

STATE OF MICHIGAN
COURT OF APPEALS

JOSEFINA L. RODRIGUEZ,

Plaintiff-Appellant,

v

T. MOLITOR, INC., d/b/a SCHOONER II
RESTAURANT,

Defendant-Appellee.

UNPUBLISHED

September 30, 2004

No. 248140

Ottawa Circuit Court

LC No. 02-043682-NO

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

I. Overview

Plaintiff Josefina Rodriguez slipped and fell on a snow- and ice-covered ramp while exiting defendant T. Molitor, Inc.'s restaurant. Rodriguez appeals as of right from an order granting Molitor's motion for summary disposition under MCR 2.116(C)(10) on the ground that the condition was open and obvious. We affirm.

II. Basic Facts And Procedural History

On December 21, 2000, Rodriguez and her husband attended a breakfast party at Molitor's restaurant. Rodriguez left the restaurant at about 9:30 a.m. As Rodriguez walked to her car in the restaurant's parking lot using a sloped walkway directly adjacent to the building, she slipped and fell, causing injuries that included a broken ankle.

Rodriguez filed this premises liability action and Molitor moved for summary disposition under MCR 2.116(C)(10), arguing that Rodriguez's complaint was barred by the open-and-obvious doctrine and that Molitor did not violate any duty owed to Rodriguez. According to Rodriguez's deposition testimony attached to Molitor's motion, it was snowing that morning, and there was about an inch of snow on the restaurant's walkways when she arrived at 8:00 a.m. Rodriguez testified that when she entered the restaurant, she told Ron Beisel, the cook at the restaurant, that he should shovel the walkways, but he responded that he was too busy. Rodriguez explained that there were two separate paths leading from the restaurant to different areas of the parking lot, one of which was inclined for handicap access. When Rodriguez left the restaurant, she took the inclined path and noted that the amount of snow on the path had increased to approximately 5 to 6 inches. As she was walking on the inclined portion of the sidewalk, she slipped on what she believed was ice underneath the snow.

Molitor also attached the deposition testimony of Beisel, the cook. He testified that he shoveled the sidewalk at around 6:00 a.m. and again at around 7:30 a.m. that morning. Beisel stated, however, that the sidewalk was not shoveled between the time Rodriguez arrived at the restaurant and the time she left. Beisel testified that he did not recall Rodriguez telling him that the sidewalk needed to be shoveled.¹

After a motion hearing, the trial court denied the motion in a ruling from the bench, reasoning that the incident occurred on a

handicapper's ramp, which by its nature is sloped, and which he had shoveled, and, therefore, it would have been apparent to him that there was ice on the ramp if in fact there was ice as claimed by the plaintiff, and that it continued to snow and he hadn't removed the ice. Now, what is dangerous is not the snow but the snow covering the ice on a sloped or slanted walk, and I think that at least gives rise to a jury question.

On March 20, 2003, Molitor moved for reconsideration of the trial court's decision pursuant to MCR 2.119(F). The trial court granted the motion, explaining:

Having reread *Delay v McLaren Regional Medical Center*, Michigan Court of Appeals decision No. 239768, unpublished decided December 13, 2002 and *Uptergrove v Nacu*, Court of Appeals decision No. 230329, unpublished case decided August 20, 2002, this Court now believes its prior decision was incorrect, that ice under snow on a walkway entrance during a Michigan winter is a condition which reasonably intelligent persons can and will anticipate and is a condition which is not so unusual as to obviate the "*open and obvious condition*" defense.

Accordingly, the court granted Molitor's motion for reconsideration, reversing its earlier ruling and thereby granting Molitor's motion for summary disposition.

III. Motion For Reconsideration

A. Standard Of Review

We review the trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion.²

¹ We note that the lower court record does not contain any evidence that Rodriguez offered in opposition to Molitor's motion for summary disposition, but only an unsigned, one-page document entitled "Reply Brief." A review of this document indicated that the record contained only an incomplete version of what Rodriguez filed in response to Molitor's motion.

² *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

B. MCR 2.119(F)(3)

Rodriguez's first argument on appeal is that the trial court erred in granting Molitor's motion for reconsideration under MCR 2.119(F)(3) because the court merely considered the same issue presented in Molitor's original motion for summary disposition.

Molitor's motion for reconsideration was brought under MCR 2.119(F), which provides in pertinent part:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.^[3]

Rodriguez argues that the trial court abused its discretion by violating this portion of the rule, which Rodriguez contends limits reconsideration to new issues. However, this Court has taken a broad view of MCR 2.119(F)(3). In *Michigan Bank v Reynaert, Inc.*,⁴ we stated:

“ . . . It is hard to give literal application to this language – for example, it would seem unlikely that the original losing party was ‘misled’ and irrelevant that the original winning party was misled. Instead, the language, taken as a whole, can be interpreted as an expression of great reluctance to entertain or grant motions for reconsideration. Nonetheless, it would be a strange result to perpetuate an error on the grounds that it was not ‘palpable’ or more generally upon a reluctance to reconsider issues (especially when the same error, if not harmless, would presumably be subject to correction on appeal, but at much greater expense).

We read this provision governing rehearings as not restricting the discretion of the trial judge to reconsider motions where he later determines that he or his predecessor made a serious error, based on an intervening change in the law or otherwise.^[5]

³ MCR 2.119(F)(3).

⁴ *Michigan Bank v Reynaert, Inc.*, 165 Mich App 630; 419 NW2d 439 (1988).

⁵ *Id.* at 645-646, quoting *Brown v Northville Regional Psychiatric Hospital*, 153 Mich App 300, 309; 395 NW2d 18 (1986), quoting Martin, Dean & Webster, Michigan Court Rules Practice, Rule 2.119, 537.

We have further explained that “if a trial court wants to give a ‘second chance’ to a motion it has previously denied, it has every right to do so, and this court rule [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion.”⁶

While we acknowledge that the language of the rule seems to suggest that reconsideration under MCR 2.119(F)(3) is reserved for cases when a new issue should be considered, the controlling case law has established that a court may revisit a legal issue already decided on summary disposition under MCR 2.119(F).⁷ Therefore, we conclude that the trial court did not abuse its discretion in granting the motion.

IV. Due Process Violation

A. Standard Of Review

We review de novo issues involving the interpretation of court rules⁸ and issues involving constitutional law.⁹

B. Preclusion Of Response To Motion For Reconsideration

Rodriguez argues that MCR 2.119(F)(2), which precludes an opposing party from responding to a motion for reconsideration unless the trial court has otherwise directed, violates her right to due process.

The United States and Michigan Constitutions preclude the government from depriving a person of life, liberty, or property without due process of law.¹⁰ “A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.”¹¹ Rodriguez has a property interest in her cause of action;¹² therefore, the question remaining is whether the procedures attendant upon deprivation were sufficient.

⁶ *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000), quoting *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986).

⁷ See *id.*

⁸ See *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

⁹ See *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

¹⁰ US Const, Am XIV; Const 1963, art 1, § 17.

¹¹ *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993).

¹² See *In re Certified Questions*, 416 Mich 558, 572; 331 NW2d 456 (1982) (a cause of action is a vested property right); *Barlett v North Ottawa Community Hosp*, 244 Mich App 685, 696; 625 NW2d 470 (2001).

This Court has set forth the required procedures as follows:

Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. The opportunity to be heard requires a hearing to allow a party the chance to know and respond to the evidence.^[13]

Rodriguez does not argue that she was denied sufficient notice or an impartial decision maker, but rather that she was not given a meaningful opportunity to be heard because MCR 2.119(F)(2) provides that in opposition to Molitor’s motion for reconsideration, she may not file a response or present oral argument. However, Rodriguez was able to, and did, file a response to Molitor’s original motion for summary disposition, and she was represented by counsel at oral argument on that motion. Moreover, after the court’s adverse decision on Molitor’s motion for reconsideration, Rodriguez herself had the right under MCR 2.119(F) to seek reconsideration of the court’s ruling. Finally, because the court was reconsidering an issue of law in the context of a summary disposition motion under MCR 2.116(C)(10), Rodriguez also had the right, which she has exercised, to take a direct appeal and have the particular issue decided by this Court and have the opportunity to file, brief, and orally argue the matter before the panel. Therefore, we conclude that MCR 2.119(F)(2) does not violate Rodriguez’s due process right to be heard.

V. The Open-And-Obvious Doctrine

A. Standard Of Review

Whether the open-and-obvious-danger doctrine applies to bar Rodriguez’s claim is a question of law this Court reviews de novo.¹⁴

B. Snow-Covered Ice

Rodriguez next argues that the trial court erred in finding that the snow- and ice-covered inclined handicap ramp was open and obvious. Generally, a premises possessor owes invitees a duty to exercise reasonable care to protect invites from unreasonable risks of harm caused by dangerous conditions on the land.¹⁵ This duty, however, does not include the specific duty to warn of dangers which are open and obvious.¹⁶ “Where 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.”¹⁷ “[I]n the context of an accumulation of snow and ice, . . . when such an accumulation is ‘open and obvious,’ a premises possessor must ‘take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish

¹³ *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000).

¹⁴ *Riddle v McLouth Steel Products*, 440 Mich 85, 95; 485 NW2d 676 (1992).

¹⁵ *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

¹⁶ *Id.* at 516-517.

¹⁷ *Riddle, supra* at 96.

the hazard of injury to [plaintiff]’ only if there is some ‘special aspect’ that makes such accumulation ‘unreasonably dangerous.’”¹⁸

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.”¹⁹ Rodriguez argues that the ice was not visible and therefore could not be open and obvious. However, the touchstone of the open-and-obvious doctrine is not whether a particular danger is “visible,” but whether a person of average intelligence would discover the danger. In addressing a case in which there was either slippery snow or ice underneath the snow on a sidewalk, this Court held that an average person with ordinary intelligence would nonetheless notice the condition of the sidewalk and would discover the risks of slipping on it.²⁰ Moreover, in this case, it appears that Rodriguez was actually aware of the hazardous condition. In her deposition testimony, she stated that when she arrived at the restaurant she immediately told the cook that he should clean the sidewalk. She also described how she tried to walk in the footprints present in the snow when walking into the restaurant. Accordingly, we conclude that, both subjectively and objectively, the risk that the sidewalk would be slippery was open and obvious.²¹

With respect to the handicap access ramp, we held in *Novotney v Burger King (On Remand)*²² that a reasonable person would discover the danger of an inclined handicap access ramp. Accordingly, we conclude that the trial court properly concluded that the risks of walking on a snow- or ice-covered inclined ramp were open and obvious.

C. The Special-Aspects Doctrine

Rodriguez next argues that even if the conditions were open and obvious, “special aspects” exist that impose liability upon Molitor. Though a premises possessor is not required 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 the risk.”²³ As the Michigan Supreme Court explained:

[W]ith regard to open and obvious dangers, 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

¹⁸ *Mann v Shusteric Enterprises*, 470 Mich 320, 332; ___ NW2d ___ (2004), quoting *Lugo*, *supra* at 517 and M Civ JI 19.05.

¹⁹ *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

²⁰ *Id.* at 239.

²¹ *Id.* at 239-240.

²² *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

²³ *Lugo*, *supra* at 517.

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.^[24]

Rodriguez argues that there was a special aspect in this case because she had to walk over the ice and snow to leave the restaurant, making the dangerous conditions unavoidable. Rodriguez asserts that this case is analogous to the Supreme Court’s illustration in *Lugo*:

An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable.^[25]

Though Rodriguez admits there were other routes to the parking lot, she suggests that they were no safer than the one she took. Rodriguez’s fall appears to have occurred due to two open and obvious conditions: (1) snow and ice, and (2) the inclined handicap ramp. First, we note that the other exit from the restaurant to the parking lot did not have a ramp. Second, and more importantly, the evidence indicated that Rodriguez could have used the public sidewalk that was directly adjacent to the restaurant’s sidewalk. In her deposition, Rodriguez admitted observing that there was a public sidewalk adjacent to the restaurant’s sidewalk, that the public sidewalk “looked clean,” and that she believed the city had come to clean it earlier. Accordingly, we find that a reasonable jury could not conclude that the dangerous condition was “effectively unavoidable.”

VI. Right To Jury Trial

A. Standard Of Review

We review constitutional issues de novo.²⁶

B. The Judicial Power To Develop Negligence Law

Rodriguez’s final argument is that the application of the open-and-obvious doctrine violated her constitutional right to a jury trial. The law of negligence is a product of the common law.²⁷ Absent legislative directive, it is within the power of the judiciary to develop or limit the development of the common law.²⁸ The elements of a common law negligence cause of action

²⁴ *Id.* at 517-518.

²⁵ *Id.* at 518.

²⁶ *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

²⁷ See *Moning v Alfonso*, 400 Mich 425, 436; 254 NW2d 759 (1977).

²⁸ *Id.*

are (1) a duty, (2) breach of that duty, (3) causation, and (4) damages.²⁹ The existence of a duty presents a question of law for the court.³⁰ The Michigan Supreme Court, in defining the element of duty, has stated that while 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, this duty does not generally encompass removal of open and obvious dangers.³¹

The open-and-obvious doctrine is a part of the legal determination whether a duty exists. As the Court explained, “the open and obvious doctrine should not be viewed as some type of ‘exception’ to the duty generally owed invitees, but rather as an integral part of the definition of that duty.”³² The question of duty is one of law, and the courts are well within their constitutional power to make such decisions.³³

The trial court, in essence, ruled that Rodriguez could not, as a matter of law, establish a duty that Molitor had with regards to the snow and ice on the property. Because of this legal determination, Rodriguez could not have established a prima facie case and the court properly granted summary disposition to Molitor. Implied in the trial court’s decision is the determination that the particular condition here was open and obvious. Though this may under some circumstances be a question of fact for the jury,³⁴ in this case, the trial court decided the issue on summary disposition after concluding that no genuine issue of material fact existed and that, based on the evidence presented, no reasonable juror could conclude that an average user with ordinary intelligence would not have been able to discover the danger and the risk presented upon casual inspection.

Under MCR 2.116(C)(10) a party may move for summary disposition if “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” Though a jury is charged with deciding disputed facts, “[b]efore a jury is ever reached a preliminary decision must always be made, namely, whether or not there is anything to go to a jury.”³⁵ Where the facts of a case are uncontroverted and the only question left is what legal conclusions can be drawn from the facts, the question is for the court and not the jury.³⁶ The Michigan Supreme Court explained how this procedure is consistent with and does not violate the right to a trial by jury:

²⁹ *Holton v A+ Ins Associates, Inc.*, 255 Mich App 318, 325; 661 NW2d 248 (2003).

³⁰ *Groncki v Detroit Edison Co.*, 453 Mich 644, 649; 557 NW2d 289 (1996).

³¹ *Lugo*, *supra* at 516.

³² *Id.*

³³ See *Moning*, *supra* at 436.

³⁴ See *Abke v Vandenberg*, 239 Mich App 359, 362; 608 NW2d 73 (2000).

³⁵ *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993), citing *Kroes v Harryman*, 352 Mich 642, 648; 90 NW2d 444 (1958).

³⁶ *Moll*, *supra* at 26.

“In deciding motions for and reviewing orders granting or denying, summary disposition, directed verdict and judgment notwithstanding the verdict, the court must view the evidence in the light most favorable to the nonmoving party” [Citation omitted.] If reasonable minds could disagree about the conclusions to be drawn from the facts, a fact question exists that must be presented to the jury. When there is no genuine issue with respect to any material fact and reasonable minds could not differ regarding the legal conclusions to be drawn from the facts, summary judgment can be granted without violating the right to a jury trial.^[37]

Here, there is no issue of material fact in dispute. The parties agree that Rodriguez’s fall was due to snow and ice and the existence of a handicap ramp. More importantly, our appellate courts have found that reasonable minds could not disagree that these conditions are open and obvious.³⁸ Likewise, on the issue of whether special aspects exist to create a duty, the facts, taken in the light most favorable to Rodriguez, show that an alternative path did exist and no reasonable person could conclude otherwise. Accordingly, summary disposition was proper in this case and did not violate the right to a jury trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette

³⁷ *Id.* at 28 (citation omitted).

³⁸ See *Joyce, supra*; *Novotney, supra*.