STATE OF MICHIGAN

COURT OF APPEALS

APRIL SPEARS, Plaintiff-Appellee,	UNPUBLISHED October 11, 2012
v	No. 304859 Oakland Circuit Court
PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC., Defendant-Appellant.	LC No. 2010-111940-NO

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by leave granted an order denying its motion for summary disposition in this negligence action. We reverse.

I. BASIC FACTS

At approximately 12:30 p.m. on January 6, 2010, plaintiff was exiting defendant's facility after a doctor's appointment. She fell after slipping on ice near the entrance of the facility. In her deposition, plaintiff testified that when she was on the ground after her fall, her hand slipped when she tried to get back up. It was when her hand slipped that she looked and saw "a little ice . . . where [her] hand had slipped." The ice looked "sheary," which she agreed meant "glassy." The patch of ice was all underneath her. Climatologic data reveals that, on that date, there was no snow fall; trace amounts of other precipitation comprised of drizzle and freezing drizzle were measured throughout the day. The maximum temperature was 30° F, which was the warmest day in at least six days.

In its motion for summary disposition, defendant argued that the condition was open and obvious based on plaintiff's testimony that she could see the ice after her fall. Additionally, defendant argued that the weather conditions should have put plaintiff on notice of the icy condition of the walkway – there had been freezing drizzle the previous day and the conditions never got above freezing.

In response, plaintiff argued that there were no indications of wintry conditions during plaintiff's drive to the hospital – there was no ice or snow on the ground or the roads. As she walked into the building, plaintiff saw no evidence of ice or snow on her path. Plaintiff conceded that there was 1/10 of an inch of rain the night before that ended in the "wee hours" on

January 6, 2010. To the extent plaintiff stated in her deposition that she saw the ice on which she fell, plaintiff noted that she made this observation when she was already on the ground, which did not compel a finding that the ice was readily observable on casual inspection.

The trial court denied defendant's motion for summary disposition, finding that there was a genuine issue of material fact regarding whether the black ice on defendant's property created an open and obvious danger. Defendant now appeals by leave granted. *Spears v Providence Hospitals and Medical Centers, Inc*, unpublished order of the Court of Appeals, entered March 23, 2012 (Docket No. 304859).

II. ANALYSIS

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). MCR 2.116(C)(10) provides that a moving party is entitled to judgment as a matter of law if there "is no genuine issue as to any material fact." "In relation to a motion under MCR 2.116(C)(10), we . . . review the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Odom v Wayne County*, 482 Mich 459, 466-467; 760 NW2d 217 (2008) (internal quotations omitted). Furthermore, "[t]he contents of the complaint are accepted as true unless contradicted by the evidence provided." *Id.* at 466. "Summary disposition is appropriate only if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 467. A genuine issue of material fact "exists when the record leaves open an issue on which reasonable minds might differ." *Jimkoski v Shupe*, 282 Mich App 1, 4-5; 763 NW2d 1 (2008). "This Court is liberal in finding genuine issues of material fact." *Id.* at 5.

The parties agreed that plaintiff was an invitee who was owed the highest duty of care. Accordingly, defendant was subject to liability for physical harm caused to plaintiff by a condition on the land if defendant (a) knew of, or by the exercise of reasonable care would have discovered, the condition and should have realized that the condition involved an unreasonable risk of harm to plaintiff; (b) should have expected that plaintiff would not have discovered or realized the danger; and (c) failed to exercise reasonable care to protect plaintiff against the danger." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).

While a landowner has the duty to exercise reasonable care and protect invitees from unreasonable risks of harm caused by dangerous conditions on the land, "a premises possessor is not generally required to protect an invitee from open and obvious dangers, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm." *Watts v Michigan Multi-King, Inc*, 291 Mich App 98, 102; 804 NW2d 569 (2010). "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. This is an objective standard, calling for an examination of the objective nature of the condition of the premises at issue." *Hoffner v Lanctoe*, ___ Mich ___; ___ NW2d ___ (Docket No. 142267, decided July 31, 2012), slip op, p 8 (footnotes and internal quotations omitted).

As our Supreme Court has reaffirmed:

> The law of premises liability in Michigan has its foundation in two general precepts. First, landowners must act in a reasonable manner to guard against harms that threaten the safety and security of those who enter their land. Second, and as a corollary, landowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land. These principles have been used to establish well-recognized rules governing the rights and responsibilities of both landowners and those who enter their land. Underlying all these principles and rules is the requirement that both the possessors of land and those who come onto it exercise common sense and prudent judgment when confronting hazards on the land. These rules balance a possessor's ability to exercise control over the premises with the invitees' obligation to assume personal responsibility to protect themselves from apparent dangers. [*Id.* at slip op, p 7 (footnotes omitted).]

Specifically with regard to snow and ice, our Supreme Court has noted:

> Michigan, being above the 42nd parallel of north latitude, is prone to winter. And with winter comes snow and ice accumulations on sidewalks, parking lots, roads, and other outdoor surfaces. Unfortunately, the accumulation of snow, ice, and other slippery hazards on surfaces regularly traversed by the citizens of this state results in innumerable mishaps and injuries each year.
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> [a] premises owner has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that "reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." However, it is also well established that wintry conditions, like any other condition on the premises, may be deemed open and obvious. Michigan courts thus ask whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger. [*Id.* at slip op pp 1, 12 (footnotes omitted).]

Janson v Sajewski Funeral Home, Inc, 486 Mich 934; 782 NW2d 201 (2010), contained facts similar to the case at bar: "the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening." In its order, the Supreme Court noted that, in reversing the trial court's order of summary disposition in the defendant's favor, this Court had "failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App. 474, 483, 760 NW2d 287 (2008), which renders alleged 'black ice' conditions 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.'" *Id.* Looking at the facts of the case, our Supreme Court concluded that "[t]hese wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection." *Id.*

Here, mere allegations of black ice were insufficient to defeat the open and obvious doctrine where there were other indicia that ice may be present. The actual weather conditions for January 6, 2010, are crucial to a determination of what indicia of winter weather was present at the time of the fall. Drizzle or freezing drizzle fell at the time of the incident and the temperature was below freezing. We hold that the facts at bar are sufficiently similar to *Janson* to compel a finding that the danger was open and obvious and would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection.

We also reject plaintiff's claim that the condition had "special aspects" such that the condition was unavoidable or unreasonably dangerous. "The touchstone of the 'special aspects' analysis is that the condition must be characterized by its *unreasonable* risk of harm." *Hoffner*, slip op p.

> 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 subjected to an unreasonable risk of harm. Unavoidability is characterized by an *inability to be avoided*, an *inescapable result*, or the *inevitability* of a given outcome. . . . Accordingly, 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 slip op pp 16-17 (footnote omitted).]

The condition in this case was in no way an unreasonable risk of harm, given our wintery conditions in Michigan, as well as the specific conditions at the time of plaintiff's fall. There is no indication that the condition could not have been negotiated with the exercise of reasonable care.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto