

STATE OF MICHIGAN
COURT OF APPEALS

EUGENE ROGERS,

Plaintiff-Appellant,

v

PONTIAC ULTIMATE AUTO WASH, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
February 19, 2013

No. 308332
Oakland Circuit Court
LC No. 2011-117031-NO

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant in this premises liability action. We affirm.

I. FACTUAL BACKGROUND

Plaintiff slipped and fell on black ice at a car wash owned by defendant. Plaintiff had driven through the car wash and stopped just outside of the enclosure. This was typically the area where employees would adjust mirrors and dry vehicles. Employees had pushed in plaintiff's mirrors before he entered the car wash, but there were no employees in the exit area at the time plaintiff drove through. Planning on exiting the vehicle to adjust his mirrors, he opened the door of his vehicle. Once he stepped outside of his vehicle, he slipped and fell on what he later determined was black ice.

Plaintiff filed a complaint, alleging that defendant was negligent and violated its duty to maintain its premises in a reasonable and safe manner. Defendant, however, filed a motion for summary disposition, arguing that the condition complained of was open and obvious, relieving it of liability. The trial court agreed with defendant and granted its motion based on the open and obvious doctrine. The trial court also found that there were no special aspects rendering the open and obvious doctrine inapplicable. Plaintiff now appeals.

II. SUMMARY DISPOSITION

A. Standard of Review

A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407

(2011). The motion for summary disposition “tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers “affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted). This Court considers only “what was properly presented to the trial court before its decision on the motion.” *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

B. Open and Obvious

Plaintiff first argues that the trial court erred in granting summary disposition to defendant because the condition complained of was not open and obvious. We disagree.

Plaintiff was an invitee on defendant’s premises and, thus, defendant owed plaintiff a “duty to use reasonable care to protect [plaintiff] from an unreasonable risk of harm caused by dangerous conditions on the premises, including snow and ice conditions.” *Hoffner v Lanctoe*, 492 Mich 450, 455; 821 NW2d 88 (2012). A premises owner is liable for breach of this duty if the owner “knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect.” *Id.* at 460.

However, if the danger is open and obvious, then a premises owner does not owe a duty to an invitee either to protect him from danger or warn him of danger. *Hoffner*, 492 Mich at 460-461. “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 it upon casual inspection. This is an *objective standard*, calling for an examination of the objective nature of the condition of the premises at issue.” *Id.* at 461 (emphasis in original) (quotation marks, footnotes, and citation omitted).

At issue in this case is whether the black ice plaintiff allegedly slipped on was open and obvious. Our Supreme Court has established that the governing precedent regarding the open and obvious doctrine and black ice is *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008). As explained by the Court, black ice conditions are “open and obvious when there are indicia of a potentially hazardous condition, including the specific weather conditions present at the time of the plaintiff’s fall.” *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010) (quotation marks and citation omitted). In *Slaughter*, this Court held that there was a question of fact regarding whether the black ice was open and obvious because, among other factors, there was no snow on the ground, it had not snowed in a week, and it was beginning to rain. *Id.* at 483-484.

While plaintiff argues that the ground likewise appeared wet rather than icy at the time of his fall, the weather conditions in the instant case were significantly different than in *Slaughter*.

Here, rather than rain, plaintiff testified that “[t]here was snow on the ground,” and later clarified that there was at least “inclement weather,” which could be snow, ice, no snow, just ice, and very cold temperatures. The temperature at the time of the accident was below freezing, and plaintiff acknowledged that he knew it was extremely cold on that day. The weather reports attached to defendant’s brief in support of its motion for summary disposition indicate that the high temperature on that day was 23 degrees Fahrenheit, and the low temperature was five degrees. There also is no evidence that the water on the ground was caused by a sudden or temporary rainfall, but was instead intrinsic to the nature of that location. Thus, even adopting plaintiff’s argument regarding the specific weather conditions at the time of the accident—chronic wetness on the ground in temperatures below freezing—we find that these were sufficient indicia of potentially hazardous conditions. In other words, “an average person with ordinary intelligence would have discovered [the hazardous condition] upon casual inspection.” *Hoffner*, 492 Mich at 461.

Analogous is *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 913; 781 NW2d 806 (2010), where the plaintiff slipped and fell on ice at a self-service car wash. In lieu of granting leave to appeal, the Michigan Supreme Court reversed the judgment of this Court and reinstated the trial court’s grant of summary disposition. *Id.* The Court held that “the circuit court properly ruled that the alleged hazardous condition was open and obvious, because a reasonably prudent average user of ordinary intelligence spraying water outdoors in a temperature range of 11 to 24 degrees would anticipate the likelihood of freezing and the resulting danger therefrom.” *Id.* at 914. Similarly in the instant case, plaintiff stopped his vehicle directly outside the car wash, where wet vehicles exit. A person of ordinary intelligence would anticipate that water running off from freshly washed vehicles, in below freezing weather, would likely lead to freezing and the resulting danger of icy conditions. Moreover, while plaintiff argues that, based on *Slaughter*, the lack of snow on the ice is a deciding factor for whether black ice is open and obvious, that is only one possible indicator of a hazard.

C. Special Aspects

Alternatively, plaintiff contends that even if the condition complained of was open and obvious, special aspects existed that rendered the application of the open and obvious doctrine improper. Specifically, plaintiff argues that the ice was unavoidable because he needed to adjust his mirrors before reentering the roadway and there was insufficient space for him to turn his vehicle into the parking lot to adjust his mirrors.

While plaintiff correctly notes that the existence of special aspects renders the application of the open and obvious doctrine improper, there were no special aspects in the instant case. “[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, [then] the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A special aspect is a condition of the hazard that is unusual in character, location, or surrounding circumstances. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995). The essential inquiry is not whether the harm was foreseeable, but whether despite its foreseeability, the harm remained unreasonable. *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997).

However, the Michigan Supreme Court has clarified that “only those special aspects that give rise to a 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*, 464 Mich at 518-519. The Court in *Lugo*, 464 Mich at 518-519, provided two hypothetical examples of these special aspects. First, the Court gave the example of a high likelihood of harm when the only exit to a commercial building was flooded with a standing pool of water, making it impossible for a patron to exit safely. *Id.* at 518. This harm is effectively unavoidable. *Id.* Even viewing the evidence in the light most favorable to plaintiff, the circumstances of this case did not present an unavoidable hazard. Plaintiff could have driven away from the car wash and turned into the first available parking lot to adjust his mirrors. Or, plaintiff could have rolled down his windows and adjusted his mirrors, reaching over to the passenger side, never having to exit the vehicle at all. Plaintiff was not trapped in the carwash lot. He was not forced to exit his vehicle and encounter the hazard. Rather, he chose to do so. See *Hoffner*, 492 Mich at 469 (“situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so.”) (emphasis in original).

In regard to what constitutes a high risk of severe harm, the Court in *Lugo*, 464 Mich at 518, gave the example of an unguarded 30-foot deep pit in a parking lot. This harm poses a risk of death or severe injury, not a risk of a lesser harm. *Joyce v Rubin*, 249 Mich App 231, 241-242; 642 NW2d 360 (2002). In the instant case, the risk of slipping on black ice is a categorically different type of risk, both in nature and degree, than a 30-foot deep pit. While it is certainly unfortunate that plaintiff was injured in the alleged incident, the risk of black ice is not that of death or severe injury, but of the lesser harm that plaintiff claims to have suffered. Therefore, plaintiff has failed to demonstrate any special aspects that would render the application of the open and obvious danger inappropriate.

D. Applicability of Open and Obvious Doctrine

Lastly, plaintiff argues that because defendant had notice and “actively” created the dangerous condition, this was “textbook active negligence, removing the issue from [sic] the open and obvious analysis.” Rather than a premises liability action, plaintiff is attempting to characterize his claim as ordinary negligence resulting from defendant’s alleged creation of the hazard. We disagree, and hold that this action rests firmly in premises liability.

Michigan law distinguishes between negligent claims that pertain to conditions on the land as opposed to ordinary negligence actions. As we articulated in *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012), “[i]f the plaintiff’s injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff’s injury.” This distinction is significant because if the action involves only ordinary negligence, the open and obvious defense is unavailable. *Laier v Kitchen*, 266 Mich App 482, 490; 702 NW2d 199 (2005).

“It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.” *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Plaintiff’s complaint clearly establishes that this action is one of premises liability. He alleged that the

black ice caused him to be “violently thrown on the ground.” He also alleged that defendant had a duty to maintain its premises in a reasonably safe manner, and that the danger was unavoidable. Thus, the danger complained of was a dangerous condition on the land, consistent with a premises liability action. Consistent with this interpretation, our Supreme Court has recognized that when the alleged negligence related to ice surrounding a self-service car wash, such a “claim sounds exclusively in premises liability.” *Kachudas*, 486 Mich at 914. Hence, because plaintiff’s injuries were directly caused by the ice on the land, this action rests firmly in premises liability and the open and obvious doctrine is applicable.

III. CONCLUSION

The trial court properly found that the condition was open and obvious without any special aspects. Also, as this is a premises liability action, the application of the open and obvious doctrine was proper. Defendant is entitled to costs as the prevailing party, MCR 7.219(F). We affirm.

/s/ Michael J. Riordan
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell