

STATE OF MICHIGAN
COURT OF APPEALS

DOMINICK SPADAFORE,

Plaintiff-Appellant,

v

WAYNE DALE BAILEY,

Defendant-Appellee.

UNPUBLISHED

January 19, 2012

No. 301456

Oakland Circuit Court

LC No. 2010-106984-NO

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Plaintiff Dominick Spadafore brought a premises liability and nuisance action against the defendant landowner Wayne Dale Bailey after Spadafore slipped and fell on Bailey's ice and snow covered walkway. Because Spadafore knew of the walkway's condition and the ice and snow would have been open and obvious to a reasonable observer, we are bound to affirm the trial court's summary dismissal of Spadafore's claims.

On the evening of December 10, 2008, Spadafore, an Oakland County sheriff's deputy, responded to Bailey's house to investigate a claim that Bailey's teenage son had run away. Spadafore parked his patrol vehicle in the street. He noted that snow covered Bailey's driveway and that a single cleared path led up a step, onto the porch and to the front door. Spadafore followed that path and was admitted into Bailey's home. Bailey told Spadafore that he had asked his teenage son to shovel and salt the home's drive and walkways earlier that day. The son had refused to do so and ran away. Spadafore remained in Bailey's home for approximately a half hour discussing the situation. When Spadafore left, he followed the same path from the front door, across the porch and down the lone step. As Spadafore began to step from the porch onto the step, he slipped on a patch of ice and fell. Spadafore suffered injuries that limited his strength and range of motion and forced him into early retirement.

The trial court summarily dismissed Spadafore's premises liability and nuisance claims pursuant to MCR 2.116(C)(10), holding that the condition was open and obvious and did not have "special aspects that made it unreasonably dangerous." We review a trial court's decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." In evaluating such a motion, a court considers the entire record in the

light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (internal citations omitted).]

The parties agree that Spadafore was an “invitee” on Bailey’s property. A premises owner owes invitees a duty to take reasonable care to protect against unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises owner bears no duty to warn invitees of an open and obvious danger unless special aspects of the condition make the risk unreasonably dangerous. *Id.* at 516-517. The standard for determining whether a particular condition qualifies as open and obvious “is whether ‘an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.’” *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

The snowy, icy condition of the walkway Spadafore encountered qualifies as open and obvious. Even “‘black ice’ conditions [can be] open and obvious when there are ‘indicia of a potentially hazardous condition,’ including the ‘specific weather conditions present at the time of the plaintiff’s fall.’” *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010), quoting *Slaughter*, 281 Mich App at 483. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 119; 689 NW2d 737 (2004) (Griffin, J., dissenting), rev’d for reasons stated in dissent 472 Mich 929 (2005), provides an example of such “indicia of a potentially hazardous condition”:

Kenny acknowledged that, before she exited the vehicle, she had observed the others hang onto it for support. That alone should have clued her into the possible danger that awaited her outside the vehicle. She also conceded that it had been snowing outside. As a lifelong resident of Michigan, she should have been aware that ice frequently forms beneath snow during snowy December nights.

Spadafore personally observed the snowy and icy conditions on his way into Bailey’s home. Spadafore’s observations were reinforced by Bailey’s report that his teenage son ran away without shoveling or salting the drive and walkways. When Spadafore exited the home, the snow and ice remained present on the drive and walkways. Spadafore admitted that the weather conditions on December 10, 2008 were right for the snow to “melt in the sunlight during the day and then freeze when the sun went down.” Under these circumstances, a reasonable person in Spadafore’s position would have been able to discover the condition and take self-preserving precautions.

Spadafore claims that Bailey caused an unavoidable danger and an unreasonable risk of severe harm when he cleared the single pathway to the home. Spadafore asserts that this amounted to a special aspect that removed the danger from the scope of the open and obvious doctrine. A special aspect is a condition that “give[s] rise to a uniquely high likelihood of harm or severity of harm,” such as an unavoidable or unreasonably dangerous open and obvious

danger. *Lugo*, 464 Mich at 519. Michigan courts have consistently relied on two examples of special aspects removing a condition from the scope of the open and obvious doctrine: “(1) ‘an unguarded thirty foot deep pit in the middle of a parking lot’ resulting in a fall of an extended distance and (2) standing water at the only exit of a commercial building resulting in the condition being unavoidable because no alternative route is available.” *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 4; 649 NW2d 392 (2002), quoting *Lugo*, 464 Mich at 518.

In *Corey*, 251 Mich App at 7, the plaintiff slipped on ice and fell down three steps, which were “elevated only a couple of feet.” This Court compared the 30-foot drop described in *Lugo* with the short fall involved in *Corey* and held that the height of three icy steps was insufficient to be classified as a special aspect. *Id.* The fall in the current case was even shorter—it involved only one step. Just as in *Corey*, we cannot find that falling from the height of a single step is so unreasonably dangerous or poses such a threat of severe injury that the open and obvious doctrine should be inapplicable. Moreover, Spadafore has presented no evidence suggesting that the dangerous condition was unavoidable.

Spadafore also contends that Bailey’s meager attempt to remove the snow and ice from the walkway actually increased the danger along the single cleared passage into the home. However, Spadafore presented no evidence that Bailey’s “‘attempted cleaning itself, as distinguished from the normal operation of the forces of nature upon this sidewalk’” caused an unnatural or increased risk of danger. *Morton v Goldberg*, 166 Mich App 366, 370; 420 NW2d 207 (1988), quoting *Weider v Goldsmith*, 353 Mich 339, 343; 91 NW2d 283 (1958). Accordingly, although we sympathize with Spadafore’s plight, we are bound to affirm the trial court’s dismissal of his claims.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell