STATE OF MICHIGAN

COURT OF APPEALS

RYAN VANWYK,

Plaintiff-Appellant,

v

POTTER'S ENTERPRISES, INC., d/b/a LOG CABIN COCKTAIL LOUNGE,

Defendant-Appellee.

UNPUBLISHED
December 14, 2010

No. 294134
Kent Circuit Court
LC No. 08-009010-NO

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

In this premises-liability action, plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

Plaintiff was bowling across the street from defendant's establishment, the Log Cabin Cocktail Lounge, in early February. At about 7:00 p.m., he walked across the street to the Log Cabin to retrieve a takeout order. Plaintiff noticed that the parking lot was covered in snow, ice, and slush, but he decided to walk through the lot and use the rear entrance to the Log Cabin. When plaintiff was leaving the Log Cabin with his takeout order, he slipped and fell about ten feet from the entryway in the parking lot and sustained injuries, including a broken ankle.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on the grounds that the condition was open and obvious and that there were no special aspects present making the condition unavoidable or unreasonably dangerous. The trial court granted the motion. We review that decision de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). In doing so, we consider the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate where there is no genuine issue regarding any material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

Plaintiff first argues that the danger in the parking lot was not open and obvious because it was getting dark and the snow, ice, and slush were unevenly dispersed throughout the parking lot making it difficult to tell which spots would be slippery. We disagree. To prevail on a negligence claim, plaintiff must show duty, breach, causation, and damages. *Hampton v Waste*

Mgt of Michigan, Inc, 236 Mich App 598, 602; 601 NW2d 172 (1999). Plaintiff was an invitee on defendant's property; therefore, defendant had a duty to maintain its premises in a reasonably safe condition and to "exercise reasonable care to protect the 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). However, this duty does not extend to the removal of dangers that are open and obvious. *Id*.; *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.*

Plaintiff herein observed that the parking lot was covered in snow, ice, and slush; therefore, plaintiff had actual knowledge of the dangerous condition. Even if plaintiff did not have actual knowledge, a reasonable person with ordinary intelligence would know that a snowy and icy surface poses a slipping risk. Therefore, the condition was an open and obvious danger. Plaintiff's argument is similar to the argument of the plaintiff in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 118-119; 689 NW2d 737 (2004) (GRIFFIN, J. dissenting), adopted 472 Mich 929 (2005). In *Kenny* the plaintiff argued that ice covered by a layer of snow was "virtually undetectable" in the dark. *Id.* at 118 (GRIFFIN, J., dissenting). The Michigan Supreme Court adopted the reasoning of Judge GRIFFIN, who stated in dissent that the open and obvious doctrine applied because the plaintiff, as a life-long resident of Michigan who observed others traverse the parking lot holding onto vehicles for support and who was aware that it had been snowing, "should have been aware that ice frequently forms beneath snow during snowy December nights." *Id.* at 119 (GRIFFIN, J., dissenting). On the record before us in this case, there is similarly no question that the danger at issue was open and obvious.

Plaintiff alternatively argues that even if the dangerous condition was open and obvious, it was effectively unavoidable, and therefore the special aspects exception removes it from the open and obvious danger doctrine. We disagree. The special aspects doctrine 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. A special aspect exists when the dangerous condition is unavoidable or poses an unreasonably high risk of severe injury. *Id.* at 516-518. The determination that a special aspect is present must be based on the objective nature of the condition at issue. *Id.* at 523-524. In this case, plaintiff could have entered and exited the building through an alternative entrance located at the front of the Log Cabin. While the evidence must be construed in a light most favorable to the non-moving party, plaintiff has not offered any evidence to suggest that the front entrance was unsafe. Indeed, other evidence in this case suggests that the front entrance would have provided a safe alternative. Additionally, plaintiff's fall occurred about ten feet from the rear entrance in the parking lot. If plaintiff had chosen to enter through the front he would not have had to traverse the parking lot. This Court has stated that when there is an alternative route, a dangerous condition is not unavoidable. For example, in *Joyce*, 249 Mich App at 242-243, this Court found the danger posed by a slippery sidewalk was not unavoidable because the plaintiff testified she could have avoided the slippery condition by avoiding the regular pathway. Because there was an available alternative route that the plaintiff could have used to avoid the snowy sidewalk, the case did not present any special aspects removing the condition from the open and obvious danger doctrine. *Id.*

We further note that even if there had not been an available alternative route available in this case, the condition at issue did not rise to the level of an unavoidable danger. The parking

lot was not completely covered in snow, ice, and slush. Plaintiff was able to see that there were tread marks from automobile traffic in the parking lot, and that much of the snow was packed down. Other individuals traversed the lot safely; plaintiff himself walked through the parking lot to enter the Log Cabin without incident. The conditions described by the evidence in this case are common and typical of Michigan winters and they do not rise to the level of an unavoidable danger. There must be a "'uniquely dangerous' condition that would warrant removing [a] case from the open and obvious danger doctrine," and an average snowy parking lot in February is quite simply not "uniquely dangerous." *Id.* at 243.

Affirmed.

/s/ Jane M. Beckering
/s/ Kathleen Jansen
/s/ Michael J. Talbot