STATE OF MICHIGAN

COURT OF APPEALS

LUWANNA HARRINGTON,

Plaintiff-Appellant,

v

REGINA SIMPSON,

Defendant-Appellee.

UNPUBLISHED
December 28, 2010

No. 294365
Wayne Circuit Court
LC No. 08-123881-NS

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

K. F. KELLY, J. *(Dissenting.)*

I respectfully dissent. The trial court properly granted summary disposition because defendant's snow-covered driveway was not effectively unavoidable nor did it have any special aspects that made the condition unreasonably dangerous.

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In doing so, "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion" to determine whether no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

Generally, a landowner owes a duty to exercise reasonable care to protect an invitee from a dangerous condition on its land that poses an unreasonable risk of harm. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Under the open and obvious doctrine, however, where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover the condition, a landowner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). This Court has held that, "by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006).

Although plaintiff concedes that defendant's snow-covered driveway presented an open and obvious danger, she argues that special aspects existed that render the open and obvious defense inapplicable. Our Supreme Court addressed the special aspects doctrine at length in *Lugo*, 464 Mich at 516-520. The doctrine provides that where "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the [landowner] has a duty to undertake reasonable precautions to protect invitees from that risk." *Id*. at 517. Because an accumulation of snow and ice is open and obvious as a matter of law, *Ververis*, 271 Mich App at 67, a landowner must protect an invitee against such danger only if there exists some special aspect that makes the condition unreasonably dangerous. *Mann v Shusteric Enters*, 470 Mich 320, 332-333; 683 NW2d 573 (2004). Conditions having special aspects are those that pose a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Lugo*, 464 Mich at 517-519. The illustrative examples that the Court provided of conditions having special aspects include: (1) an unguarded, 30-foot deep pit in a parking lot that creates a risk of particularly severe harm, and (2) a commercial building with one exit where water has completely flooded the floor, making the hazard unavoidable. *Id*. at 518.

Defendant's snow-covered driveway did not pose a severe risk of harm. A risk like the one here, falling a few feet to the ground, does not render a condition unreasonably dangerous. As mentioned in *Lugo*, "[u]sing a common pothole as an example, . . . [u]nlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Lugo*, 464 Mich at 520. Moreover, the fact that plaintiff in fact suffered severe harm does not justify a retrospective conclusion that the condition presented a special aspect. *Id*. at 518 n 2. Rather, a court is to assess a given risk *a priori*—i.e., before the incident occurred. *Id*.

The condition also did not pose a uniquely high likelihood of harm, such as where a hazard is effectively unavoidable. This case is not analogous to *Robertson v Blue Water Oil Company*, 268 Mich App 588; 708 NW2d 749 (2005), where the plaintiff slipped and fell while traversing a gas station's icy parking lot to allegedly purchase windshield washer fluid from the station's convenience store. *Id*. at 590-591. The *Robertson* majority determined that the only reason a rational trier of fact could find the icy-parking lot effectively unavoidable was "because it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield washer fluid." *Id*. at 594. Here, unlike the plaintiff in *Robertson*, plaintiff was under no compulsion to traverse the snow-covered condition to obtain an indispensable necessity, such as windshield wiper fluid, without which she could not safely depart. Rather, plaintiff could have refused to traverse the driveway unless and until defendant cleared a safe path.

The instant case more closely resembles *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002), where the plaintiff worked as a caregiver for the defendant's mentally impaired daughter and slipped and fell on the defendant's snowy sidewalk while removing her personal belongings from the defendant's home. *Joyce*, 249 Mich App at 233. In concluding that the plaintiff could have avoided the snow-covered sidewalk, this Court observed that "[the plaintiff] could have simply removed her personal items another day or advised [the defendant] that, if [he] did not allow her to use the garage door, she would have to move another day." *Id*. at 242. This Court also noted that, "unlike the example in *Lugo*, [the plaintiff] was not effectively

trapped inside a building so that she *must* encounter the open and obvious condition in order to get out." *Id*. (emphasis in original).

Here, plaintiff could have visited another day or informed defendant that she would not visit unless and until defendant cleared her driveway. Plaintiff was neither forced to traverse the slippery surface out of personal necessity, like the plaintiff in *Robertson*, nor trapped without any alternative means of escape, like the example in *Lugo*. Further, plaintiff clearly could avoid the hazard because she traversed the driveway three times that day without incident. Therefore, the trial court properly granted defendant's motion for summary disposition because there is no genuine issue of material fact that any dangerous condition in defendant's driveway was open and obvious and without special aspects.

I would affirm.

/s/ Kirsten Frank Kelly