

STATE OF MICHIGAN
COURT OF APPEALS

DORREEN FORTUNA,

Plaintiff-Appellant,

v

LAKE TED, INC., d/b/a MCDONALD'S OF
HOUGHTON LAKE,

Defendant-Appellee.

UNPUBLISHED

January 19, 2006

No. 264636

Roscommon Circuit Court

LC No. 04-724660-NO

Before: Zahra, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the trial court granting summary disposition under MCR 2.116(C)(10) in favor of defendant in this premises liability action. Plaintiff was injured when she slipped and fell on an icy patch on a sidewalk/ramp just after exiting defendant's McDonald's Restaurant. We affirm.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), which ruling was predicated on the court's finding that the icy condition encountered by plaintiff was open and obvious. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

As a general rule, a premises 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). However, this duty does not generally extend to removal of open and obvious dangers. *Id.* “[W]here 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.” *Id.*, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992)(alteration in *Lugo*).

A condition is open and obvious when an average user with ordinary intelligence would 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 test is not whether a particular plaintiff should have known that the condition was dangerous, but whether a reasonable person in plaintiff's position would foresee the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

On the basis of the documentary evidence presented, we reject plaintiff's argument that the trial court erred in granting the motion for summary disposition premised on the open and obvious danger doctrine.

Plaintiff testified that she did not see the ice on the sidewalk before she fell and that it was essentially black ice. However, plaintiff further testified that, following the fall, she was able to see the ice on which she slipped. Plaintiff was emphatic that the ice, which was thin, encompassed the entire ramp upon which she fell. She did not assert that the ice could not be seen on casual observation. Plaintiff stated that there was water on the ice; "[i]t was just wet on top of the ice."

Plaintiff's sister, Colleen Kaleta, testified that she hurried over to where plaintiff fell, looked at the area, saw the ice, and avoided walking on it. She further testified that it was obvious that plaintiff slipped on ice and that the area was obviously icy. Kaleta indicated that the accident occurred around 6:00 p.m., that it was dark outside, that the area of the fall was not well lit, that she did not know whether any lights were actually on, and that it was cold, but it had not been snowing.¹ Kaleta, looking at photographs taken by a McDonald's employee of the area where plaintiff fell, stated that the presence of ice was not readily apparent from the photographs, but she urged that she personally observed icy conditions at the scene.²

Defendant's former employee, Donna Madigan, who took photographs of the scene following the fall, described the ice as blotchy, shiny, and noticeable. She believed that the restaurant's lights were on when she viewed the area where plaintiff fell. Madigan further indicated that it was not black ice and that she noticed the ice right away because it shined when the light hit it.³ She did not know whether the lights were on at the exact time plaintiff fell.

Even when viewing this evidence in the light most favorable to plaintiff, we conclude that the court did not err in finding that the icy condition was open and obvious. Reasonable minds could not differ in this case as to whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented by the unobstructed ice upon casual

¹ We note that plaintiff did not testify that she failed to see the ice because of darkness, or that darkness played any role in the fall.

² We note that the Polaroid photographs are grainy and not very clear.

³ Although Madigan testified that the ice was shiny because of the lights hitting the ice, she also testified that she was uncertain whether the lights were actually on. Later she testified that one could definitely see the ice around the time of the fall.

inspection. The testimony of all of the witnesses indicated that they clearly observed icy conditions at the location of plaintiff's fall, including plaintiff's own testimony.

Plaintiff further argues that the trial court held her to an improper standard when determining that the ice that she encountered was open and obvious. Specifically, plaintiff contends that rather than applying the casual inspection test, the court improperly relied on the testimony of witnesses who inspected the area after plaintiff's fall to ascertain the cause of the accident. Plaintiff contends that such an inspection is different in kind than a casual inspection. The test is whether an average individual of ordinary intelligence would have discovered the danger on casual inspection, and the focus is on the characteristics of a reasonably prudent person. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). There is no indication that the witnesses made their statements on the basis of intensive scrutiny, meticulous observation or inspection, or up-close examination of the icy patch. They simply came upon the scene and saw the ice, with plaintiff acknowledging the presence of ice after the fall. Thus, we conclude that the trial court did not err by relying on witness testimony that described the condition as both very obvious and noticeable, despite the fact that this testimony was based on observations made after the accident.

Plaintiff also argues that the trial court erred in finding that the ice in this case did not present special aspects which would negate the open and obvious danger doctrine. Again, we disagree.

Once a court determines that a condition is open and obvious, the critical question then becomes

whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from the typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Lugo, supra* at 517-518.]

"[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous," then the owner of the premises has a duty to take reasonable precautions to protect invitees from it. *Id.* at 517. But only those special aspects that create a uniquely high likelihood or severity of harm if the risk or hazard is not avoided will remove the condition from the open and obvious danger doctrine. *Id.* at 519.

In *Lugo*, our Supreme Court set forth two hypothetical situations involving open and obvious conditions having special aspects that negated application of the open and obvious danger doctrine. *Id.* at 518. One was an unguarded thirty-foot deep pit in the middle of a parking lot, which was unreasonably dangerous because it posed a high risk of severe harm. *Id.* The other was a building with the floor outside its only exit covered in standing water, which was unreasonably dangerous because it was effectively unavoidable. *Id.*

Here, plaintiff contends that because the condition of defendant's roof and overhang created chronic ice accumulation in the area where plaintiff fell, this is a special aspect that

makes the condition unreasonably dangerous under *Lugo*. The icy condition at issue did not pose a high risk of severe harm, *Corey, supra* at 6-7, and was not effectively unavoidable. Although we do not read *Lugo* as limiting the scenarios that would provide a finding of special aspects to the examples given, we conclude that plaintiff has failed to show the existence of special aspects here.

Finally, given that the court below properly applied the open and obvious danger doctrine, we need not consider whether defendant had actual or constructive notice of the condition.

Affirmed.

/s/ Brian K. Zahra
/s/ William B. Murphy
/s/ Janet T. Neff