STATE OF MICHIGAN

COURT OF APPEALS

TAMMI ATTALA,

Plaintiff-Appellee,

v

LARRY ORCUTT and CAROLYN ORCUTT,

Defendants-Appellants.

FOR PUBLICATION
August 26, 2014

No. 315630
Kent Circuit Court
LC No. 10-006907-NO

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

RIORDAN, J. (*dissenting*).

Because plaintiff fails to establish the existence of special aspects sufficient to overcome the open and obvious doctrine, I respectfully dissent.

In its opinion and order, the trial court misstates the stipulation between the parties. It writes, in the first paragraph of its opinion, that the parties agree that the ice in the parking lot "was not avoidable in order for Plaintiff to enter or exit her apartment." In fact, the parties stipulated "[t]o get to her car from her apartment, Ms. Attala had to encounter the ice on the surface of the parking lot." The defendants did not concede that the ice was unavoidable under all circumstances and, in particular, that the ice "was not avoidable in order for Plaintiff to enter or exit her apartment." In fact, the ice was "unavoidable" only if plaintiff chose to walk on the parking lot in conditions that were known, open and obvious to her. In essence, the trial court reached its decision in favor of plaintiff based upon a faulty premise.

Seemingly recognizing this faulty premise, the majority's opinion focuses on the fact that plaintiff "had to encounter the ice to get to her car." It also describes the ice as being "universally present," to strengthen the conclusion that the plaintiff was compelled, or "required" to traverse across the ice in the parking lot. The majority twists the issue, and the stipulated facts, to transform this case by inserting on its own accord, like the trial court, a new, unstipulated fact, that plaintiff was compelled to encounter the admittedly open and obvious condition on the parking lot, when, in actuality, the facts indicate that she simply chose to do so.

A landowner owes no duty to protect or warn an invitee of dangers that are open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Nevertheless, the Michigan Supreme Court "has discussed 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*." *Hoffner v Lanctoe*, 492 Mich 450, 463; 821 NW2d 88 (2012) (emphasis in original). As the Court cautioned: "*In either circumstance,* such

dangers are those that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided and thus must be differentiated from those risks posed by ordinary conditions or typical open and obvious hazards." *Id.* at 463 (emphasis in original) (quotation marks and citation omitted). Thus, the special aspects exception is exceedingly narrow as "neither a common condition nor an avoidable condition is uniquely dangerous." *Id.*

In the instant case, the parties stipulated to the fact that the parking lot was covered with thick ice at the time of plaintiff's fall, and that no snow was covering it. Both parties agreed that the ice covering the parking lot was known to plaintiff, and open and obvious. The parties also agreed that in order to reach her car, plaintiff had to encounter the ice. From these facts, the majority concludes that there was a hazard, though not necessarily an unreasonable one, that was effectively unavoidable and, as a result, defendants are liable.

It is a logical leap that is not supported by the limited stipulated facts before this Court. While the parties stipulated that plaintiff was going to class to turn in a report, there is no evidence establishing that her only option to do so was to encounter ice in the parking lot, a condition the majority now has taken to describe as, "universally present." Further, contrary to plaintiff's suggestion, there was no evidence that she was "trapped" in her apartment. Even if walking across the parking lot at the instant she desired was the only way to reach her car, she voluntarily chose to do so.

> In her appellate brief, the plaintiff frames the issue before the Court as being:
> Whether the Circuit Court Erred in Determining that Special Circumstances Existed Where the Parking Lot of Tammi Attala's Apartment Building was Completely Covered with Thick Ice that She was Required to Cross to Leave Her Apartment.

Plaintiff argues on appeal, without there being any factual basis in the record to support her, that she "had" to get to her car, she was "unable to protect herself," she "had no option," she "had no choices," and that she was otherwise "trapped" in the apartment building. In reality, the parties did not stipulate to those facts, nor were they ever established in the trial court.

As the Michigan Supreme Court has held, a hazard is effectively unavoidable if a person "for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Hoffner*, 492 Mich at 468-469 (emphasis in original).

The example the Court provided in *Lugo* further demonstrates this point. The Court provided the following description of an effectively unavoidable condition: "[A] commercial building with only one exit for the general public where the floor is covered with standing water." *Lugo*, 464 Mich at 518. In such a scenario, a person would be effectively trapped in the building, as he or she could not exit safely. Yet, in this case, there is no evidence that plaintiff was unable to exit her apartment safely, that she had no alternative way of attending her class or submitting her report other than by walking through the parking lot to her car. The facts provided through the parties' stipulation merely indicates that plaintiff voluntarily chose to walk on the open and obvious ice. The parties do not stipulate that plaintiff was required or compelled

to do so. As such, based on the limited facts before this Court, it cannot be said that the hazard was effectively unavoidable or that plaintiff was required or compelled to confront it.

Moreover, as the Court in *Hoffner* emphasized, the effectively unavoidable exception "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." 492 Mich at 468. In other words, the "touchstone of the special aspects analysis is that the condition must be characterized by its *unreasonable risk of harm.* Thus, an unreasonably dangerous hazard must be just that—not just a dangerous hazard, but one that is unreasonably so." *Id.* at 455-456 (emphasis in original).

While the parking lot may have had ice, the parties did not stipulate that it created such a risk that its mere presence made it unreasonably hazardous, that it was "universally present," or that it created an unreasonable risk of harm. As our Supreme Court has observed: "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." *Hoffner*, 492 Mich at 454. Nothing in the stipulated facts indicates that the accumulation of ice in the parking lot was anything other than typical. As such, the ice was nothing more than an "ordinary condition," which does not constitute a special aspect. *Hoffner*, 492 Mich at 463

Because plaintiff failed to meet her burden of proof on the stipulated facts,[1] I dissent from the majority opinion. I would reverse.

/s/ Michael J. Riordan

[1] Plaintiff bears the burden to prove that defendants owed her a duty in a negligence action. *Flones v Dalman*, 199 Mich App 396, 403; 502 NW2d 725 (1993).