

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANGELA M. SABATOS,

Plaintiff-Appellant,

v

CHERRYWOOD LODGE, INC.,

Defendant-Appellee.

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UNPUBLISHED

August 9, 2012

No. 302644

Alger Circuit Court

LC No. 2010-005008-NO

Before: MARKEY, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this suit to recover damages suffered after a slip and fall, plaintiff Angela M. Sabatos appeals by right the trial court's order granting summary disposition in favor of defendant Cherrywood Lodge, Inc. (the Lodge). The sole issue on appeal is whether the trial court erred when it concluded that the icy parking lot at issue constituted an open and obvious hazard with no special aspects. The undisputed testimony established that the entire parking lot was icy; accordingly, the icy lot was unavoidable and the open and obvious hazard doctrine did not apply. Because the trial court erred when it dismissed Sabatos' claim on that basis, we reverse and remand for further proceedings.

**I. BASIC FACTS**

Sabatos testified that she worked for the Lodge in March 2009. She went to work on the day at issue at around 3:00 or 4:00 in the afternoon and worked until 10:30 or 11:00 that night. She decided not to leave immediately after her shift ended. Sabatos explained that she did not feel like going home and that it was the second to last day of work, so she decided to stay and chat with her fellow employees: Tad Zaleski and Jaymie Depew. She sat in the restaurant or lounge area and chatted. She did not drink any alcohol, but did eat a half-sandwich.

At about 1:30 in the morning, as her co-workers were closing up for the night, Sabatos left. As she walked to her truck, Sabatos slipped and fell on ice. She broke her leg and ankle.

In March 2010, Sabatos sued the Lodge for damages arising from her fall. The Lodge moved for summary disposition of Sabatos' claim in October 2010. It argued that it had no duty to warn or protect Sabatos from the icy conditions present in its parking lot because the hazard presented by the ice was open and obvious and did not have any special aspects. The trial court agreed and dismissed Sabatos' claim in February 2011.

Sabatos then appealed to this Court.

## II. OPEN AND OBVIOUS

### A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to dismiss a claim under MCR 2.116(C)(10). *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

### B. ANALYSIS

Although Sabatos was the Lodge's employee, it is undisputed that she was not working at the time of her accident and that she was an invitee.<sup>1</sup> Because Sabatos was an invitee, the Lodge owed her the highest duty of care imposed under premises liability law. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The Lodge had "a duty of care, not only to warn [Sabatos] of any known dangers, but the additional obligation to also make the premises safe, which require[d] the [Lodge] to inspect the premises and, depending upon the circumstances, make any necessary repairs . . ." *Id.* Nevertheless, even though "invitors 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). As our Supreme Court has explained, the duty that a premises possessor owes to invitees must be understood in light of the provisions for known or obvious dangers stated in 2 Restatement, 2d, § 343A(1), p 218. *Bertrand*, 449 Mich at 610. Under that provision, the premises possessor's duty does not extend to open and obvious hazards: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* (emphasis removed), quoting 2 Restatement Torts, 2d, § 343A(1), p 218.

The open and obvious danger doctrine is not an exception to the duty generally owed to invitees; rather, it is an integral part of the definition of that duty. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Where the facts show that a particular dangerous condition on the premises is either known to the invitee or is open and obvious, the premises possessor owes no duty to protect the invitee from the danger posed by that condition unless special aspects of the condition make it unreasonably dangerous despite its open and obvious

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<sup>1</sup> During the hearing on the Lodge's motion for summary disposition, the trial court briefly mentioned Sabatos' status as an invitee and the Lodge's trial lawyer suggested that she might not have been an invitee at the time of her fall. However, there was evidence that Sabatos stayed to socialize, ate a sandwich, and had coffee, which might establish a question of fact as to her status. See *Stitt*, 462 Mich at 595 (noting that "if there is evidence from which invitee status might be inferred, it is a question for the jury."). In any event, we need not decide the matter because the Lodge did not challenge Sabatos' invitee status before the trial court. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008).

character. *Id.* at 517. An open and obvious hazard has special aspects that make it unreasonably dangerous where it is “effectively unavoidable” or presents a “substantial risk of death or severe injury.” *Id.* at 518.

Sabatos has conceded that the icy parking lot constituted an open and obvious hazard to the extent that an average person of ordinary intelligence would have noticed it on casual inspection. See *Novotney v Burger King Corp*, 198 Mich App 470, 474; 499 NW2d 379 (1993). Nevertheless, she argued that the icy parking lot had special aspects that precluded application of the open and obvious danger doctrine; namely, that the icy parking lot was effectively unavoidable. Sabatos relied on this Court’s decision in *Robertson v Blue Water Oil Co*, 268 Mich 588; 708 NW2d 749 (2005) for the proposition that an icy parking lot can constitute an effectively unavoidable condition.

In *Robertson*, this Court determined that the open and obvious danger doctrine did not apply to preclude a customer’s claim against a gas station because the hazard at issue—an icy parking lot—had special aspects. *Id.* at 593-595. Specifically, this Court held that the icy parking lot was effectively unavoidable because “there was clearly no alternative, ice-free path from the gasoline pumps to the service station . . . .” *Id.* at 593. Thus, we must determine whether the icy parking lot was effectively unavoidable because there was no ice-free path from the Lodge’s business to Sabatos’ truck.

Here, the undisputed evidence showed that, no matter which way she travelled, she had to encounter the icy parking lot. Sabatos testified that the parking lot was completely iced over: “the entire thing was a sheet of ice”—it was a “[f]rozen lake.” Similarly, Zaleski characterized the parking lot as a “[b]ig skating rink out there, the whole entire place.” And Depew stated that, although they did not fall when they went to help Sabatos, it “was really slippery, though, so we had to like hold onto both of our vehicles . . . .” Thus, like the facts in *Robertson*, there was no ice-free path from the Lodge’s business to Sabatos’ truck. As such, the hazard was effectively unavoidable. *Id.* at 593; accord *Hoffner v Lanctoe*, 290 Mich App 449; 802 NW2d 648 (2010).<sup>2</sup>

In response to this evidence, the Lodge argued before the trial court that Sabatos, as an employee, knew that the lot was icy and could have cleared the ice herself or arranged for other transportation. But these arguments are not a valid basis for concluding that the icy parking lot was avoidable. The test for special aspects is an objective test founded on the conditions actually present on the premises. See *Robertson*, 268 Mich App at 593. For that reason, although

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<sup>2</sup> We also conclude that the Lodge’s reliance on the dissent in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 115-122; 689 NW2d 737 (2004), is misplaced. Although our Supreme Court reversed the majority in *Kenny* for the reasons stated in the dissent, 472 Mich 929, it did not expound on the dissent’s analysis and the dissent merely stated—without explanation—that the icy condition was avoidable. See *Kenny*, 264 Mich App at 122 (dissent by Griffin, J.). Therefore, the analysis proffered in *Robertson* is more directly on point and controls here.

Sabatos had access to the Lodge's rock salt as an employee, that access did not alter the nature of the condition itself.<sup>3</sup>

Because the icy parking lot was effectively unavoidable, the trial court erred when it concluded that the Lodge had no duty under the open and obvious danger doctrine.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Sabatos may tax her costs. MCR 7.219(A).

/s/ Jane E. Markey  
/s/ Jane M. Beckering  
/s/ Michael J. Kelly

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<sup>3</sup> It might plausibly be relevant for purposes of establishing comparative negligence.