

STATE OF MICHIGAN
COURT OF APPEALS

IAN MUSKOVIN,

Plaintiff-Appellant,

v

ASMARO, INC., d/b/a FENTON PARTY SHOP,

Defendant-Appellee.

UNPUBLISHED

November 30, 2006

No. 270170

Genesee Circuit Court

LC No. 05-081336-NO

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition pursuant to MCR 2.16(C)(10) in this premises liability action. We affirm.

On January 11, 2005, the 37-year-old plaintiff fell near a drainage sewer while walking across the rear of defendant's parking lot. Plaintiff testified that he fell on "black ice" that took on the color of the pavement below. Plaintiff indicated that no precipitation had fallen on that day, that the weather was "cold and sunny," and that the parking lot appeared clear and dry except for a bit of "slushy snow" under the gutters against the edge of the building. Plaintiff also indicated that he visited defendant's party store approximately fifteen minutes earlier and was able to walk to the front entrance of the store from the front parking lot without incident.

Defendant presented evidence that snow fell early in the morning of January 11 and that the parking lot was plowed at 8:00 a.m. Defendant also presented weather records from both Flint Bishop Airport and Detroit Metropolitan Airport indicating measurable amounts of snow in both Flint and Detroit the morning of January 11, as well as overcast skies the entire day. Defendant also noted that plaintiff's own photographic evidence taken the day of the incident and the following day revealed the presence of both residual snow and ice in defendant's parking lot.

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), holding that, pursuant to *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005), the black ice was an open and obvious condition. The court also found that no special aspects rendered the open and obvious condition unreasonably dangerous.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion under MCR

2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004).

Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect an 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). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id.* at 517. Whether a hazardous condition is open and obvious is determined by asking the question: "Would an average user with ordinary intelligence 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). The determination depends on the characteristics of a reasonably prudent person, not on the characteristics of a particular plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). The open and obvious doctrine applies to the accumulation of snow and ice. *Id.* at 322.

The question of whether black ice is an open and obvious danger was recently addressed in *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005) (*Kenny II*). In reversing this Court's decision in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004) (*Kenny I*), our Supreme Court ruled that black ice, by itself, is an open and obvious condition for reasons stated in the dissenting opinion of *Kenny I*. In *Kenny*, the plaintiff fell on snow-covered black ice. Before she fell, she saw her three companions holding on to the hood of the car for support. The dissent opined, and the Supreme Court agreed, that "after witnessing three companions exit a vehicle into the snow-covered parking lot on December 27 and seeing them holding on to the hood of the car to keep their balance, all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery." *Kenny I, supra* at 120. And in *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61; 718 NW2d 382 (2006), this Court held that as a matter of law even ice covered by snow is open and obvious *despite the lack of any other factor that would alert a plaintiff to the danger* (emphasis added).¹

This case is slightly different than *Kenny* in that the ice was not covered by snow. Nonetheless, the test for whether any icy condition is open and obvious is the same as other hazards; i.e., whether an average user of ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney, supra* at 475. Plaintiff testified that the weather on the day of the fall was sunny with no precipitation and that the parking lot was clear and dry, with only slushy snow visible up against the building. But defendant presented evidence in the form of local climatological data from the National Climatic Data Center that the high temperature for January 11 at Flint's Bishop Airport, approximately 15 miles from the party

¹ The Court also noted that "This holding regarding a snow-covered surface is an extension of precedents already recognizing that an icy surface presents an open and obvious danger. See, e.g., *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002)."

store, was 34 degrees and the low temperature was 29 degrees, that snowfall measured .6 inches, and that the sky was overcast the entire day. Defendant also presented evidence that the parking lot was plowed at 8:00 a.m. Photographs taken by plaintiff's counsel the day after the incident clearly showed the presence of residual ice and snow in the parking lot, yet no snow fell after noon on January 11 or on January 12. Rather, .49 inches of rain fell on that date and the high temperature was 54 degrees.

The trial court found defendant's evidence compelling, and found that plaintiff's and Mahoney's testimony did not create a genuine issue of material fact simply because it contradicted defendant's documentary evidence. The trial court expressed his concern that "these matters can simply be made factual issues by somebody saying, well, I couldn't see the ice, unaware that the ice was there." The trial court did not appear to be weighing the credibility of the witnesses but, rather, found that plaintiff's and his friend's testimony, even when viewed in a light most favorable to plaintiff, was not sufficient to create a genuine issue of material fact. Given the evidence presented, including the photographic evidence, the trial court properly found the condition was open and obvious because, under the circumstances, an ordinarily prudent person would have concluded that the weather conditions, as well as the presence of snow and ice, indicated the possibility of slippery pavement and would have appreciated the risk involved in walking there.

Duty does not extend to dangers that are open and obvious, unless a special aspects exception is met. An owner's duty of care arises to protect invitees from harm in the event that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Lugo, supra* at 517. An example of "special aspects" of the condition is something unusual about its character, location, or surrounding conditions that make the risk of harm unreasonable. See *Bertrand, supra* at 614-617.

Plaintiff contends that defendant's failure to maintain its gutters and drainage system in reasonable working condition caused the entire rear parking lot to be covered in an unnatural accumulation of ice and created "a special aspect which gave risk to a uniquely high likelihood of harm" because the condition was effectively unavoidable. A "special aspect" making even an open and obvious condition unreasonably dangerous may exist when evidence shows that the condition is "effectively unavoidable," creating a "uniquely high likelihood of harm," or when the condition creates "an unreasonably high risk of severe harm." *Lugo, supra* at 518-519. Like determining whether a condition is open and obvious, the test to determine whether a "special aspect" renders a condition unreasonably dangerous is an objective one applying the reasonably prudent person standard. *Mann, supra* at 329. That is, the condition of the premises, not the particular circumstances of the plaintiff, must be objectively considered. *Id.* Accordingly, in considering whether a "special aspect" is present, "it is important to maintain the proper perspective, which is to consider the risk posed by the condition a priori, that is, before the incident involved in a particular case." *Lugo, supra* at 518 n 2.

Plaintiff analogizes his fall on the ice with the *Lugo* decision's example of a special aspect that involved "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." *Id.* at 518, 629 NW2d 384. In the *Lugo* example, the potential plaintiff was required to confront an unexpected risk and had no

alternative but to walk through the water in order to have access to the exit. This example in *Lugo* differs markedly from the facts of this case.

Here, plaintiff was not required to confront an unexpected risk, nor was he "effectively trapped." In *Teufel v Watkins*, 267 Mich App 425, 426; 705 NW2d 164 (2005), and *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), this Court found that icy conditions were avoidable. In *Teufel*, the plaintiff fell in the icy parking lot of the defendant's apartment complex. This Court concluded that the icy conditions were avoidable because the plaintiff testified that reasonable and safer alternatives were available to him. *Teufel, supra* at 429. Specifically, safer parking spaces were available albeit further from the plaintiff's apartment than where he parked and fell. *Id.* The plaintiff in *Joyce*, a former in-home caregiver, fell on the walkway leading to the defendants' front door when coming to remove the remainder of her belongings. The plaintiff maintained one of the defendants insisted she complete her move on the day of her fall when conditions were snowy and dangerous. *Joyce, supra* at 232. After concluding the condition of the walkway was open and obvious, the Court rejected the plaintiff's argument that it was "effectively unavoidable." *Id.* at 241. The Court observed that the plaintiff, "could have simply removed her personal items another day or advised [the defendants] that, if [they] did not allow her to use the garage door, she would have to move another day." *Id.* Further, the Court noted that the plaintiff, "could have used an available, alternative route to avoid the snowy sidewalk." *Id.*

The record reveals that available alternatives existed. Plaintiff could have walked on the sidewalk to the front entrance of the party store, could have walked around the rear parking lot, or could have traveled in the van to the front of the party store. Nothing about defendant's premises forced plaintiff to cross the rear parking lot to reach defendant's store. Indeed, plaintiff had traversed the parking lot safely only 15 minutes earlier. Plaintiff's desire to walk across the rear parking lot "as he had done in the past" does not affect the legal duties defendant owed to plaintiff. To conclude otherwise impermissibly shifts the focus from an examination of the premises to an examination of the personal circumstances of plaintiff. Plaintiff's own photographs reveal the presence of residual snow and ice, and plaintiff admitted that he was aware of the "slushy snow" built up against the building yet plaintiff chose to traverse the area. Under these circumstances, the icy condition of the parking lot was not "effectively unavoidable." The trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot