STATE OF MICHIGAN

COURT OF APPEALS

PHILIP ROBERTSON and SHARON ROBERTSON, Plaintiffs-Appellees/Cross-Appellants,	FOR PUBLICATION November 8, 2005 9:00 a.m.
v	No. 254052 St. Clair Circuit Court
BLUE WATER OIL COMPANY, Defendant-Appellant/Cross-Appellee.	LC No. 01-001223-NO Official Reported Version

Before: Kelly, P.J., and Meter and Davis, JJ.

DAVIS, J.

Defendant appeals as of right the denials of its motions for summary disposition, for directed verdict, and for judgment notwithstanding the verdict. Plaintiffs cross-appeal the denials of their motion for a new trial or additur and their motion in limine. This case arose when plaintiff[1] slipped and fell on an ice-covered parking lot at defendant's gas station as he walked from the pump where he had fueled his truck to the station's convenience store. We affirm in part, reverse in part, and remand.

The circumstances surrounding this case involve an unusually severe and uniform ice storm that covered the entire area surrounding defendant's station. The sole employee on duty began receiving complaints from customers, including several truck drivers, about the "extremely icy" conditions in the parking lot at approximately 1:00 a.m. The lot was also described as "a disaster," "a mess," and "a sheet of ice." At approximately 2:00 a.m., the employee called the station manager at home and notified him that someone needed to salt the lot "before there was an accident." The station manager told her that a contractor would deal with the situation, and he went back to sleep. At 4:30 a.m., the employee called the contractor personally, but the contractor did not arrive until after plaintiff's accident and was not

[1] Sharon Robertson's claim was derivative for loss of consortium. For clarity, we will use the singular "plaintiff" to refer to Phillip Robertson.

responsible for salting the truck service area. A police officer advised the employee at about 2:00 a.m. that the icy conditions needed to be dealt with and testified at trial that there had been freezing rain in the area between 1:00 a.m. and at least 5:40 a.m. The employee telephoned 911 when another truck driver came into the station's store to report plaintiff's accident. The station manager arrived at approximately 5:45 a.m., at which time he saw plaintiff being attended by medical personnel. He testified that he could not differentiate between ice and wet pavement at the time, and, by 7:00 a.m., he had received reports of a car and a truck sliding into protective posts. Defendant's vice president of operations arrived at approximately 6:30 a.m. and salted the truck service area personally at that time.

Plaintiff was employed as a truck driver and required by his employer to fuel his truck at the beginning of the day. In furtherance of that requirement, plaintiff was a regular customer of defendant almost every weekday. Plaintiff generally paid at the pump and then purchased a cup of coffee in the station's convenience store. On the day of the accident, plaintiff was aware that his driveway and defendant's parking lot were icy and that the roads had been salted. Before setting out, plaintiff's inspection of the windshield washer fluid in the truck caused him to believe that he had enough. Later, however, spray from passing cars exhausted the fluid in the reservoir by the time he reached defendant's station. Plaintiff paid at the pump as usual and intended to purchase coffee and washer fluid from the convenience store, but slipped on the ice, fell, and sustained injuries.

There is no serious dispute that the parking lot was openly and obviously icy. Thus, plaintiff's case rested on the existence of "special aspects" taking it out of the ordinary application of the open and obvious danger doctrine. Plaintiff argued that the conditions were effectively unavoidable. Defendant argued that the conditions were avoidable because plaintiff could have gone elsewhere or refrained from purchasing washer fluid. The trial court and the jury both found the conditions effectively unavoidable, although the jury found plaintiff 30 percent at fault for his own injuries. The jury verdict awarded plaintiff $260,000 in noneconomic damages and $86,000 in economic damages, and it awarded Sharon Robertson $17,000 in noneconomic damages.

We first address defendant's argument that the trial court erred in denying its motions for summary disposition, directed verdict, and judgment notwithstanding the verdict. We review de novo these motions and view the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999); *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 260-261; 617 NW2d 777 (2000); *Smith v Jones*, 246 Mich App 270, 273-274; 632 NW2d 509 (2001). Defendant argues that the trial court erred in finding that the "special aspect" of unavoidability differentiated this case from the typical open and obvious danger case. We disagree.

Because the icy conditions here were open and obvious, defendant would have no liability in the absence of "special aspects" that "make a risk of harm unreasonable nonetheless," irrespective of the specific kind of negligence alleged. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 498; 595 NW2d 152 (1999), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). "Special aspects" exist if the condition "is effectively unavoidable" or constitutes "an unreasonably high risk of severe harm." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001). However, the risk must be more than merely

imaginable or premised on a plaintiff's own idiosyncrasies. *Id*., at 610 n 2. An open and obvious accumulation of snow and ice, by itself, does not feature any "special aspects." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004). Plaintiff has not cross-appealed the trial court's conclusion that there was no unreasonably high risk of harm, so we limit our analysis to whether the condition was effectively unavoidable.

Defendant argues that the condition was effectively avoidable because plaintiff could have gone to a different service station to make his purchases of fuel, coffee, and windshield washer fluid. However, one of the characteristics of the icy condition is that it was brought about by an unusually severe and uniform ice storm covering the entire area. Plaintiff patronized defendant's station almost every weekday pursuant to his employer's directions to fuel his truck first thing in the morning, and he intended to purchase wiper fluid because he was out of fluid and the weather was bad. The record contains no evidence that there existed any available alternatives. Even if there were, the scope of the inquiry is limited to "the objective nature of the condition of the premises at issue." *Lugo*, *supra* at 523-524. See also *Bragan ex rel Bragan v Symanzik*, 263 Mich App 324, 331-332; 687 NW2d 881 (2004). Therefore, the only inquiry is whether the condition was effectively unavoidable *on the premises*. Here, there was clearly no alternative, ice-free path from the gasoline pumps to the service station, a fact of which defendant had been made aware several hours previously. The ice was effectively unavoidable.

Defendant argues that the ice was avoidable because plaintiff was not "effectively trapped." *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002). However, reliance on *Joyce* is misplaced for a number of reasons. Although we discussed the possibility that the plaintiff in *Joyce* could have gone to the premises on a different day, our holding was based on the plaintiff's own testimony that she was aware and, indeed, had made use, of an available alternative route. *Id*. at 242-243. In any event, a reasonable trier of fact could rationally find that plaintiff *was* "effectively trapped" because it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield washer fluid.

Finally, and more significantly, plaintiff was a *paying customer* who was on defendant's premises for defendant's commercial purposes, and thus he was an *invitee* of defendant. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-598, 603-604; 614 NW2d 88 (2000). As our Supreme Court noted, "invitee status necessarily turns on the existence of an 'invitation.'" *Id*. at 597-598. Defendant's contention that plaintiff should have gone elsewhere is simply inconsistent with defendant's purpose in operating its gas station. The logical consequence of defendant's argument would be the irrational conclusion that a business owner who invites customers onto its premises would never have any liability to those for hazardous conditions as long as the customers even technically had the option of declining the invitation. Although we did not discuss the issue at the time, it is clear in retrospect that the plaintiff in *Joyce*, a former live-in caregiver who was at the time merely removing her personal belongings from the defendant's private residence, was a licensee to whom a lesser duty was owed. See *Joyce*, *supra* at 233; *Stitt*, *supra* at 596.

Even if the record showed that plaintiff was aware of a realistic, safe alternative location to purchase his fuel, coffee, and windshield washer fluid, where defendant has *invited* the public, and by extension plaintiff, onto its premises for commercial purposes, we decline to absolve

defendant of its duty of care on that basis. To do so would be disingenuous. Therefore, we conclude that the trial court appropriately denied defendant's motions.

We then turn to plaintiff's cross-appeal. We first address plaintiff's allegation that the trial court erred in denying his motion for additur or a new trial on the asserted ground that the jury's award of economic damages was irrational and unsupported by the evidence. We agree.

We review a denial of a motion for additur or a new trial for an abuse of discretion. *Hill v Sacka*, 256, Mich App 443, 460; 666 NW2d 282 (2003). When reviewing for additur, the appropriate inquiry is whether the evidence supports the jury's award. *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). We will not overturn a verdict if there is an interpretation of the evidence that provides a logical explanation for the jury's findings. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000).

The trial court ruled as a matter of law that plaintiff's reasonable and necessary medical expenses were $120,256.07, so the parties did not present any evidence to the jury about medical expenses. However, plaintiff presented evidence of lost wages and benefits, whereas defendant presented evidence that plaintiff was disabled because of unrelated medical conditions. The trial court instructed the jury to consider the amount of reasonable and necessary medical care, treatment, and services, as well as loss of earning capacity. However, the jury returned a verdict of only $86,000 for economic loss. We are unable to deduce any logical reason for this other than jury confusion, because this sum closely resembles the amount plaintiff claimed to have lost in wages and benefits, implying that the jury ignored the established sum of medical expenses. The evidence does not support the jury's award. We are loath to engage in fact-finding here, so we vacate that portion of the jury award relating to economic damages and remand for a trial limited to that issue.

Plaintiff also argues that the trial court erred in refusing to grant additur or a new trial regarding Sharon Robertson's award of $17,000 for noneconomic loss. We disagree. Plaintiff merely presents a list of factors that were given to and considered by the jury. The evidence rationally supports the award.

In light of our decision to vacate the jury's award of economic loss and remand for a new trial on that issue, we see no need to address plaintiff's remaining issues. We do not retain jurisdiction.

Meter, J., concurred.

/s/ Alton T. Davis
/s/ Patrick M. Meter