

STATE OF MICHIGAN
COURT OF APPEALS

OTHELA POOLE, a Legally Incapacitated Person,
by her Next Friend GLENDA POOLE JONES,

UNPUBLISHED
August 12, 2014

Plaintiff-Appellee,

v

No. 312685
Wayne Circuit Court
LC No. 12-000472-AV

FOODLAND/ATLAS MARKET,

Defendant-Appellant.

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ a circuit court order affirming the district court's denial of defendant's motion for summary disposition in this premises liability action. We reverse.

Defendant argues that the district court erred in denying defendant's motion for summary disposition because there was no genuine issue of material fact regarding the application of "special aspects" to defendant's open and obvious defense. We agree.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court will only consider "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. "[A] genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might

¹ *Poole v Foodland/Atlas Market*, unpublished order of the Court of Appeals, entered April 19, 2013 (Docket No. 312685).

be developed . . . would leave open an issue upon which reasonable minds might differ.” *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (internal citations omitted).

To prove a cause of action for negligence, a plaintiff must prove that: “(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant’s breach was a proximate cause of the plaintiff’s damages.” *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 162; 809 NW2d 553 (2011). The duty that defendant, as the premises possessor, owed to plaintiff depends on plaintiff’s status. *Bialick v Megan Mary, Inc*, 286 Mich App 359, 362; 780 NW2d 599 (2009). Here, plaintiff was an invitee because she entered the premises to conduct business, and this status triggers a duty of care to warn of known dangers, to make the premises safe, to inspect the premises, and to make any necessary repairs. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). However, the premises possessor does not owe a duty to protect an invitee from “dangers that are ‘open and obvious’ unless special aspects exist, such as a condition that is effectively unavoidable or imposes an unreasonably high risk of severe harm.” *Bialick*, 286 Mich App at 362. A “condition is open and obvious if an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.” *Id.* at 363 (internal citations omitted). The presence of special aspects essentially negates a defendant’s open and obvious defense. *Id.*

The snow and ice conditions were open and obvious to plaintiff. This Court has held that the presence of snow is not only open and obvious, but when snow is present, ice can also be open and obvious because the “existence of a condition” can “reasonably be gleaned from all of the senses as well as one’s common knowledge of weather hazards that occur in Michigan during the winter months.” *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). Plaintiff acknowledged that she observed the ice when she entered defendant’s store. She also observed snow when she exited the store; thus, she also would have knowledge of other hazards – like ice – that typically come with snow. *Slaughter*, 281 Mich App at 479. . Further, this Court has held that “by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery.” *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006). Therefore, the snow and ice at the exit of defendant’s store was an open and obvious condition.

Plaintiff argues that even if the snow and ice condition was open and obvious, the condition had special aspects that directly negated defendant’s open and obvious defense. The Supreme Court, in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001), clearly held 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.” There, the Court used a condition that was effectively unavoidable as an *example* of a special aspect that would give rise to a uniquely high likelihood of harm. *Id.* at 518-519. The Court in *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), held that “the standard for ‘effective unavoidability’ is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard.” *Id.* at 469. Here, the condition was not effectively unavoidable because plaintiff was not required to traverse the path on which she fell and, as plaintiff testified, she was able to traverse the area when she entered the store. The circumstances here simply do not meet the standard of effective unavoidability.

Accordingly, the district court erred in denying defendant's motion for summary disposition, and the circuit court erred in affirming the district court's order.

Reversed and remanded to the district court for entry of an order granting summary disposition to defendant. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ Michael J. Riordan