STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of NELSON E. HALL.

BARBARA A. HALL, Individually and as Personal Representative of the Estate of NELSON E. HALL, and ED COLE, as next friend for ZACHARY W. HALL, a Minor,

Plaintiffs-Appellants,

v

BR FINANCIAL OF MICHIGAN, INC., BLUE RIBBON MOTOR SALES, DEWAYNE HUTCHINS, BRENDA ANN HUTCHINS, FAWN RIVER, L.L.C, SMC, and JAMES D. WEISS,

Defendants-Appellees.

UNPUBLISHED
November 27, 2012

No. 308071
St. Joseph Circuit Court
LC No. 08-000904-NO

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

In this premises liability action, plaintiffs Barbara A. Hall, individually and as personal representative of the Estate of Nelson E. Hall, and Ed Cole, as next friend of Zachary W. Hall, a minor, appeal as of right the trial court's order granting summary disposition in favor of all defendants. Because we conclude the condition was open and obvious and no special aspects were present, we affirm.

Plaintiffs brought this wrongful death action after Nelson E. Hall fell and struck his head on a concrete sidewalk while entering defendants' business premises to deliver a car payment. Nelson later died from his head injury. Nelson fell after stepping in a puddle of water near the customer entrance to the business. The trial court determined that the condition was open and obvious, and was not effectively unavoidable, and granted defendants' motion for summary disposition under MCR 2.116(C)(10).

"A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to de novo review." *Smith v Globe Life Ins Co*, 460 Mich 446, 454;

597 NW2d 28 (1999). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers the affidavits, pleadings, depositions, admissions, and any documentary evidence filed in the action or submitted by the parties, in the light most favorable to the party opposing the motion. *Id*. A trial court may grant summary disposition under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*, at 454-455.

Owners and occupiers of property have a duty to maintain their premises in a reasonably safe condition and to exercise ordinary care in keeping the premises safe. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). A defendant does not breach the duty of care when the dangerous condition is open and obvious. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). A condition is open and obvious when the invitee has actual knowledge of it or when a reasonable person of ordinary intelligence would discover the condition upon a casual inspection. *Id.*

The special aspects doctrine is an exception to the open and obvious rule, and it imposes a duty on a landowner who permits an unreasonable risk of harm to exist regardless of whether the danger is open and obvious. *Lugo*, 464 Mich at 525. Our Supreme Court has recently made clear that "liability does not arise for open and obvious dangers *unless special aspects* of a condition make even an open and obvious risk *unreasonably dangerous*." *Hoffner v Lanctoe*, 492 Mich 450, 455; 821 NW2d 88 (2012) (emphasis in original). There are "two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Id.* at 463 (emphasis in original). In both cases, the dangers must "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* (quotation marks and citation omitted). "[A]n 'effectively unavoidable' condition must be an inherently dangerous hazard that a person is inescapably required to confront under the circumstances." *Id.* at 456. Common or avoidable conditions are not uniquely dangerous. *Id.* at 463. Further, the determination that a special aspect is present must be based on the nature of the condition at issue, and must not be based retrospectively on the fact that a particular plaintiff in fact suffered severe harm. *Lugo*, 464 Mich at 518, n 2, 523-524.

The issue on appeal is whether the trial court properly granted summary disposition in favor of defendants because the condition was open and obvious and had no special aspects. Plaintiffs argue that the puddle was effectively unavoidable because it was in front of the only customer entrance to the business, and Nelson had to enter the business to make a payment on his vehicle. Thus, plaintiffs argue that the puddle had a special aspect and the open and obvious doctrine was not applicable in this case.

First, while plaintiffs do not explicitly dispute the trial court's finding that the condition was open and obvious, we note that the evidence in this case, when viewed in a light most favorable to plaintiffs, shows that there is no genuine issue of material fact regarding whether the condition that allegedly caused Nelson's fall was open and obvious. In her deposition testimony, Nelson's wife Barbara, who was present when Nelson fell, agreed that she could tell by looking at the area that the area where Nelson fell was wet, and that to the extent there might have been some puddles somewhere, she could easily see those as well. Thus, the evidence demonstrates

that the condition was readily observable, and accordingly, there is no genuine issue of material fact regarding whether the water was open and obvious.

Next, we consider plaintiffs' argument regarding whether the condition had any special aspects giving rise to liability despite its open and obvious nature. During her deposition, Barbara testified that the water was not right up against the door to the building, and that the puddle was "just outside" the doorway, located "where the sidewalk and asphalt meet." The manager working at the business on the day of Nelson's fall testified during his deposition that the puddle was avoidable, and that it was two feet in diameter and located on the asphalt parking lot. This evidence, which was not rebutted by plaintiffs, supports the conclusion that the condition was not unavoidable, as it would have been possible for Nelson to enter the building without walking through the puddle. Further, Nelson was not inescapably required to confront the puddle under the circumstances; he could have decided not to enter the business. In light of *Hoffner*, the fact that Nelson had a business interest and a contractual obligation to render payment for his vehicle at defendants' business is not sufficient to demonstrate that he was unavoidably compelled to confront the dangerous condition. *Hoffner*, 492 Mich at 456, 473 (rejecting the notion that a contractual right or business interest in entering a business renders a danger blocking the only entrance effectively unavoidable, and noting that a plaintiff is not "forced" to confront a risk when the plaintiff is not "trapped" in a building or "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk"). Thus, the condition was not uniquely dangerous because it was avoidable. *Id.* at 463. Moreover, a puddle in a parking lot is arguably a common condition, such as a pothole, that is not uniquely dangerous even if unavoidable. *Id.*

Finally, the condition did not pose a uniquely high likelihood of harm. In this case, Nelson suffered a severe head injury resulting in death; however, that fact is immaterial to whether the puddle was unreasonably dangerous. See *Lugo*, 464 at 518 n 2. In *Lugo*, the Court used a pothole as an example, and explained that "there is little risk of severe harm" because "[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." *Id*. at 520. Similarly, a common water puddle, such as the one in this case, in a parking lot has no unique characteristics that would suggest it presents a uniquely high likelihood of harm. Indeed, we are skeptical as to whether an ordinary puddle in a parking lot constitutes a hazard of any kind. Thus, when the evidence is viewed in the light most favorable to plaintiffs, we conclude that there were no special aspects to remove the condition from the open and obvious danger doctrine, and the trial court properly granted summary disposition in favor of defendants.

Plaintiffs also argue that the trial court abused its discretion in denying their motion for reconsideration. We review a trial court's ruling on a motion for reconsideration for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). An abuse of discretion occurs when the decision results in an outcome falling outside the range of reasonable and principled outcomes. *Id*. at 605-606. In denying plaintiffs' motion for reconsideration, the trial court noted that plaintiffs were not making any new argument, and stated that it was satisfied that it had applied the proper standard for deciding a motion for summary disposition under MCR 2.116(C)(10). Because plaintiffs did not demonstrate a palpable error by which the trial court was misled or show that a different disposition of the motion was warranted, the trial court did not err in denying plaintiffs' motion for reconsideration. MCR 2.119(F)(3).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra