STATE OF MICHIGAN

COURT OF APPEALS

PAUL KACHUDAS,

Plaintiff-Appellant,

v

INVADERS SELF AUTO WASH, INC.,

Defendant-Appellee.

UNPUBLISHED
September 1, 2009

No. 281411
Genesee Circuit Court
LC No. 06-084859-NO

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

MURRAY, J. (*concurring*).

I concur in the majority opinion reversing the trial court's order granting defendant's motion for summary disposition, although my basis for concluding reversal is necessary is on a different ground. In my view, plaintiff pleaded a premises liability claim but that claim should not have been dismissed because there was no evidence of any open and obvious danger for a reasonable person to casually observe.

In *Slaughter v Blarney Castle*, 281 Mich App 474, 478; 760 NW2d 287 (2008), our Court set forth the standards to apply in reviewing a premises liability claim:

> It is well settled in Michigan that a premises possessor owes a duty "to undertake reasonable efforts to make it premises reasonably safe for its invitees." *Lugo v Ameritech Corp Inc*, 464 Mich 512, 526; 629 NW2d 384 (2001). As such, a premises possessor "owes a duty to an invitee to exercise reasonable care to protect the invitee from a reasonable risk of harm caused by a dangerous condition on that land." *Id*. at 516, citing *Bertrand v Alan Ford Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).
>
> A premises possessor is generally not required to protect an invitee from open and obvious dangers. The logic behind the open and obvious danger doctrine is that "an obvious danger is no danger to a reasonably careful person." *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 474; 499 NW2d 379 (1993). Accordingly, when the potentially dangerous condition is "wholly revealed by casual observation, the duty to warn serves no purpose." *Id*. If this purpose is frustrated by the application of the doctrine to a particular set of facts because the condition is for all practical purposes invisible and indiscernible, then

> the application for the open and obvious danger doctrine would not be appropriate.
>
> "[I]f special aspects of a condition make even an open and obvious risk unreasonable dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, *supra* at 517. The special aspects that cause even open and obvious conditions to be actionable are those that make the conditions "effectively unavoidable," or those that "impose an unreasonably high risk of severe harm." *Id*. at 518.
>
> The standard for determining if the condition is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotny*, *supra* at 475. The test is objective, and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous. *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 5; 649 NW2d 392 (2002). [*Slaughter*, *supra* at 477-479 (footnote omitted).]

Applying this standard to the undisputed facts in this case, there was no evidence submitted establishing that any condition existed or was visible when plaintiff entered the car wash stall. Plaintiff testified that no ice existed in the stall when he entered it, and defendant's owner testified to not seeing any ice in the stall after the incident. Thus, there is no evidence upon which the open and obvious danger doctrine would apply because there was no "obvious danger" for a reasonably careful person to discover and avoid upon casual inspection.

Additionally, although defendant argues that we should impute knowledge to plaintiff that the act of spraying water on a car when the temperature was between 12 degrees and 24 degrees Fahrenheit would cause a reasonably careful person to realize a danger could exist, see *Id*. at 479, that proposition simply does not fit into this case. In each of the prior cases decided by our Court or the Supreme Court where knowledge of wintery conditions and the dangers created by those conditions were imputed to a reasonable person, there was evidence of visible snow or ice in the area. See, e.g., *Ververis v Hartfield Lanes* (*On Remand*), 271 Mich App 61, 65; 718 NW2d 382 (2006); *Kenny v Kaatz Funeral Home Inc*, 264 Mich App 99, 101-102, 119; 689 NW2d 737 (2004) (Griffin, J. dissenting), rev'd 472 Mich 929 (2005); and *Joyce v Reuben*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002). However, as noted above, there are no facts in this case showing that any ice had accumulated or otherwise existed in the car wash stall prior to plaintiff entering the stall. Additionally, because defendant was aware that the underground heaters were not operating under that stall prior to plaintiff's injury, plaintiff's premises liability claim should proceed to a jury.

For these reasons, I concur in the reversal of the trial court's order granting defendant's motion for summary disposition.

/s/ Christopher M. Murray