

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK RAY,

Plaintiff-Appellant,

v

LOWEN REAL ESTATE, L.L.C., and LOWEN
CLINIC, d/b/a STOLLER CLINIC,

Defendants,

and

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellee.

UNPUBLISHED

April 18, 2013

No. 305403

Oakland Circuit Court

LC No. 2011-118459-NO

PATRICK RAY,

Plaintiff-Appellant,

v

LOWEN REAL ESTATE, L.L.C., and LOWEN
CLINIC, d/b/a STOLLER CLINIC,

Defendants-Appellees,

and

BOTSFORD GENERAL HOSPITAL,,

Defendant.

No. 309436

Oakland Circuit Court

LC No. 2011-118459-NO

Before: MARKEY, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff challenges the trial court's orders granting summary disposition for defendants Botsford General Hospital (Botsford), Lowen Real Estate,

L.L.C. (LRE) and Lowen Clinic, d/b/a Stoller Clinic (Lowen Clinic). In Docket No. 305403, plaintiff appeals by leave granted the trial court's order granting summary disposition in favor of Botsford pursuant to MCR 2.116(C)(8). In Docket No. 309436, plaintiff appeals as of right the trial court's order granting summary disposition in favor of LRE and Lowen Clinic pursuant to MCR 2.116(C)(10). Because plaintiff abandoned his argument that he was negligently placed on the operating table and failed to allege negligence based on the use of an unstable or defective operating table, the trial court properly granted summary disposition for Botsford pursuant to MCR 2.116(C)(8). In addition, although the trial court erroneously determined that the black ice on which plaintiff alleges he fell was open and obvious, summary disposition for LRE and Lowen Clinic was nevertheless proper because neither defendant had constructive notice of the condition. We therefore affirm in both appeals.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 30, 2009, plaintiff slipped and fell on a handicap ramp while attempting to enter Lowen Clinic, a chiropractic clinic, located in a building that LRE owned. Plaintiff alleged that he fell because of a buildup of water and ice on the ramp. Plaintiff suffered fractures to his right arm as a result of the fall and went to Botsford seeking treatment. While undergoing surgery at Botsford, plaintiff fell off the operating table onto the floor, purportedly injuring his back. Plaintiff filed this action alleging two counts of violation of the Americans with Disabilities Act (ADA) against LRE and Lowen Clinic¹ and one count of general negligence against Botsford.

Botsford filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) arguing that plaintiff's claim sounded in medical malpractice rather than ordinary negligence and that dismissal was required because plaintiff failed to file an affidavit of merit along with his complaint as required by MCL 600.2912d. In response, plaintiff argued that his claim sounded in ordinary negligence because it did not involve questions of medical judgment or require expert testimony. Rather, plaintiff argued that his medical records showed that he was placed on an unstable operating table and thereafter fell to the floor. The trial court granted Botsford's motion, stating:

Looking at plaintiff's complaint, he clearly avers that Botsford failed to "exercise reasonable care and diligence to handle a patient with care, so as not to drop the Plaintiff from an operating table" and "breached the above duties when they failed to exercise reasonable care in handling [plaintiff] while he was on the operating table, as they dropped him from the table." Both of these allegations

¹ The trial court granted summary disposition for LRE and Lowen Clinic pursuant to MCR 2.116(C)(8) on plaintiff's ADA claims on the basis that plaintiff failed to allege that he qualified for protection under the ADA and failed to allege that either defendant owed him a duty pursuant to the ADA. Plaintiff has not appealed that ruling. The trial court proceeded to analyze plaintiff's ADA claims as a premises liability claim, stating that the claims sounded in premises liability. It is the trial court's grant of summary disposition on a premises liability theory that plaintiff challenges in this appeal.

relate to “how” Botsford handled plaintiff not whether it was negligent for using an unsteady operating table – a fact that is only introduced through documentary evidence not the pleadings[]. As such, plaintiff’s complaint states allegations that are sound [sic] in medical malpractice not ordinary negligence and since plaintiff failed to attach an Affidavit of Merit to his complaint, his complaint is deficient pursuant to MCL § 600.2192d [sic, 600.2912d]. Summary disposition pursuant to MCR 2.116(C)(8) is, therefore, appropriate.

Thereafter, Lowen Clinic moved for summary disposition pursuant to MCR 2.116(C)(10), and LRE moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Both defendants argued that the black ice that plaintiff claimed caused his fall² was an open and obvious condition and that there were no special aspects of the condition that rendered the open and obvious doctrine inapplicable. They also argued that they had no notice of the alleged unsafe condition. In response, plaintiff argued that the condition was not open and obvious and that Lowen Clinic and LRE had actual or constructive notice of it.

Following oral argument, the trial court determined that there was no genuine issue of material fact that LRE and Lowen Clinic had constructive notice that the ramp may become slippery. The court stated:

Plaintiff alleges facts to support that the Clinic previously roped off the ramp when the forecast was for temperatures in the 30s and the weather conditions on the day of the incident were hovering around the freezing mark. Defendants acknowledge that they roped off the ramp at certain times. As such, . . . [s]ummary disposition pursuant to MCR 2.116(I)(2) for plaintiff is, therefore, appropriate that defendants had constructive notice that the ramp may become slippery as supported by the fact that they took steps to rope off the ramp as a part of their normal procedure when the conditions presented themselves.

The trial court also determined, however, that the condition was open and obvious and granted summary disposition for LRE and Lowen Clinic pursuant to MCR 2.116(C)(10). The trial court relied on evidence showing that plaintiff is a longtime Michigan resident, he knew that condensation on the ground could freeze if the temperature dropped lower than anticipated, he listened to the weather report in the morning before he went to Lowen Clinic, he heard that the temperature had dropped lower than anticipated, and he had used his defroster in his car because his car had frost on it.

II. DOCKET NO. 305403

In Docket No. 305403, plaintiff challenges the trial court’s order granting summary disposition for Botsford pursuant to MCR 2.116(C)(8). We review de novo a trial court’s decision on a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672;

² Plaintiff testified during his deposition that he believed that he fell because of black ice on the handicap ramp.

719 NW2d 1 (2006). “A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone.” *Id.* A motion pursuant to subrule (C)(8) “should be granted if no factual development could possibly justify recovery.” *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

Plaintiff argues that the trial court erred by determining that his claim sounds in medical malpractice rather than ordinary negligence. Plaintiff asserts that he alleged in his complaint that an employee negligently set up the operating table, failed to inspect the defective table, or negligently placed him on the table, causing him to fall to the floor. Plaintiff maintains that because his allegations do not raise questions concerning medical judgment or require knowledge beyond a person’s common knowledge and experience, his claim sounds in ordinary negligence.

Initially, we note that plaintiff has abandoned his argument that he was negligently placed on the operating table by taking a contrary position in the trial court. In response to Botsford’s motion for summary disposition plaintiff argued, “[t]he instant claim is not that [Botsford] placed [plaintiff] improperly,” and “this is not a case about whether or not [Botsford] positioned the patient in the proper way, or the way to secure a patient. Rather, the Plaintiff was placed on a defective unstable operating table.” Plaintiff further argued:

[Plaintiff] was in the middle of having surgery when he was dropped to the floor. Merely because it was during a surgical procedure does not in and of itself mean there was malpractice. Plaintiff’s claim is not about the “technique” that was used to secure him to the operating table. Rather, the table he was on was unstable – which explains the fall. It had nothing to do with positioning or skill, rather, [Botsford] did not pay close attention to the status of the table.

By denying in the trial court that his claim involved his alleged improper placement on the operating table, plaintiff cannot now assert on appeal that his claim stems from his negligent placement on the operating table. “A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.” *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003) (quotation marks and citation omitted). Accordingly, plaintiff has abandoned his argument that his claim against Botsford stems from his negligent placement on the operating table.

Plaintiff argues in this Court, and he maintained in the trial court, that he was placed on an unstable or defective operating table. The trial court correctly determined that plaintiff’s complaint did not allege negligence based on Botsford’s use of an unstable or defective operating table. In his complaint, plaintiff alleged, in pertinent part:

35. That during surgery, Plaintiff was dropped from the operating table and fell to the floor.

36. That Defendant, Botsford Hospital, and its agents, servants and or employees, were required to exercise reasonable care and diligence to handle a patient with care, so as not to drop the Plaintiff from an operating table.

37. That Defendant, Botsford Hospital, and its agents, servants and or employees, breached the above duties when they failed to exercise reasonable care in handling [plaintiff] while he was on the operating table, as they dropped him from the table.

38. That as a result of failure of Botsford Hospital and its agents, servants, and/or employees^[1] failure to handle Plaintiff with care while he was on the operating table, he sustained a fall from the operating table onto the hard floor injuring his back and causing significantly more pain and debility than he experienced before his fall at [LRE and Lowen Clinic].

* * *

41. It is within the common knowledge of all individuals that it is negligent and grossly negligent to drop a patient from an operating table. The negligence of dropping [plaintiff] did not involve any aspect of medical judgment as it is within the common knowledge to secure a person onto an operating table and take steps to prevent a fall from the table.

Viewing the allegations in the complaint alone, plaintiff failed to allege negligence based on the use of an unstable or defective operating table. Rather, as the trial court recognized, plaintiff's allegations pertained to the manner in which plaintiff was handled while he was on the operating table. Because no factual development could have justified recovery based on plaintiff's theory of liability, the trial court properly granted summary disposition for Botsford pursuant to MCR 2.116(C)(8).

Further, we note that plaintiff's claim as stated in his complaint, based on the manner in which he was handled while on the operating table, sounds in medical malpractice rather than ordinary negligence.

If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. [*Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 423; 684 NW2d 864 (2004).]

Here, expert testimony was required to assess the reasonableness of the health care professionals' handling of plaintiff while he was on the operating table. Plaintiff's medical records state that he was administered general anesthesia and "then positioned in the left lateral decubitus position in the beanbag on the Jackson fracture table. He was belted down and taped. Blankets were used for bumps to his anterior chest wall which were taped for position of the arm during surgery. The right upper extremity was then prepped and draped in the usual manner." The records further state that while surgery was being performed, "the patient inadvertently rolled off the Jackson table down to the floor." The proper positioning of a patient on a Jackson table or the handling of such a patient during surgery is not within the common knowledge of lay jurors.

Rather, expert testimony is necessary to assess the actions of the health care professionals and whether their conduct was reasonable. Accordingly, plaintiff's claim sounds in medical malpractice rather than ordinary negligence.

III. DOCKET NO. 309436

In Docket No. 309436, plaintiff challenges the trial court's order granting summary disposition for LRE and Lowen Clinic pursuant to MCR 2.116(C)(10). A motion pursuant to subrule (C)(10) tests the factual support for a claim. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). In reviewing a motion granted under subrule (C)(10), this Court reviews the documentary evidence submitted by the parties "and all legitimate inferences in the light most favorable to the nonmoving party." *Id.* 567-568. Summary disposition is appropriate if "there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff argues that the trial court erred by granting summary disposition for LRE and Lowen Clinic because the court essentially determined that black ice is always open and obvious and disregarded evidence that Lowen Clinic and/or LRE roped off the handicap ramp so that it could not be used during icy conditions. We conclude that the trial court erred by determining that the black ice was open and obvious, but also erred by determining that LRE and Lowen Clinic had constructive notice of the condition. Therefore, summary disposition for LRE and Lowen Clinic was proper.

Generally, a premises owner or 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." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor 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." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). The duty, however, does not extend to open and obvious dangers. *Lugo*, 464 Mich at 516. "[S]uch dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 461. Courts employ an objective standard to determine whether a condition is open and obvious. *Id.* "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." *Id.*

Michigan courts have previously addressed situations involving black ice and declined to hold that black ice constitutes an open and obvious condition as a matter of law. In *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008), this Court stated:

The overriding principle behind the many definitions of black ice is that it is either invisible or nearly invisible, transparent, or nearly transparent. Such definition is inherently inconsistent with the open and obvious danger doctrine. Consequently, we decline to extend the doctrine to black ice without evidence that

the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition.

In *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934; 782 NW2d 201 (2010), our Supreme Court peremptorily reversed this Court's determination that the trial court erred by applying the open and obvious doctrine in a situation involving black ice. See *Janson v Sajewski Funeral Home, Inc*, 285 Mich App 396, 400; 775 NW2d 148 (2010), rev'd *Janson*, 486 Mich 934. Our Supreme Court stated:

The Court of Appeals failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008), which renders alleged "black ice" conditions 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." Here, the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Moreover, the alleged condition did not have any special aspect. It was avoidable and not unreasonably dangerous. *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002).

In this case, there was no evidence that the black ice would have been visible on casual inspection. See *Slaughter*, 281 Mich App at 483. Plaintiff testified that as he was trying to get up after falling, he felt water and ice on the ramp with his left hand and his clothes were wet. The ramp was a wooden ramp covered with black tar paper, and no evidence was presented that the water and ice would have been visible from a standing position. The trial court determined that the black ice was open and obvious based on the following reasons:

(1) plaintiff is a long time Michigan resident; (2) plaintiff knew that any condensation on the ground would freeze if the temperature dropped lower than anticipated . . . (3) plaintiff listened to the weather report before his appointment [at Lowen Clinic]; (4) plaintiff heard that the temperature had dropped lower than predicted; and (5) plaintiff's car had frost on it such that he had to use his defroster.

Those circumstances, however, were insufficient to render the black ice open and obvious given the other circumstances that existed. Plaintiff testified that the weather was in the mid to upper 30's and therefore above freezing; it had not snowed that November; it had not rained that day or the previous day; it was sunny that morning; and the roads were not slippery when he drove to Lowen Clinic. Plaintiff speculated that the icy condition was caused by condensation on the ramp. Although plaintiff had to use the defroster in his car because his rear window "was a little frosty," that fact would not have alerted an average person of ordinary intelligence to the presence of black ice considering the lack of precipitation. The circumstances presented in this

case are far removed from those presented in *Janson*, 486 Mich at 934. Thus, the trial court erred by concluding that the black ice was open and obvious.

The trial court also erred by concluding that LRE and Lowen Clinic had constructive notice “that the ramp may become slippery.” The trial court determined that LRE and Lowen Clinic were aware that the ramp could become slippery because they roped off the ramp so that it could not be used during wintery conditions. The fact that LRE and Lowen Clinic were aware that the ramp could become slippery during icy or snowy weather, however, does not imply that they were aware of the black ice that purportedly caused plaintiff’s fall. As previously discussed, the temperature was above freezing, it was sunny, it had not yet snowed that season, and it had not rained that day or the previous day. When asked whether anyone had checked the ramp that morning to make sure that it was usable, Dr. Craig Stoller, a Lowen Clinic employee, testified:

No. Weather-wise, if I remember, I don’t remember it being a day people would have checked it, because it wasn’t – ice wasn’t an issue that day. So it wouldn’t be something that – you know, unless it was – you know, there was precipitation or something like that, it wouldn’t be something that people would check routinely if the weather was not an issue on that day.

Thus, the evidence shows that neither LRE nor Lowen Clinic knew about the black ice and the circumstances were not such that either defendant should have been aware of it. Accordingly, the trial court erred by concluding that LRE and Lowen Clinic had constructive notice of the condition. Because neither defendant knew or should have known of the condition, summary disposition in their favor was proper. We will not reverse where the trial court reaches the correct result, albeit for the wrong reason. *Adams v West Ottawa Pub Schs*, 277 Mich App 461, 466; 746 NW2d 113 (2008).

Affirmed. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Pat M. Donofrio