STATE OF MICHIGAN

COURT OF APPEALS

LASHANDA SNELL, Plaintiff-Appellant,	UNPUBLISHED May 24, 2016
v	No. 327658 Kent Circuit Court
AVALON PROPERTIES OF GRAND RAPIDS, L.L.C. and TURF PLUS LAWN CARE AND PLOWING, L.L.C., Defendants-Appellees.	LC No. 14-003401-NO

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, Lashanda Snell, appeals as of right the circuit court's order granting summary disposition to defendants, Avalon Properties of Grand Rapids, L.L.C. and Turf Plus Lawn Care and Plowing, L.L.C., pursuant to MCR 2.116(C)(10) and denying her motion to amend her complaint. We affirm.

This premises-liability lawsuit arises out of plaintiff's slip and fall in the driveway of her apartment. Plaintiff rented an apartment from Avalon Properties during the time period at issue in this case. On the morning of December 20, 2013, plaintiff exited her apartment at approximately 8:00 a.m. to attend a pre-surgical consultation for a hysterectomy that was scheduled on January 6, 2014. Although she admittedly recognized the snowy and icy condition of her driveway—describing the snow and ice accumulation as "[l]ots of snow," "past [her] ankles," "[a]t least 3 inches," and "mid-calf"—plaintiff nevertheless chose to attempt to access her vehicle, which she had parked in the driveway. While trying to do so, she slipped and fell. According to her deposition testimony, plaintiff's "[l]eft leg/foot planted in the snow, right leg/knee came down on the pavement." Plaintiff subsequently filed this lawsuit against Avalon Properties and Turf Plus, the snow-removal company, alleging that both failed to properly maintain her driveway.

Avalon Properties and Turf Plus both moved for summary disposition in response. Avalon Properties argued that plaintiff's claims were barred by the open-and-obvious-danger doctrine. Specifically, Avalon Properties argued that plaintiff's own deposition testimony demonstrated that the snowy and icy condition of the driveway was reasonably apparent upon casual inspection. Furthermore, Avalon Properties argued, plaintiff could have prevented her

slip and fall entirely had she merely parked in her garage. Turf Plus argued that it owed no duty to plaintiff beyond its contractual obligations to Avalon Properties. Plaintiff responded, arguing that there remained a question of fact as to whether the snowy and icy conditions were effectively unavoidable. She also moved to amend her complaint to assert a claim under MCL 554.139. In response to her motion to amend, Avalon Properties objected, contending that it should be denied in light of the fact that discovery and other filing deadlines had expired months before.

After hearing the parties' oral arguments, the circuit court granted defendants' summary-disposition motions. With respect to Avalon Properties, the circuit court concluded that the snowy and icy conditions were open and obvious. It also rejected plaintiff's argument that the conditions were effectively unavoidable in light of the fact that plaintiff could have parked in the garage. With respect to Turf Plus, the circuit court concluded that Turf Plus did not owe a separate and distinct duty to plaintiff. Thus, the circuit court granted both defendants' motions. In light of these conclusions, the circuit court additionally denied plaintiff's motion to amend her complaint. This appeal followed.

On appeal, plaintiff first argues that, while the snowy and icy condition of the driveway was open and obvious, summary disposition was nevertheless improper because a question of fact remains as to whether it was effectively unavoidable. We disagree. We review a circuit court's decision on a motion for summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). In reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), courts are required to consider the pleadings, affidavits, and other evidence in a light most favorable to the nonmoving party. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate "if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*.

In premises-liability actions, plaintiffs must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach was the proximate cause of the plaintiff's injury, and (4) that the plaintiff suffered damages, i.e., the elements of negligence. *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). While a land possessor owes a duty of reasonable care to protect an invitee from unreasonable risks of harm posed by dangerous conditions on the land, that duty does *not* require a land possessor to protect an invitee from dangers that are open and obvious. *Id*. at 440-441. Open and obvious dangers cut off a land possessor's duty because "there is an overriding public policy that people should take reasonable care for their own safety and this precludes the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693-694; 822 NW2d 254 (2012) (citations and internal quotation marks omitted). A dangerous condition is open and obvious when "an average user with ordinary intelligence" would be "able to discover" it "upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

For purposes of this appeal, it is undisputed that the snowy and icy condition of the driveway was, in fact, open and obvious. The only dispute raised by plaintiff is whether the

condition was "effectively unavoidable." We conclude that it was not. "The 'special aspects' exception to the open and obvious doctrine for hazards that are effectively unavoidable is a limited exception designed to avoid application of the open and obvious doctrine only when a person is subject to an unreasonable risk of harm." *Hoffner v Lanctoe*, 492 Mich 450, 468; 821 NW2d 88 (2012). Under the "effectively unavoidable" exception, "a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*." *Id*. (emphasis in original). Stated differently, "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Id*. at 469 (emphasis in original). "[S]ituations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. (emphasis in original).

We agree with the circuit court in that the snowy and icy condition of the driveway was not effectively unavoidable under the facts and circumstances presented in this case. To begin, as the circuit court correctly recognized, plaintiff expressly admitted that she *chose* not to park in her garage. Instead, she *chose* to park in the driveway, knowing that, when she parked there, the snow-removal company would not be able to plow around her vehicle. Furthermore, she *chose* to traverse the snowy and icy condition of her driveway rather than, for example, calling for alternative transportation. Additionally, and perhaps more importantly, there is nothing in the record to support her claim that she could not have simply rescheduled her consultation. While she frequently cited the importance of her appointment both before the circuit court and this Court, there is nothing in the record, other than her unsupported speculation, to support a conclusion that her pre-surgery consultation could not be rescheduled or needed to occur immediately. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995) ("A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact."). While she now claims that "[i]t is common knowledge that individuals usually wait lengthy periods of times to get into see a doctor and any rescheduling of an appointment could cause an individual to wait weeks if not months to see his or her doctor," we do not believe that plaintiff's subjective and unsupported views of what "common knowledge" "usually" stands for is sufficient to warrant reversal in this case.

The unavoidability of the snowy and icy condition presented in this case is analogous to the unavoidability of the snowy and icy conditions that have been presented in cases before this Court in the past. In *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002), for example, this Court explained that a snowy and icy walkway was not effectively unavoidable when the plaintiff could have used an alternative route or used the same route on a different day. Specifically, this Court concluded that the plaintiff "was not effectively trapped inside a building so that she *must* encounter the open and obvious condition . . . ." *Id*. (emphasis in original). Similarly, in *Hoffner*, 492 Mich at 473, for example, our Supreme Court explained that a snowy and icy walkway was not effectively unavoidable when the plaintiff could have visited the fitness club on another day. Specifically, our Supreme Court concluded that the plaintiff "was not 'trapped' in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Id*. While rescheduling her appointment *might* have been inconvenient—although nothing in the record supports that claim either—plaintiff's convenience is simply not the proper inquiry. *Cloverleaf Car Co*, 213 Mich App at 192-193. Instead, we look to whether she was effectively trapped in her home and compelled to encounter the snowy and icy condition of her driveway at that time. She was not.

Creatively, plaintiff's argument on appeal focuses on whether choosing to park in the garage or choosing to reschedule her appointment were practical choices. In essence, she claims they were not. While she acknowledges them as "extreme example[s,]" she claims that "a choice always exists," such as when "a person with a gun to their head can always say no and risk being shot," when "[a] person could always lie down on the floor at their place of employment and not leave the premises," or when "an individual could always stay in their apartment or home all winter and on every day there was any snow or ice around their vehicle or between their door and their car." While we appreciate the point plaintiff is apparently trying to make, rescheduling a pre-surgical consultation for a hysterectomy in the future and remaining home presents a much more practical choice, at least in our view, than being shot in the head, sleeping at work, or winter-long hibernation. Accordingly, we conclude that the circuit court properly granted Avalon Properties' summary-disposition motion.

On appeal, plaintiff also argues that the circuit court erred in denying her motion to amend her complaint to include a claim under MCL 554.139. We disagree. Plaintiff claims that she should be able to amend her complaint to assert a claim under MCL 554.139 because her counsel was "on extensive pain medication due to a total knee replacement surgery in the summer of 2014[.]" While leave to amend pleadings "shall be freely given when justice so requires," MCR 2.118(A)(2), a motion to amend may be denied for a variety of reasons including undue delay, bad faith, repeated failures to cure deficiencies, undue prejudice, or futility. *Diem v Sallie Mae Home Loans, Inc*, 307 Mich App 204, 216; 859 NW2d 238 (2014). A circuit court's decision on a motion to amend is reviewed for an abuse of discretion. *Id*. at 215-216. "An abuse of discretion occurs when the trial court chooses an outcome falling outside a range of principled outcomes." *PCS4LESS, LLC v Stockton*, 291 Mich App 672, 676-677; 806 NW2d 353 (2011).

In this case, we conclude that the circuit court's denial of plaintiff's motion to amend did not fall outside the range of principled outcomes. First, it is important to point out that the July 21, 2014 scheduling order required all pleadings to be amended within 21 days and all motions to amend to be filed no later than August 29, 2014. Despite these clear time limitations, this motion to amend was not filed until May of the following year and after the close of discovery. Furthermore, plaintiff offers no argument against Avalon Properties' position and the circuit court's conclusion that any amendment to the complaint would be futile, see *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 430; 751 NW2d 8 (2008) (concluding that MCL 554.139 would apply "only under much more exigent circumstances than" when tenants are inconvenienced by "the accumulation of snow and ice in a parking lot . . . ."), and would prejudice Avalon Properties, see *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997) (concluding that a motion to amend may be denied when it will "prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment . . . ."). Moreover, it is our view that in order to successfully demonstrate the circuit court abused its discretion, plaintiff is required to do more than simply state that her counsel was under the influence of pain medication during the summer of 2014. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Finally, we would be remiss not to mention the fact that plaintiff's counsel filed two amended complaints during the summer of 2014—one in June and one in August—which somewhat belies the idea that he was rendered unable to do so or unable to realize he failed to do so by his medication. Accordingly, we conclude that the circuit court properly denied plaintiff's motion to amend.

Lastly, we must briefly address plaintiff's argument (or lack thereof) as it relates to Turf Plus's liability in this lawsuit. Before the circuit court, Turf Plus argued that it was entitled to summary disposition pursuant to MCR 2.116(C)(8) or (C)(10) because it did not owe plaintiff a separate and distinct duty apart from its contractual duties with Avalon Properties. See, e.g., *Fultz v Union-Commerce Assoc*, 470 Mich 460, 468-470; 683 NW2d 587 (2004). The circuit court agreed, and plaintiff *does not* challenge this conclusion on appeal. Indeed, plaintiff requests only that we reverse the circuit court's decision with respect to Avalon Properties. Thus, plaintiff has abandoned any argument that summary disposition with respect to Turf Plus was improper. *Peterson Novelties, Inc*, 259 Mich App at 14. Furthermore, summary disposition with respect to Turf Plus was appropriate for the same reasons as those articulated in *Fultz*. Accordingly, we conclude that the circuit court properly granted Turf Plus's summary-disposition motion.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Colleen A. O'Brien
/s/ Kirsten Frank Kelly