STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN SALL, Plaintiff-Appellant,	UNPUBLISHED August 14, 2014
v	No. 317088 Kent Circuit Court
NEXT DOOR OPERATIONS, LLC, Defendant-Appellee.	LC No. 12-006838-NO

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this tort suit arising from a slip and fall accident, plaintiff appeals as of right the trial court order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). Because the hazard in the present case was open and obvious, and not effectively unavoidable, we affirm the trial court's grant of summary disposition.

Defendant is the lessee and operator of a Marathon gas station in Grand Rapids, MI. On the morning of January 8, 2010, plaintiff visited the gas station with her daughter. While her daughter stayed outside to pump gas, plaintiff went inside the gas station to purchase a cappuccino. As plaintiff approached the building, a man opened the door for her. Plaintiff proceeded through the open door, and, as she entered the building, plaintiff slipped and fell inside the store, near the doorway. Her fall resulted in an injury to her right ankle, necessitating surgery and ultimately preventing plaintiff's return to work as a waitress.

Plaintiff's fall occurred in winter, on a January day when snow and slush appeared on the ground at the gas station. According to weather records, the high temperature in Grand Rapids on January 8, 2010 was 25 degrees. The day before plaintiff's fall was equally cold and there was some precipitation. One of the gas station employees had been outside shoveling snow around the building when plaintiff's fall occurred. Plaintiff, having lived in Michigan for more than 45 years, acknowledged that it snows in Grand Rapids and is sometimes slippery as a result. In particular, plaintiff admitted that snow and slush can accumulate on shoes, necessitating care when walking to stores and other places.

The specific gas station in question had two entrances available to the public. The interior of the gas station had a tile floor. Near where plaintiff entered the store, a rug had been placed over the floor. A yellow caution sign had also been placed in front of the door, on the tile

floor beyond the area covered by the rug. However, plaintiff indicated that she, personally, did not see the wet floor warning sign.

In her complaint in the present case, plaintiff alleged that the tile floor was covered in water and/or another clear liquid, making the floor unnoticeably slippery. Defendant moved for summary disposition, arguing that, given the apparent wintery conditions, any purported liquid on the floor of the gas station constituted an open and obvious danger, and defendant had no obligation to protect plaintiff from an open and obvious condition. Plaintiff contested the open and obvious nature of the hazard, and asserted that, even if open and obvious, the danger was effectively unavoidable. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10), concluding that, on the undisputed facts, any danger to plaintiff was open and obvious, and it was not effectively unavoidable. Plaintiff now appeals to this Court.

Consistent with her arguments in the trial court, plaintiff argues on appeal that summary disposition was inappropriate because the danger in question was not open and obvious, and was, in any event, effectively unavoidable.

A trial court's decision to grant a motion summary disposition is reviewed de novo.[1] *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In this case, the trial court granted summary disposition pursuant to MCR 2.116(C)(10), which tests the factual support for a claim and is properly granted where "there is no genuine issue as to any material fact." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). In determining whether a conflict in the evidence remains, the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties must be viewed in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A material question of fact remains when, after viewing the evidence in this light, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Generally, "a premises possessor owes a duty to an invitee 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, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). This duty does not, however, typically require a premises possessor to protect or warn an invitee in relation to "open and obvious" dangers. *Ghaffari v Turner Const Co*, 473 Mich 16, 21-22; 699 NW2d 687 (2005). The reason for this

[1] On appeal, plaintiff maintains that reversal is warranted because the trial court failed to consider all the evidence presented, specifically, video footage of her fall, and failed to draw all reasonable inferences in her favor. The record does not support plaintiff's claims in this regard and, in any event, our review is de novo. Having considered the evidence, and drawing all reasonable inferences in plaintiff's favor, for the reasons discussed *infra*, summary disposition was appropriately granted pursuant to MCR 2.116(C)(10).

rule is that open and obvious dangers "by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 460-461.

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 461. This test is an objective one, concerned with "the objective nature of the condition on the premises," *id.*, and 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," *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). Wintry conditions such as snow and ice, while not necessarily open and obvious in every instance, may be deemed open and obvious depending upon the circumstances in question. See *Hoffner*, 492 Mich at 464. In particular, individuals may be charged with discovering "the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter*, 281 Mich App at 479. On a snowy or slushy winter day, liquid on the floor near a store's entryway is a hazard comparable to that presented by ice and snow.[2]

In the present case, we conclude that no material question of fact remained regarding the open and obvious nature of the hazard posed by the tile floor near the gas station's entryway. The weather conditions in Grand Rapids on the day of plaintiff's fall were undisputedly wintry. The weather reports offered by defendant show precipitation and cold temperatures the day before plaintiff's fall, and continued cold temperatures on the day of plaintiff's fall. Pictures offered by defendant establish that those wintry conditions were plainly apparent the day of plaintiff's fall at the particular gas station in question. Snow and slush can be seen near the gas pumps, and on the driving areas around the pumps. A person walking from a gas pump to the gas station's building would need to traverse slushy/snowy conditions. An employee was in fact outside shoveling when plaintiff's fall occurred. Plaintiff does not dispute the weather conditions as depicted in defendant's evidence; rather, in her deposition testimony, she indicated merely that she could not recall the weather conditions at the gas station. Accordingly, it is clear that a reasonable person of average intelligence would have been alerted to the dangers posed by the wintry conditions at the gas station.

That these wintry conditions had also created a hazard near the store's threshold was equally apparent to a reasonable person of average intelligence. Specifically, upon opening the door to the store, as shown in one of the photographs and in the video footage of plaintiff's fall, a patron could see a tile floor, a rug set somewhat back (perhaps a foot or so) from the doorway, and beyond the mat a wet floor sign. Cognizant of the snow and slush outside, a reasonable person confronting a tile floor and wet floor sign would, on casual inspection, perceive the danger posed by a slippery floor. Although plaintiff argues that advertisements covering the doors prevented patrons from seeing the hazard awaiting inside the gas station, one does not

[2] See, e.g., *Sharp v Art Van Furniture, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2006 (Docket No. 267810) ("Water in a store entryway on a slushy January day in Michigan is a hazard analogous to that presented by ice and snow.").

enter a building through a closed door and the more pertinent inquiry is what would be apparent when the door is opened. In this regard, plaintiff conceded in her testimony that the tile floor, the rug, and the wet floor sign would be visible through the open door. Considering the evidence presented by the parties, it is clear that, upon casual inspection, the wintry conditions at the gas station coupled with the wet floor sign and the tile floor would alert a reasonable person of ordinary intelligence to the hazard posed by stepping onto the tile floor. Accordingly, the hazard involved in this case was open and obvious.

In disputing this conclusion, plaintiff maintains that any liquid on the floor cannot be perceived from the photographs, meaning that the hazard cannot be considered open and obvious. However, in suggesting that there must be obviously visible liquid on the floor to render the danger open and obvious, plaintiff ignores the fact that the open and obvious nature of hazards must be evaluated based on the surrounding circumstances presented, see *Hoffner*, 492 Mich at 464, which circumstances can include wintry conditions and the presence of a "wet floor" sign. See, e.g., *Slaughter*, 281 Mich App at 482-484 (considering lack of "other indicia of a potentially hazardous condition" in determining danger posed by black ice was not open and obvious); *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 103; 804 NW2d 569 (2010) (considering "wet floor" sign, or lack thereof, among evidence related to whether wet floor was an open and obvious danger). In this case, as discussed, the snow and slush outside the gas station, coupled with the wet floor sign, would, upon casual inspection, have alerted a reasonable person of ordinary intelligence that the tile floor at the threshold of the store had a high probability of being slippery, either because others had tracked liquids into the store, or because plaintiff herself would have slush on her own shoes. Thus, even if liquid on the tile was not obviously visible, a reasonable person of ordinary intelligence would have perceived the danger posed by a tile threshold on a slushy January day. Accordingly, the danger was open and obvious.

Although typically there is no duty to protect an invitee from open and obvious dangers, this is not true if the open and obvious danger has "special aspects." *Lugo*, 464 Mich at 518. "The touchstone of the duty imposed on a premises owner being reasonableness, this narrow 'special aspects' exception recognizes there could exist a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature." *Hoffner*, 492 Mich at 462. There are two recognized "special aspects" of an open and obvious hazard that can create liability: "when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Id.* at 463.

In this case, plaintiff argues only that the hazard at issue was effectively unavoidable. The Michigan Supreme Court has described what it means for a danger to be "effectively unavoidable" as follows:

> Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. . . . [A] hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*. Accordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so. [*Id.* at 468-469.]

Further, a plaintiff's interest in using a business's services does not equate with a compulsion to confront a hazard. *Id.* at 472-473. Consistent with *Hoffner*'s explanation, this Court has rejected claims of effectively unavoidability where a plaintiff chose to confront a hazard despite other alternatives, including the existence of alternative routes into a building or the simple fact that a visit to a structure could have been delayed to another day. See, e.g., *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002); *Corey v Davenport College of Business*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002).

Applying these principles to the present record, it is plain that the hazard posed by the tile floor was not effectively unavoidable. According to plaintiff's deposition testimony, she entered the gas station in order to purchase a cappuccino.[3] Her interest in availing herself of the services offered by the gas station does not render the hazard in question effectively unavoidable. See *Hoffner*, 492 Mich at 472-473. Rather, plaintiff made the choice to enter the building and to do so through the door in question, despite the availability of an alternative route into the building.[4] Having freely made this choice, plaintiff cannot establish that the hazard in question was effectively unavoidable. *Id.* at 468-469.

Given that the danger was open and obvious, and not effectively unavoidable, the trial court properly granted summary disposition to defendant. Having determined summary disposition was appropriately granted on this basis, we decline to reach defendant's alternative argument for affirmance.

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[3] Plaintiff attempts to create a question of fact regarding her motivation for entering the gas station by offering an incident report completed by a gas station employee which indicates that plaintiff came inside to pay for gas. This unsworn document, however, does not create a material question of fact when surely plaintiff would best know her motives for entering the gas station and she testified at her deposition that she entered the gas station to buy a cappuccino. In any event, plaintiff was under no compulsion to purchase gasoline or to use the door through which she entered the building. Thus, she has not shown the hazard was effectively unavoidable.

[4] On appeal, plaintiff specifically attempts to liken the present facts to a hypothetical example described in *Lugo*, 464 Mich at 518, where a customer attempting to exit a commercial structure through the building's only public access door was confronted with standing water near the exit. The hypothetical hazard was described by the Court as effectively unavoidable. *Id.* However, the current facts are readily distinguishable because plaintiff was outside the building trying to gain entry, meaning she was not effectively trapped inside and forced to confront the hazard to exit. See *Joyce*, 249 Mich App at 242. Further, unlike the scenario in *Lugo*, plaintiff could have gone elsewhere rather than enter the building, and she had alternative routes into the building. Considering the obvious factual differences, plaintiff's reliance on *Lugo* is misplaced.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra