

STATE OF MICHIGAN  
COURT OF APPEALS

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MARILYNNE BURTON,

Plaintiff-Appellant,

v

MUFFLER MAN,

Defendant-Appellee,

and

JAMES CHRISTENSEN PROPERTIES, JAMES  
CHRISTENSEN, CMS OIL COMPANY, INC.,  
WILSON ASSOCIATES, HUBBELL ROTH &  
CLARK, INC., VILLAGE OF LAKE ORION,  
CARL SCHULTZ, INC., and CARL SCHULTZ,

Defendants.

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Before: Murphy, C.J., and Jansen and Zahra, JJ.

MURPHY, C.J. (*concurring*).

On the issue of unavailability as a potential special aspect that would preclude dismissal under the open and obvious danger doctrine, plaintiff has simply failed to submit sufficient documentary evidence necessary to create an issue of fact on the matter, MCR 2.116(C)(10). The majority opinion does not directly confront the issue of whether the hazard was unavoidable, and I find that if there existed a factual dispute regarding whether the snow-covered ice was effectively unavoidable, a jury would need to resolve the special aspects question. Accordingly, I respectfully concur.

In *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005), the plaintiff slipped and fell on an ice-covered parking lot at the defendant's gas station when he walked from the pump where he had fueled his truck to the station's convenience store. This Court observed:

“Special aspects” exist if the condition “is effectively unavoidable” or constitutes “an unreasonably high risk of severe harm.” However, the risk must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies. An

open and obvious accumulation of snow and ice, by itself, does not feature any “special aspects.” Plaintiff has not cross-appealed the trial court's conclusion that there was no unreasonably high risk of harm, so we limit our analysis to whether the condition was effectively unavoidable.

Defendant argues that the condition was effectively avoidable because plaintiff could have gone to a different service station to make his purchases of fuel, coffee, and windshield washer fluid. However, one of the characteristics of the icy condition is that it was brought about by an unusually severe and uniform ice storm covering the entire area. Plaintiff patronized defendant's station almost every weekday pursuant to his employer's directions to fuel his truck first thing in the morning, and he intended to purchase wiper fluid because he was out of fluid and the weather was bad. The record contains no evidence that there existed any available alternatives. Even if there were, the scope of the inquiry is limited to “the objective nature of the condition of the premises at issue.” Therefore, the only inquiry is whether the condition was effectively unavoidable *on the premises*. Here, there was clearly no alternative, ice-free path from the gasoline pumps to the service station, a fact of which defendant had been made aware several hours previously. The ice was effectively unavoidable. [*Id.* at 593-594 (citations omitted).]

Analysis of special aspects entails a determination whether an unreasonable risk of harm existed despite the open and obvious nature of the hazard, which can be the case where a hazard is effectively unavoidable. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-518; 629 NW2d 384 (2001). The *Lugo* Court stated:

[W]e conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly “special aspects” of the open and obvious condition that differentiate the risk from 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.

An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id.*]

Here, plaintiff merely testified that “there was ice all where my car was.” This is simply inadequate to create a factual dispute on unavoidability. Minimally, the evidence needed to clearly show that it was impossible to access the car without traversing ice-covered snow. There was also the possibility of plaintiff asking one of defendant’s employees to bring the car up. In sum, plaintiff failed to establish an issue of fact on unavoidability.

I respectfully concur.

/s/ William B. Murphy