

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY POWELL,

Plaintiff-Appellant,

v

SAVE-A-LOT,

Defendant-Appellee.

UNPUBLISHED

April 21, 2009

No. 282436

Berrien Circuit Court

LC No. 2006-003254-NO

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals the trial court's order that granted defendant's motion for summary disposition. For the reasons set forth below, we affirm.

Plaintiff alleges that he sustained injuries after he slipped on a patch of black ice in defendant's parking lot. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), and argued that the black ice was an open and obvious hazard. The trial court granted defendant's motion and dismissed the case.

Plaintiff contends that the trial court erred in holding that black ice is an open and obvious hazard as a matter of law. Alternatively, plaintiff argues that, if the black ice in this case was an open and obvious hazard, it constituted an unreasonably dangerous condition such that defendant had a continuing duty to protect plaintiff.

We review de novo a trial court's decision to grant summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). We review 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." *Id.* at 551-552. Summary disposition is proper under MCR 2.116(C)(10) when "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." See *Lugo v Ameritech Corp*, 464 Mich 512, 520; 629 NW2d 384 (2001).

"In general, 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, supra* at 516 "However, this duty does not generally encompass removal of open and obvious dangers." *Id.* at 516. An open and obvious danger is a danger and risk presented by

that danger that an “average user of ordinary intelligence [would] have been able to discover . . . upon casual inspection.” *Novotney v Burger King*, 198 Mich App 470, 475; 499 NW2d 379 (1993). “Because the test is objective, this Court looks not to whether a particular plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his or her position would have foreseen the danger.” *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007). A continuing duty to protect invitees from an open and obvious danger exists only if there are special aspects that make the open and obvious risk “unreasonably dangerous.” *Lugo, supra* at 517. An “unreasonably dangerous” condition could be a condition that is “effectively unavoidable” or poses an “unreasonably high risk of severe harm.” *Id.* at 518.

Dangerous conditions caused by winter weather in Michigan can constitute an open and obvious hazard. See *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5-6, 8; 649 NW2d 392 (2002). Moreover, black ice may constitute an open and obvious hazard. See *Kenny v Kaatz Funeral Home*, 472 Mich 929; 697 NW2d 526 (2005); *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007) (snow-covered black ice is an open and obvious hazard). After plaintiff filed his appeal, this Court released *Slaughter v Blarney Castle Oil Company*, 281 Mich App 474; 760 NW2d 287 (2008), lv pending. In *Slaughter*, this Court ruled that black ice is an open and obvious hazard only if the ice would have been visible upon casual inspection or if there are “other indicia of a potentially hazardous condition.” *Id.* at 483. While, pursuant to *Slaughter*, black ice is not necessarily an open and obvious hazard as a matter of law, we affirm the trial court’s grant of summary disposition to defendant because, here, a reasonable person in plaintiff’s position would have foreseen the possibility of the formation of black ice in defendant’s parking lot. *Kennedy, supra*.¹

Here, the weather records submitted by plaintiff indicate that, on the day of plaintiff’s fall, there were snow flurries and mist almost continuously from 5:51 a.m. until 11:24 a.m. The records further show that the temperature was below freezing, and that there were intermittent periods of fog throughout the morning hours. According to plaintiff’s brief in response to defendant’s motion for summary disposition, “[t]hose records suggest ideal conditions for the formation of ‘black ice.’ ” These facts differ from those in *Slaughter* where the plaintiff slipped on black ice when it had not snowed for a week and there were clear conditions up until the time the plaintiff fell. *Slaughter, supra* at 475-476. Although, in *Slaughter*, it began to rain just as the plaintiff slipped, here, almost seven hours of snow flurries, mist, fog and freezing temperatures shortly preceded plaintiff’s fall. Viewing these facts in a light most favorable to plaintiff, a reasonable lifelong citizen of Michigan would have foreseen that mist, snow, fog, and freezing temperatures in February could lead to the formation of black ice. *Kennedy, supra*. No genuine issue of material fact existed on the issue of whether the alleged dangerous condition was open and obvious.

¹ “[W]e will not reverse the lower court when it reaches the correct result, albeit for the wrong reason.” *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

We further hold that plaintiff failed to present evidence that the condition was unreasonably dangerous under *Lugo, supra* at 517. Here, the black ice was clearly avoidable. Plaintiff got out of his vehicle and walked into the store without slipping on the ice and, even if ice formed near the driver's side door, plaintiff could have entered his vehicle through the passenger-side door, so any alleged hazard was not "effectively unavoidable." *Id.* at 518. Also, the black ice did not pose an unreasonably high risk of severe harm. The *Lugo* Court provided an example of such a harm: "consider an unguarded thirty foot deep pit in the middle of a parking lot ... this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous..." *Id.* at 518. "Falling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot deep pit." *Corey, supra* at 7. Accordingly, we find the black ice was open and obvious did not present an unreasonable high risk of severe harm.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra