

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH GANAWAY,

Plaintiff-Appellant,

v

TONI BRUSTICK-OLDE HANHOF and RUDI
ARTHUR OLDE HANHOF,

Defendants-Appellees.

UNPUBLISHED
February 25, 2010

No. 288072
Oakland Circuit Court
LC No. 2008-088441-NO

Before: Gleicher, P.J., and O’Connell and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the lower court’s order granting summary disposition in favor of defendants. We affirm.

Defendants own a house in Keego Harbor, Michigan, that they maintain as a rental property. Plaintiff, a meter reader, slipped and fell on a snow-covered icy patch on the driveway of the rental property while trying to exit the property after reading an electrical meter located at the back of the house. On appeal, plaintiff argues that the lower court should not have granted defendants’ motion for summary disposition under MCR 2.116(C)(10) because genuine issues of material fact exist regarding whether the snow-covered ice was open and obvious and if special aspects existed. We disagree.

We review de novo a trial court’s decision on a motion for summary disposition. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a plaintiff’s claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). “We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). “Additionally, we only consider what was properly presented to the trial court before its decision on the motion.” *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). “Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Latham, supra* at 111. “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

“In a premises liability action, 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.” *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

At the outset, we note that defendants argue that plaintiff was a licensee, rather than an invitee. Our Supreme Court discussed the three categories of individuals who enter the premises of another:

A “trespasser” is a person who enters upon another’s land, without the landowner’s consent. The landowner owes no duty to the trespasser except to refrain from injuring him by “wilful and wanton” misconduct.

A “licensee” is a person who is privileged to enter the land of another by virtue of the possessor’s consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee’s visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit.

The final category is invitees. An “invitee” is “a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee’s] reception.” The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).]

The *Stitt* Court then noted that to establish invitee status, “a plaintiff must show that the premises were held open for a *commercial* purpose,” explaining, “[i]t is the owner’s desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. [T]he prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees.” *Id.* at 604 (emphasis in original).

Plaintiff did not receive defendants’ consent to enter the property in the manner of a social guest. Rather, plaintiff entered the property for the commercial or business purpose of reading the electric meter. Defendants enjoy a mutually beneficial relationship in having a meter reader come onto their land because they continue to receive electricity to the house.¹ Therefore,

¹ We assume that defendants, as owners of a rental property, would provide access to electricity
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plaintiff was an invitee on defendants' land at the time the incident occurred. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But, a premises possessor does not owe a duty to protect an invitee from a danger that is open and obvious. *Id.* at 517.

The test for whether something is "open and obvious" is objective. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002). The test is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon causal inspection[.]" *Kennedy, supra* at 713, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This means that the test is not "whether a particular plaintiff should have known the condition was hazardous," but "whether a reasonable person in [the plaintiff's] position would have foreseen the danger." *Id.*

Although the general rule is that a premises possessor owes no duty to protect an invitee from open and obvious dangers, 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." *Lugo, supra* at 517. "Special aspects" may exist when, for example, the open and obvious condition is "effectively unavoidable" or poses "an unreasonably high risk of severe harm." *Id.* at 518. In such situations, the premises possessor remains liable to the invitee to protect him from the danger. *Id.* at 517-518. The *Lugo* Court gave two illustrations of special aspects: 1) "a commercial building with only one exit for the general public where the floor is covered in standing water" would create a high likelihood of harm for a customer wishing to exit the store because the condition is effectively unavoidable; and 2) "an unguarded thirty foot deep pit in the middle of a parking lot" would present "such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken." *Id.* at 518. "[T]he risk must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies." *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005). "[O]nly those special aspects that give rise to an uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo, supra* at 519.

An open and obvious accumulation of snow and ice does not, by itself, contain any special aspects that will give rise to liability. *Robertson, supra* at 593; see also *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004). Furthermore, it is the condition of the premises, not the condition of the plaintiff, to which the fact-finder must apply an objective standard. *Mann, supra* at 329. This means that "the only inquiry is whether the condition was effectively unavoidable *on the premises*." *Robertson, supra* at 593 (emphasis in original).

In looking specifically at cases involving ice and snow in Michigan, the courts have generally held that absent special circumstances, "the hazards presented by snow, snow-covered

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as a condition of a rental agreement.

ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard.” *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 481; 760 NW2d 287 (2008).

In looking at the record in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether the dangerous condition of the snow-covered ice was open and obvious, or if special aspects existed. Plaintiff was walking down the driveway after reading the meter in the back of the house. The snow was open and obvious to plaintiff because he stated in his deposition that he could see the three to four inches of snow on the ground and that it was still snowing in the community. Plaintiff also indicated that he is familiar with the ice and snow conditions that exist during Michigan winters. Also, plaintiff could have walked down the same path after reading the meter that he used to enter the backyard without incident. Therefore, the evidence provided does not establish a question of fact regarding whether the dangerous condition of the snow-covered ice was open and obvious, or whether special aspects existed. The lower court did not err when it granted defendant’s motion for summary disposition.

Because we agree with the lower court’s ruling on plaintiff’s first issue on appeal, we need not address plaintiff’s second issue on appeal.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Peter D. O’Connell

/s/ Kurtis T. Wilder