# STATE OF MICHIGAN

# COURT OF APPEALS

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THOMAS BRENT,

Plaintiff-Appellant,

v

TOM HOLZER FORD, INC.,

Defendant-Appellee.

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UNPUBLISHED
November 29, 2005

No. 256695
Oakland Circuit Court
LC No. 03-050865-NO

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the order granting summary disposition in favor of defendant. We affirm. This case is being decided without argument pursuant to MCR 7.214(E).

A motion for summary disposition under MCR 2.116(C)(10) is subject to de novo review. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion under MCR 2.116(C)(10), a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Where the burden of proof at trial rests on the nonmoving party, as is the case here, the nonmoving party may not rely on mere allegations or denials in the pleading, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

A premises possessor has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not, however, extend to hazardous conditions that are open and obvious. "Where 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.* The test for an open and obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented

upon casual inspection. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

Generally, an average parking lot user with ordinary intelligence will discover and recognize the danger and risk presented by snow and ice upon casual inspection of the lot. *Teufel v Watkins*, 267 Mich App 425, 428; 705 NW2d 164 (2005); *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002). In the present case, plaintiff stated that the parking lot where he fell was completely covered by snow and, thus, was open and obvious. While plaintiff concedes the open and obvious nature of the hazard, plaintiff contends that special aspects made the ice effectively unavoidable and, therefore, defendant still had a duty to undertake reasonable precautions to protect him. We disagree.

There is an exception to the general rule regarding open and obvious dangers if "special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Lugo*, *supra* at 517. If the danger has special aspects that pose an unreasonable risk, "the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* The Court in *Lugo* explained that unreasonable risks were risks that were entirely unavoidable or that, despite being open and obvious, presented "such a substantial risk of death or severe injury … that it would be unreasonably dangerous to maintain the condition." *Id.* at 518.

In this case, the danger posed by a slip and fall in the parking lot does not "present such a substantial risk of death or severe injury" that it creates an "unreasonable risk of harm." *Id.* at 517-518; see also *Corey*, *supra* at 7 ("Falling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit."). Likewise, we disagree with plaintiff's contention that the snow-covered parking lot was effectively unavoidable. While plaintiff argues that he was compelled to traverse the slippery lot because his employment would be terminated had he refused, plaintiff proffered no evidence to support that claim. Plaintiff could have refused to tow the vehicle until such time as the premises owner cleared the snow and ice.[1] Consequently, because the hazard was neither unavoidable nor posed a substantial risk of death or severe injury such that it would be unreasonable to maintain it, we must conclude that the condition had no special aspects that made the condition unreasonably dangerous. The trial court did not err when it granted summary disposition in favor of defendant.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello

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[1] This Court's recent decision in *Robertson v Blue Water Oil Co*, ___ Mich App ___; ___ NW2d ___ (2005), does not alter this result. In *Robertson* the Court determined that the plaintiff had no choice but to traverse the icy parking lot. In this case, the snow-covered parking lot was to the rear of the dealership. There was no evidence that plaintiff could not have safely entered the dealership to request that the area surrounding the vehicle he needed to tow be cleared of snow and ice.