STATE OF MICHIGAN

COURT OF APPEALS

TAMMI ATTALA, Plaintiff-Appellee,	FOR PUBLICATION August 26, 2014 9:05 a.m.
v	No. 315630 Kent Circuit Court
LARRY ORCUTT and CAROLYN ORCUTT, Defendants-Appellants.	LC No. 10-006907-NO

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

SHAPIRO, J.

Defendants appeal from the trial court judgment for plaintiff in this premises liability/personal injury action. Because the trial court did not err in its application of the exceptions to the open and obvious doctrine, we affirm.

On January 20, 2010, plaintiff was injured when she slipped and fell on the icy surface of the parking lot outside her apartment, rented from defendants, while trying to get into her car in order to attend her college class as scheduled. The parties reached an agreement that the case turned solely on whether or not defendants owed plaintiff a duty given that (a) the ice was an open and obvious hazard and (b) the entire parking lot was covered in ice and the plaintiff had to encounter the ice in order to get to her car. They agreed that if defendants owed a duty under these conditions, judgment should enter for plaintiff, but that if defendants did not owe a duty under these conditions, judgment should enter for defendants. Accordingly, the parties jointly submitted this purely legal issue to the trial court for determination on the following stipulated facts:

> 1. On January 20, 2010, Plaintiff, Tammi Attala, slipped and fell on ice in the parking lot of the apartment she rented at 1307 Northfield Ave., Grand Rapids, Michigan.
>
> 2. That at all times pertinent, the Defendants, Larry Orcutt and Carolyn Orcutt, were the Plaintiff's landlords and owners of the premises where the injury occurred.
>
> 3. Tammi Attala had the status of an invitee on the premises at the time of the accident.

4. The apartment rented by Plaintiff was one of four apartments in the Defendants' apartment building.

5. That the Defendants, as owners and landlords of the Plaintiff, provided the parking lot for use of their tenants.

6. That the Defendants owned, managed and maintained the premises, including the parking lot.

7. *That Defendants provided the parking for their tenants and the tenants could reasonably expect to be able to get to and from their vehicles as part of using this parking lot.*

8. That on January 20, 2010, and for a period of time prior thereto, the entire parking lot was covered with thick ice. There was no snow covering the ice.

9. *The lot had been plowed at some time prior to January 20, 2010 but not salted.*

10. That on January 20, 2010, Plaintiff was a student taking classes to become a medical assistant. On the date of her injury, she was going to school to attend classes and turn in a report that was due that day.

11. *To get to her car from her apartment, Ms. Attala had to encounter the ice on the surface of the parking lot.*

12. Plaintiff was injured when she slipped and fell on the ice as she was entering into her car.

13. The thick ice covering the parking lot was known to Ms. Attala and open and obvious.

14. The amount of Ms. Attala' damages after all applicable setoffs is $12,500.

15. *The sole issue for determination by the Court is whether special aspects existed such that Defendants owed a duty to the Plaintiff despite the open and obvious nature of the hazard.*

[Emphasis added.]

The trial court found that, because it was undisputed that to reach her car, plaintiff had to encounter the icy conditions and that the entire parking lot was covered with thick ice, the hazard was effectively unavoidable and, therefore, the open and obvious doctrine did not vitiate defendants' duty. The court reviewed the decisions in *Lugo v Ameritech Corp Inc*, 464 Mich 512; 629 NW2d 384 (2001) and *Hoffner v Lanctoe*, 492 Mich 450, 464-465; 821 NW2d 88

(2012), correctly noting their holdings that a premises owner retains a duty as to those open and obvious hazards that have either of two "special aspects": those that are either "effectively unavoidable" or "pose a substantial risk of death or serious injury." *Lugo*, 464 Mich at 518; *Hoffner*, 492 Mich at 463. As explained in *Lugo*, these two types of special aspects address the two different ways in which a risk may remain unreasonable even when open and obvious. An effectively unavoidable hazard "give[s] rise to a unique *likelihood* of harm" while one which poses a substantial risk of death or serious injury "give[s] rise to a uniquely high . . . *severity* of harm." *Lugo*, 464 Mich at 519 (emphasis added). If the hazard in question has either of these special aspects, then it continues to present an "unreasonable risk of harm" despite being open and obvious. *Id*. at 518-519.

Given these principles, the trial court properly rejected defendants' sole argument – that to fall outside the open and obvious doctrine, the conditions of the premises must be *both* effectively unavoidable *and* pose a substantial risk of death or serious injury. The trial court accurately stated the law in its opinion:

> [C]ontrary to Defendants' position, the *Lugo* Court clearly saw unavoidable situations as distinct from avoidable but substantial risks. This distinction is applied in *Hoffner*, where the Court first found that the plaintiff freely admitted that the danger was avoidable. *Hoffner supra* at 473. The *Hoffner* Court then proceeded to analyze whether the danger was substantial. *Id*. Therefore, the *Hoffner* Court did not see substantiality and unavoidability as two necessary elements because the substantiality analysis would have been unnecessary once the plaintiff admitted that the condition was avoidable. *See id*.

The trial court was correct in describing *Hoffner*'s two-part analysis and in describing effective unavoidability as one of the exceptions to the open and obvious doctrine. However, the trial court erred by referring to the second exception as being applicable when "the danger was substantial." This underestimates the degree of potential injury that must be present for the second exception to apply. The Supreme Court has made clear that if the danger is not effectively unavoidable, the premises owner does not have a duty unless the hazard poses "an extremely high risk of *severe* harm[.]" *Hoffner*, 492 Mich at 462, quoting *Lugo*, 464 Mich at 519 n 2 (emphasis added). As an example, *Lugo* offered a 30-foot unguarded pit in a parking lot, noting that while the pit would be avoidable, a person who failed to avoid it would suffer "a substantial risk of death or severe injury[.]" *Lugo*, 464 Mich at 518. Thus, contrary to the characterization used by the trial court, if the hazard is not effectively unavoidable, the premises owner's duty under common law is limited to situations where the hazard poses a substantial risk of death or severe injury.

The parties agreed that judgment should enter for plaintiff if defendants owed a duty and for defendants if defendants did not owe such a duty. Defendants did not argue below or on appeal that the hazard was not effectively unavoidable. The parties submitted a question of law to the trial court on stipulated facts and the trial court correctly stated and applied the law.[1]

Affirmed.

/s/ Douglas B. Shapiro
/s/ William B. Murphy

[1] Our dissenting colleague concludes that plaintiff's case should have been dismissed because she failed to show that "alternative modes of transportation" were not available to her. We reject this view for several reasons. First, defendant never made any such argument to either the trial court or in its brief to this Court. See *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009), quoting MCR 2.116(G)(4) (in a motion under 2.116(C)(10), the moving party must "specifically identify the issues to which the moving party believes there is no question of material fact"). Second, defendants *stipulated* that "[plaintiff] had to encounter the ice on the surface of the parking lot to get to her car" and so any claim that she did not need to do so is waived. Third, the dissent never states what reasonable "alternative modes" of transportation it theorizes might have allowed plaintiff to avoid the icy conditions that covered the entire premises and cites no evidence to support such a theory. This is a telling omission, as it is difficult to imagine what could have transported plaintiff off the property without having to encounter the universally present ice. The dissent seems to take the view that that, even if a defendant does not argue that safe and reasonable alternatives existed, a plaintiff must nevertheless demonstrate a lack of safe and reasonable alternatives. A plaintiff is required to rebut the reasonableness of any alternatives proffered by the defense, but is not required to do so where the defense, as here, fails to offer evidence (or even a claim) of any such alternatives. The dissent's approach suggests that the party with the burden of proof must rebut theories that are never presented. This is akin to an appellate court reversing a defendant's conviction because the prosecutor failed to *disprove* self-defense or alibi where the defendant never asserted that he acted in self-defense or that he had an alibi for the time in question.