

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS JAMES,

Plaintiff-Appellant,

v

CITY OF BIRMINGHAM, FULLER CENTRAL
PARK PROPERTIES, and CERESNIE FURS,

Defendants-Appellees,

and

MIDTOWN CAFÉ, JAVA COFFEE, ROYAL
OAK SNOW REMOVAL, INC., and ROYAL
OAK SNOW REMOVAL DON TRIVETT/C-
MARK LANDSCAPING,

Defendants.

UNPUBLISHED

April 12, 2007

No. 273437

Oakland Circuit Court

LC No. 2005-065537-NI

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant, Fuller Central Park Properties (“defendant”), pursuant to MCR 2.116(C)(10). We affirm.

This premises liability case arises out of injuries plaintiff suffered on April 7, 2003, at approximately 11:30 p.m. Plaintiff drove from his house to downtown Birmingham to obtain coffee. He parked in a designated parking space on Woodward Avenue, exited his car, took a few steps toward the sidewalk abutting the parking lot, and stepped up onto the sidewalk. When he did so, he slipped on ice and fell, injuring himself. He then got back into his car and drove to a nearby police station to make a report. Plaintiff testified that he was unaware that the sidewalk was icy, although he had observed it looking “wet” and “sort of shiny.” He also testified that he had been aware when he left his house that the precipitation was slushy and getting colder, it had been raining since 7:00 p.m., that the temperature was around freezing, and the forecast predicted freezing rain. However, he observed no ice on the roadway. Several years previously, defendant had cut out a portion of the curb around the parking lot for the purpose of water drainage, and plaintiff speculated that this hole caused the water to flow and unnaturally accumulate as ice in the area where he slipped. The trial court granted summary disposition to defendant on the

ground that the ice was open and obvious, and it did not possess any special aspects. Plaintiff contends that the trial court erred.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Because the parties have gone beyond the pleadings in presenting their claims, their claims are reviewed under MCR 2.116(C)(10). *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all evidence submitted by the parties in the light most favorable to the nonmoving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden, supra* at 120. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *PT Today, Inc v Comm’r of Financial & Ins Services*, 270 Mich App 110, 150; 715 NW2d 398 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In a premises liability action, the plaintiff must prove the elements of a negligence claim: (1) that the defendant had a duty to the plaintiff, (2) the defendant breached that duty, (3) an injury proximately resulted from that breach, and (4) the plaintiff suffered damages. *Taylor v Laban*, 241 Mich App 449, 452-453; 616 NW2d 229 (2000). Different standards of care are owed to a plaintiff in accordance with the plaintiff’s status on the land. A person entering upon the property of another for a reason directly connected to the landowner’s commercial business interest is an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). Although plaintiff was merely walking alongside defendant’s parking lot, rather than going to defendant’s property or business, defendant concedes that plaintiff here was an invitee. An invitor has a common law duty to exercise reasonable care to warn or protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001).

The basic duty to warn or protect an invitee does not generally include removal of open and obvious dangers: “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 unless he should anticipate the harm despite knowledge of it on behalf of the invitee.” *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3; 649 NW2d 392 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection. *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). The test is objective and the court should look to whether a reasonable person in the plaintiff’s position would foresee the danger, not whether a particular plaintiff should have known that the condition was hazardous. *Corey, supra* at 5.

At issue here is first whether it would have been reasonable to expect an average person with ordinary intelligence to have discovered the ice on casual inspection. *Teufel, supra* at 427.

Plaintiff contends that there was nothing to alert him to the possibility of ice on the sidewalk. We disagree. There was an ice storm warning in effect for the night in question, and plaintiff was aware that the weather reports predicted freezing rain. Plaintiff was aware of the slush and precipitation, and he was particularly aware that the sidewalk appeared wet and shiny. In light of the harsh weather conditions, plaintiff's status as a Michigan resident, and the wet and shiny appearance of the sidewalk, a reasonable person in plaintiff's position would anticipate that the sidewalk could be icy. Consequently, the ice was open and obvious. See *Kenny v Kaatz Funeral Home, Inc (Kenny II)*, 472 Mich 929; 697 NW2d 526 (2005) (adopting Judge Griffin's dissent from *Kenny v Kaatz Funeral Home, Inc (Kenny I)*, 264 Mich App 99; 689 NW2d 737 (2004)) (even though the plaintiff did not see the black ice that was underneath the snow and blended in with the pavement until after her fall, the ice was held to be open and obvious given the fact that the cold temperatures and snow fall on the day in question would have led a reasonable person, especially a Michigan resident, to anticipate the possibility of ice on paved surfaces).

However, if there are "special aspects" of a condition that make it "unreasonably dangerous" despite being open and obvious, the invitor retains the duty to undertake reasonable precautions to protect invitees from such danger. *Mann v Shusteric Enterprises*, 470 Mich 320, 328-329; 683 NW2d 573 (2004). Such special aspects might include a high likelihood of harm or an unreasonably high risk of severe injury. *Lugo, supra* at 516-517. The determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Lugo, supra* at 523-524. The *Lugo* Court provided two examples of situations that might involve special aspects and present "an unreasonable risk of harm" despite their open and obvious character: a commercial building with only one exit for the general public where the floor is covered with standing water, and an unguarded 30 foot deep pit in the middle of a parking lot. *Lugo, supra* at 518. Here, plaintiff could have avoided the icy sidewalk by walking adjacent to it in the street. Because his fall occurred around 11:30 p.m. and plaintiff testified that the streets were deserted, contending with vehicular traffic would not have been a concern. Furthermore, it appears that the sidewalk could be safely traversed simply by exercising proper care, as suggested by the fact that after plaintiff fell, he got up, braced himself, and walked back over the ice toward his car without incident.

Moreover, plaintiff cannot establish that the ice posed an unreasonably high risk of severe injury. Although the ice may have posed some risk of injury, the type of danger contemplated by *Lugo* is of a different nature. The critical inquiry is whether there is something unusual about the ice, which because of its character, location, or surrounding conditions gives rise to an unreasonable risk of harm. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995). When analyzing whether an ordinary pothole in a parking lot could give rise to an unreasonable risk of harm, the *Lugo* Court concluded, "there is little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Lugo, supra* at 520. Similarly, the ice in the instant case cannot be considered to have given rise to an unreasonably high risk of severe injury. Accordingly, plaintiff's premises liability claim is barred by the open and obvious danger doctrine as the ice was an open and obvious danger possessing no special aspects.

We also find no evidence in support of plaintiff's contention that the ice accumulated unnaturally due to defendant's decision to cut out a portion of the curb. Plaintiff admitted that he could not determine whether the curb in fact caused an unnatural accumulation of ice in the area

that he fell. He noted that the accumulation of ice in the area where he fell might very well have been no more than the accumulation on other parts of the sidewalk that were far away from the cut curb and apparently not affected by it. In short, plaintiff's contention that the curb cut-out contributed to his fall is mere speculation. This is not a sufficient basis on which to deny defendant's motion for summary disposition.

Finally, plaintiff asserts that even if the ice was open and obvious, defendant had an independent duty to clear the ice from the sidewalk under a city of Birmingham ordinance. The ordinance imposed a duty on every occupant of every lot, and the owner or proprietor of any business establishment, to clear all ice and snow from public sidewalks adjoining said lots within 12 hours. The ordinance appears to apply to defendant, but such ordinances create a public duty for which there is no private right of action. See *Taylor v Saxton*, 133 Mich App 302, 306; 349 NW2d 165 (1984). To the extent that plaintiff argues that his fall was caused not by defendant's failure to clear the abutting public sidewalk of ice, but rather, by defendant's affirmative creation of a defect, plaintiff has not presented sufficient evidence that defendant created a defect which caused plaintiff's fall. Accordingly, the trial court did not err in granting defendant's motion for summary disposition on the ground that the open and obvious nature of the ice precludes plaintiff's entire premises liability claim.

Affirmed.

/s/ Kurtis T. Wilder

/s/ David H. Sawyer

/s/ Alton T. Davis