangers in common work areas.” *Id.*, 21, 23, quoting *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974). But the duties owed under the common work area doctrine are distinct from the general duties of a premises possessor. *Id.*, 23-24, citing *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 19; 643 NW2d 212 (2002).

Plaintiff correctly contends that, in *Ghaffari, supra*, 29-30, our Supreme Court held that the fact that a hazard is open and obvious cannot defeat a claim under the common work area doctrine. But plaintiff does not contend that his injury occurred due to the negligence of defendant’s subcontractors or their employees. Rather, he asserts that a dangerous condition present on defendant’s premises caused the accident. No issue concerning the common work area doctrine arises out of the facts alleged by plaintiff. Thus, the doctrine cannot prevent his premises liability claim from being dismissed on the ground that the hazardous condition that existed on defendant’s driveway was open and obvious.

Even if we were to find the common work area doctrine applicable, plaintiff’s claim would fail. To recover under the doctrine, a plaintiff must establish that:

- (1) the defendant, either the property owner or the general contractor, failed to take reasonable steps within its supervisory and coordinating authority
 - (2) to guard against readily observable and avoidable dangers
 - (3) that created a high degree of risk to a significant number of workmen
 - (4) in a common work area.
- [*Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004).]

Here, defendant testified that the construction of the house, with the exception of the installation of some tile and a few fixtures, had been completed by January of 2004. Further, there were no workers at premises on day of plaintiff’s accident. Similarly, plaintiff testified that there was no one else at the home when he made the delivery. Regardless of whether defendant failed to take reasonable steps to guard against the danger presented by a snow-covered

driveway, the parties agree that plaintiff was the only person present. Consequently, the hazardous condition could not have created a high degree of risk to a significant number of workmen and plaintiff cannot recover under the common work area doctrine.

In his second issue on appeal, plaintiff contends that, although the hazard presented by the snow was open and obvious, special aspects making the condition unreasonably dangerous existed and prevented defendant from being entitled to summary disposition.

Although a landowner does not generally have a duty to protect invitees from open and obvious dangers, he must take reasonable steps to protect invitees from harm where “special aspects of a condition make even an open and obvious risk unreasonably dangerous.” *Lugo, supra*, 517. When determining whether such special aspects exist, courts must “focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.” *Id.*, 523-524. But “an open and obvious accumulation of snow and ice, by itself, does not feature any ‘special aspects.’” *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005), citing *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004).

Special aspects are found in two sets of circumstances. The condition must give rise to (1) a uniquely high likelihood of harm, or (2) cause a severe harm if the risk is not avoided. *Lugo, supra*, 519. The first of these occurs when a person cannot effectively avoid the dangerous condition. *Id.*, 518. In explaining this situation, our Supreme Court provided the example of a business in which standing water covers the only exit and traps a customer inside. *Id.* The second circumstance occurs when the open and obvious condition imposes “an unreasonably high risk of severe harm.” *Id.* Here, the Court gave the example of an unguarded thirty-foot pit in the middle of a parking lot. *Id.*

In the instant case, plaintiff does not argue that the snow created an unreasonably high risk of severe harm. Rather, plaintiff asserts that the danger presented by driveway, like the hazardous condition in *Robertson*, was effectively unavoidable because his instructions dictated that he deliver the fixtures as soon as possible and place them in defendant’s garage using the side service entrance.

In *Robertson, supra*, 591, the plaintiff slipped on ice in the parking lot of the defendant’s gas station as he walked to the station’s convenience store to purchase windshield washer fluid. In rejecting the defendant’s argument in favor of summary disposition based on the open and obvious doctrine, this Court stated that the hazard presented by the icy conditions was effectively unavoidable because no ice-free path to the service station existed and it would have been unsafe, given the weather conditions, to drive away without windshield washer fluid. *Id.*, 593-594. This Court further stated that the defendant’s contention that the plaintiff could have gone elsewhere was inconsistent with its purpose in operating a gas station and inviting the public onto its premises for commercial purposes. *Id.*, 594-595.

Contrary to plaintiff’s assertions, *Robertson* does not require reversal of the trial court’s order. While both plaintiff and his counterpart in *Robertson* were licensees, their situations can be distinguished. In *Robertson, supra*, 594-595, the defendant made a general invitation to all members of the public to shop at its service station. Here, plaintiff was not a “paying customer”

who came to defendant's premises on a weekly basis. *Id.*, 591. Rather, plaintiff went to defendant's home a single time to deliver goods defendant had purchased from his employer.

More importantly, unlike the plaintiff in *Robertson*, the snow-covered driveway did not effectively trap plaintiff. Rather than being unable to safely leave the premises, plaintiff could have chosen to make the delivery at another time after the driveway had been cleared of snow. Plaintiff's work order does state that defendant's fiancé wanted the fixtures delivered as soon as they arrived. But plaintiff testified that he had already put off delivering the goods until his last delivery of the day and that no one was present at the home when he arrived. Nothing in the record suggests that plaintiff, upon observing the hazard presented by the snow, could not have simply delayed making the delivery until some later time.

Further, a decision reversing the trial court's order granting defendant motion for summary disposition would be at odds with our Supreme Court's recent decision in *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005). In *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 101; 689 NW2d 737 (2004), this Court reversed the trial court's order granting the defendant's motion for summary disposition. In lieu of granting leave to appeal, our Supreme Court reversed this Court's decision for the reasons stated in Judge Griffin's dissenting opinion. *Kenny, supra*, 472 Mich 929.

In *Kenny, supra*, 264 Mich App 115, the plaintiff and four companions drove to the defendant's funeral home to attend the funeral of a co-worker. After they parked the car in defendant's snow-covered parking lot, plaintiff attempted to walk around behind the vehicle, slipped, and fell. Plaintiff argued that the icy condition was unavoidable because there was only one vacant parking space available and, as a passenger in the car, she had no control over where the driver parked. *Id.*, 122. But Judge Griffin noted, "Neither a common condition nor an avoidable condition is uniquely dangerous." *Id.*, 117, citing *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002). He found that the plaintiff's circumstances did "not rise to the level of making her encounter with the allegedly icy condition 'effectively unavoidable' such that it constituted an unreasonable risk of harm." *Id.*, 122. Judge Griffin therefore held that, because the condition of the parking lot was both common and avoidable, no special aspects existed and the trial court's decision granting the funeral homes motion for summary disposition should be affirmed. *Id.*

Like the hazard encountered by the plaintiff in *Kenny*, the snow-covered driveway in the instant case did not present any special aspects making it unreasonably dangerous. Rather, the condition was both common and avoidable. Consequently, the trial court did not err in granting defendant's motion for summary disposition on the basis of the open and obvious doctrine.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens