

STATE OF MICHIGAN
COURT OF APPEALS

HADI NAZAL,

Plaintiff-Appellant,

v

AUTOALLIANCE INTERNATIONAL, INC.,

Defendant-Appellee.

UNPUBLISHED
February 26, 2013

No. 306690
Wayne Circuit Court
LC No. 10-007210-NI

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

PER CURIAM.

In this premises liability case, plaintiff Hadi Nazal appeals as of right the trial court's order granting defendant AutoAlliance International, Inc.'s motion for summary disposition pursuant to MCR 2.116(C)(10). Because we conclude that the trial court did not rely on inadmissible evidence and because there is no genuine issue of material fact in regard to whether the dangerous condition had any special aspects, we affirm.

The basic facts of this case are not in dispute. On December 28, 2009, plaintiff was operating a tractor-trailer on defendant's premises in the course of his employment. Plaintiff was working in defendant's container yard with Dave David, a crane operator. It was snowing, and the ground was covered in snow. Plaintiff was waiting for David to load an empty container onto his vehicle when David honked his horn and lowered his window, indicating that he wanted to speak with plaintiff. In his deposition, plaintiff explained that he could not hear David over the wind and engine noise. Plaintiff also explained that one of his job responsibilities was to communicate with David; thus, he could not simply ignore David's request. In order to talk to David, plaintiff exited his vehicle and started to walk across the container yard. Plaintiff testified during his deposition that their vehicles were about 15 to 20 feet apart, and that after walking about ten feet, he slipped and fell on a patch of ice that was covered by the snow, falling to the ground and sustaining injuries.

As a result of the slip and fall accident, plaintiff filed a complaint on June 23, 2010, alleging that defendant was negligent for breaching its duty to maintain its premises in a reasonably prudent manner. Defendant answered plaintiff's complaint, and the case proceeded to discovery. On May 26, 2011, defendant filed its motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that summary disposition was appropriate because there

was no genuine issue of material fact, and the evidence demonstrated that plaintiff's claim was barred by the open and obvious doctrine.

On July 8, 2011, the trial court held a hearing on defendant's motion for summary disposition. Plaintiff did not specifically concede that the hazard was open and obvious, but he did not argue otherwise. Rather, plaintiff argued that the hazard was effectively unavoidable because communication with David was one of his job duties. Accordingly, plaintiff argued that special aspects existed, and the open and obvious doctrine did not bar his lawsuit. After hearing arguments from both parties, the trial court granted summary disposition in favor of defendant because it found there were no special aspects present to preclude application of the open and obvious doctrine. Specifically, the trial court stated that there were other ways plaintiff could have communicated with David, as set out in David's affidavit. Thus, plaintiff did not have to walk across the container yard, and the hazardous condition was avoidable. A conforming order was entered on July 8, 2011.

Plaintiff filed a motion for reconsideration on July 21, 2011. In his motion for reconsideration, plaintiff challenged David's affidavit, arguing that it should not have been considered by the trial court because it did not satisfy MRE 602 because David lacked personal knowledge in regard to plaintiff's options. On September 27, 2011, the trial court denied plaintiff's motion for reconsideration because even though its ruling was based in part on David's affidavit plaintiff failed to challenge the affidavit at the time it was filed or in the six-week period between the filing of defendant's motion for summary disposition and the hearing on the motion. Accordingly, the trial court denied plaintiff's motion for reconsideration. This appeal ensued.

On appeal, plaintiff argues that the trial court erred by granting summary disposition in favor of defendant because the dangerous condition had a special aspect precluding application of the open and obvious doctrine. Specifically, plaintiff argues that because he was required by his employment duties to communicate with David, the crane operator, the icy condition in the container yard was unavoidable because he had to cross the yard to hear what David was saying to him; thus, he had no choice but to confront the danger.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Owners and occupiers of property have a duty to maintain their premises in a reasonably safe condition and to exercise ordinary care in keeping the premises safe. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). A defendant does not breach the duty of care when the dangerous condition is open and obvious. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). A condition is open and obvious when the invitee has actual knowledge of it or when a reasonable person of ordinary intelligence would discover the condition upon a casual inspection. *Id.*

The special aspects doctrine is an exception to the open and obvious rule, and it imposes a duty on a landowner who permits an unreasonable risk of harm to exist regardless of whether the danger is open and obvious. *Lugo*, 464 Mich at 525. Our Supreme Court has recently made clear that “liability does not arise for open and obvious dangers *unless special aspects* of a condition make even an open and obvious risk *unreasonably dangerous*.” *Hoffner v Lanctoe*, 492 Mich 450, 455; 821 NW2d 88 (2012) (emphasis in original). There are “two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*.” *Id.* at 463 (emphasis in original). In both cases, the danger must “give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided.” *Id.* (quotation marks and citation omitted). “[A]n ‘effectively unavoidable’ condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances.” *Id.* at 456. Common or avoidable conditions are not uniquely dangerous. *Id.* at 463. Further, the determination that a special aspect is present must be based on the nature of the condition at issue, and must not be based retrospectively on the fact that a particular plaintiff in fact suffered severe harm. *Lugo*, 464 Mich at 518, n 2, 523-524.

Here, the dangerous condition was ice underneath snow. It is not disputed that the dangerous condition was open and obvious; however, plaintiff argues the condition was effectively unavoidable because he was compelled to cross the icy yard to communicate with David because such communication was part of his job. Further, plaintiff argues that the alternatives suggested by David were not actually viable.

Contrary to plaintiff’s claim, the Michigan Supreme Court in *Hoffner* rejected the notion that a preexisting contractual or other relationship alters the analysis of whether a condition is effectively unavoidable. *Hoffner*, 492 Mich at 469. The Court explained that the “law of premises liability in Michigan provides that the duty owed to an invitee applies to *any business invitee*, regardless of whether a preexisting contractual or other relationship exists, and thus the open and obvious rules similarly apply with equal force to those invitees.” *Id.* (emphasis in original). See also *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002) (holding that the open and obvious doctrine applied, and no special aspect existed, despite the fact that the plaintiff’s employment required him to work around an icy condition). Thus, plaintiff’s duty to communicate with David because of their employment relationship was not sufficient to render the dangerous condition effectively unavoidable.

Moreover, the evidence before the trial court at the time of the hearing on defendant’s motion for summary disposition demonstrated that plaintiff could have communicated with David without crossing the icy container yard. In his affidavit, David offered several alternative ways plaintiff could have communicated with him, such as driving plaintiff’s vehicle up to David’s, cutting the engine to reduce the background noise, or motioning for David to come to plaintiff. Plaintiff did not challenge David’s affidavit at the time of the motion hearing, nor did plaintiff offer any evidence to rebut the viability of David’s alternative communication methods. Plaintiff’s affidavit challenging David’s suggested alternatives to walking across the container yard was not before the trial court at the time of the motion hearing, and was submitted later with plaintiff’s motion for reconsideration. “When reviewing a motion for summary disposition, this Court’s review is limited to review of the evidence properly presented to the trial court.” *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 380; 775

NW2d 618 (2009). Thus, the trial court did not err by concluding that the dangerous condition was avoidable, and therefore, the trial court properly granted summary disposition.

Next, plaintiff argues that the trial court's order granting summary disposition should be reversed because David was not competent to make the averments in his affidavit, and accordingly, it was admitted in violation of MRE 602 and MCR 2.119(B)(1). Plaintiff did not challenge the admissibility of David's affidavit before or during the motion hearing. Rather, plaintiff first questioned the validity of the affidavit in his motion for reconsideration. Accordingly, this issue is not properly preserved for review. *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 117; 724 NW2d 485 (2006). A motion for reconsideration should not be granted if it merely presents the same issues ruled on by the trial court, and "the moving party must demonstrate a palpable error by which the court and the parties have been misled." MCR 2.119(F)(3). Further, this Court will not find that the denial of a motion for reconsideration was an abuse of discretion when the motion for reconsideration rests on evidence that could have been presented the first time the issue was argued. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

In this case, there was no "palpable error" that misled the trial court to justify reversal on reconsideration because plaintiff's challenges to David's affidavit were not based on new facts, and plaintiff could have challenged David's affidavit before the trial court's original order. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion for reconsideration. Nevertheless, we note that David's affidavit provides sufficient foundation for his opinions. In his affidavit, David states that he has personal knowledge of the facts therein, that he was working with plaintiff at the time of the accident, and that he worked closely with plaintiff to load and unload the tractor-trailer. These averments are sufficient to satisfy MRE 602 and MCR 2.119(B)(1).

Affirmed.

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