STATE OF MICHIGAN

COURT OF APPEALS

MARY BUHALIS,

Plaintiff-Appellee/Cross-Appellant,

v

TRINITY CONTINUING CARE SERVICES, a/k/a SANCTUARY AT THE ABBEY, f/k/a ABBEY MERCY LIVING CENTER,

Defendant-Appellant/Cross-Appellee.

FOR PUBLICATION
May 29, 2012
9:10 a.m.

No. 296535; 300163
Macomb Circuit Court
LC No. 2009-000633-NO

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

SAAD, J.

I. NATURE OF THE CASE

Under Michigan law, a premises possessor generally owes no duty to an invitee to warn of or protect from open and obvious dangers, such as ice and snow, absent special aspects. We hold that, for the reasons set forth below, the icy condition that plaintiff encountered was open and obvious. We also hold that, as a matter of law, if a premises possessor provides a clear means of ingress and egress and the invitee strays off the normal pathway onto an area that is obviously not reserved for that purpose, the landowner has not breached its duty of "reasonable care." Because the pathway for normal access is made available to invitees and the dangers of straying off the clear path are, as here, open and obvious, the premise possessor owes no duty to warn or protect such an invitee.

II. FACTS

In January 2008, plaintiff, Mary Buhalis, slipped and fell on ice on a patio near the front entrance of a building owned by defendant Trinity Continuing Care Services (Trinity). On the morning of the incident, Ms. Buhalis rode a large, three-wheeled bike to the nursing home to donate a bag of clothes. She parked her bike on the uncleared and unsalted patio adjacent to the main entrance walkway. The main walkway was free of ice and snow and covered by a large awning. After she dismounted her bike, Ms. Buhalis retrieved the bag of clothes from her basket and set it on the ground. She then picked up the bag and, as she started to walk toward the building, she slipped and fell. Ms. Buhalis offered conflicting testimony about the precise location of her fall, but receptionist Marlene Calcaterra testified that she saw Ms. Buhalis

attempting to pull herself up right outside of her window, which is directly in front of the patio. At oral argument on appeal, plaintiff's counsel agreed that Ms. Buhalis fell on the patio and not on the cleared walkway leading to the building.

Joshua Shock, the maintenance technician for the nursing home, testified that part of his job is to remove snow and place salt on the walkways and entrance areas of the building. Mr. Shock testified that the sidewalks and main entrance walkway were clear of ice and snow when Ms. Buhalis fell. He further testified that he never salted or removed ice from the patios and they were generally not maintained during the winter months. According to Mr. Shock, the large awning over the main walkway "performed as designed, in directing rain and melting snow and ice away from the covered walkway and entrance to the building, and onto the uncovered cement patio areas adjacent to each side of the awning." Mr. Shock recalled that, on the day Ms. Buhalis fell, there was visible ice on the patio in the area where plaintiff slipped. According to Ms. Buhalis, she was aware that ice and snow could accumulate on the patio, that the awning caused water to fall onto the patio where it could freeze and thaw, and she was also aware that Trinity had posted a sign that cautioned: "SIDEWALKS, PARKING LOTS AND COMMON AREAS MAY BE WET, SNOWCOVERED [SIC] AND SLIPPERY," but Ms. Buhalis maintained that she did not see any ice on the patio before she slipped. However, Ms. Buhalis recalled that, after she fell, she saw that she slipped on a patch of ice.

Ms. Buhalis sued Trinity, alleging various claims of liability. In Docket No. 296535, Trinity appeals by leave granted[1] the trial court's order that denied its second motion for summary disposition. Ms. Buhalis also filed a cross-appeal in Docket No. 296535. In Docket No. 300163, Trinity appeals by leave granted[2] the trial court's order that denied its third motion for summary disposition. For the reasons set forth below, we reverse and remand for entry of summary disposition for Trinity in Docket Nos. 296535 and 300163.

III. ORDINARY NEGLIGENCE

We agree with Trinity that the trial court erred when it denied its motion for summary disposition on Ms. Buhalis's first amended complaint, in which she asserted that Trinity should be held liable for ordinary negligence. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

Courts are not bound by the labels that parties attach to their claims. *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). Indeed, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond

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[1] *Buhalis v Trinity Continuing Care Services*, unpublished order of the Court of Appeals, entered June 4, 2010 (Docket No. 296535).

[2] *Buhalis v Trinity Continuing Care Services*, unpublished order of the Court of Appeals, entered May 18, 2011 (Docket No. 300163).

mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710–711; 742 NW2d 399 (2007). Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land. See *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury. *James*, 464 Mich at 18-19.

Here, Ms. Buhalis alleged that she was injured when she slipped on ice and fell; that is, she alleged that she was injured when she encountered a dangerous condition on Trinity's premises. Though she asserted that Trinity's employees caused the dangerous condition at issue, this allegation does not transform the claim into one for ordinary negligence. *Id.* Rather, she clearly pleaded a claim founded on premises liability. Therefore, Buhalis's negligence claim is a common law premises liability claim and, to the extent that she purported to allege an ordinary negligence claim in addition to her premises liability claim, the trial court should have dismissed that claim.

IV. OPEN AND OBVIOUS DANGER AND DUTY OF REASONABLE CARE

On cross-appeal in Docket No. 296535, Ms. Buhalis argues that the trial court erred by granting Trinity's first motion for summary disposition regarding plaintiff's premises liability claim[3] because Ms. Buhalis contends the ice on which she fell was not open and obvious.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "[T]he existence of a legal duty is a question of law for the court to decide." *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). A possessor of land is not an absolute insurer of the safety of an invitee. *Id*. Generally, an owner of land "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Absent special aspects, this duty does not extend to open and obvious dangers. *Id.* Moreover, "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Id*.

[3] The trial court subsequently set aside its order granting defendant's first motion for summary disposition, but on different grounds. The trial court did not alter its decision regarding this issue.

"[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Indeed, there is an overriding public policy that people should "take reasonable care for their own safety" and this precludes the imposition of a duty on a landowner to take extraordinary measures to warn or keep people safe unless the risk is unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995).

"Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Royce v Chatwell Club Apartments*, 276 Mich App 389, 392; 740 NW2d 547 (2007). Here, Ms. Buhalis contends that the ice was not open and obvious because it was clear and she did not see it before she fell. However, if a "condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand*, 449 Mich at 611. A plaintiff may not recover if the condition is "so common that the possibility of its presence is anticipated by prudent persons." *Id*. at 615.

In *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008), this Court explained: "When applying the open and obvious doctrine to conditions involving the natural accumulation of ice and snow, our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." Thus, the question is whether the ice was visible on casual inspection or whether there were other indicia of a potentially hazardous condition that would impute knowledge on the part of Ms. Buhalis. *Id*. at 483.

Here, Ms. Buhalis failed to establish a genuine issue of material fact with regard to whether the ice was open and obvious because, even if the ice could be fairly characterized as clear, Ms. Buhalis knew of the danger of ice on the patio and other indicia of a potentially icy condition would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection.

Evidence showed that it rained and snowed the day before plaintiff's fall. Though temperatures rose during the night before the incident, Ms. Buhalis admitted that, after she fell, she could see the patch of ice on which she slipped, and Mr. Shock testified that, when he went to move Ms. Buhalis's bike after her fall, the ice on the patio was evident. Further, at the time of her fall, Ms. Buhalis had lived through 85 Michigan winters. She testified that, even when sidewalks are clear, there is danger of "black ice" on the ground. Ms. Buhalis also testified that she knew that water fell from the awning onto the patio, that ice may develop from a freeze-thaw cycle, and that she chose to park her bike away from the awning because she knew there could be ice present from water run-off. Ms. Buhalis was also specifically aware of the caution sign warning that common areas could be wet, snow-covered, and slippery, but she knowingly chose not to heed the warning and, thus, voluntarily exposed herself to the hazard. Again, while a premises possessor owes a duty to invitees to exercise reasonable care to protect the invitee from an unreasonable risk of harm, an invitee has a concurrent and important duty to "take reasonable

care for their own safety." For these reasons, the danger of ice was actually known to Ms. Buhalis and a reasonably prudent person in Ms. Buhalis's position would have foreseen the danger of slipping on ice. *Riddle*, 440 Mich at 96.[4]

We further observe that there is no question of fact with regard to whether Trinity exercised reasonable care to protect invitees from the dangers of ice and snow. The degree of care required of a premises possessor is to "take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [the plaintiff] only if there is some special aspect that makes such accumulation unreasonably dangerous." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004) (internal quotations and footnote omitted). See also *Benton*, 270 Mich App at 443 n 2 ("*Mann* established that there is no general duty of inviters to take reasonable measures to remove snow and ice for the benefit of invitees unless the accumulation meets the [*Mann*] majority's high standard of creating an unreasonable risk of danger."). In other words, it is not Trinity's duty to guarantee that ice will never form on its premises, but to ensure that invitees are not unnecessarily exposed to an unreasonable danger.

Reasonable minds could not disagree that Trinity exercised "reasonable care." Trinity provided a sizeable, fully-cleared walkway to its main entrance, covered by a large awning to protect the walkway from the elements. Mr. Shock also testified that all sidewalks surrounding the building were clear and free of ice and snow. It was not unreasonable for Trinity not to clear ice or snow from its seasonal patios. Again, during the winter, a premises possessor cannot be

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[4] Moreover, no special aspects existed that would differentiate the icy condition from a typical open and obvious risk. "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo*, 464 Mich at 519. Thus, for example, an unguarded 30-foot-deep pit in a parking lot would present such a substantial risk of death or severe injury that it would be unreasonably dangerous to maintain the condition despite its obvious nature. *Id*. at 518. Also, an effectively unavoidable condition, such as the presence of standing water on the floor of the only exit in a commercial building, would present a special aspect to differentiate a hazard from a typical open and obvious risk. *Id*. However, "[n]either a common condition nor an avoidable condition is uniquely dangerous." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 117; 689 NW2d 737 (2004) (Griffin, J., dissenting), rev'd on other grounds, 472 Mich 929 (2005).

Here, the patio was clearly avoidable. Plaintiff was not required to use the patio and, again, the main walkway to the front entrance was clear. Evidence also showed that a side entrance was available for visitors to use. Moreover, the presence of ice on the patio did not present such a substantial risk of death or severe injury that it was unreasonably dangerous to maintain the condition. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002). Accordingly, plaintiff has failed to establish that any special aspect existed that rendered the icy condition effectively unavoidable or unreasonably dangerous.

expected to remove snow and ice from every portion of its premises, including areas adjacent to a cleared walkway, and Michigan case law makes clear that such extraordinary measures are not required. *Mann*, 470 Mich at 332; *Benton*, 270 Mich App at 443 n 2. Further, Trinity posted a caution sign warning that the area may be slippery. Trinity had no duty to clear every surface on which Ms. Buhalis, individually, may have chosen to park her bike, whenever she might visit, in whatever type of weather. And, there is no evidence that the patios were used by invitees throughout the winter. That Ms. Buhalis chose to stray from the safe means of ingress and egress to the building does not impose liability on Trinity, where Trinity clearly complied with its duty of care to invitees.

V. DESIGN AND CONSTRUCTION

Trinity argues that Ms. Buhalis's claims that it defectively designed and constructed the roof and awning—even if those claims are distinct from the premises liability claim—are barred under MCL 600.5839. That statute protects "any contractor making the improvement." MCL 600.5839(1). Because there is no evidence that Trinity designed or constructed the roof or the awning, that statute does not apply. But for the same reason, Ms. Buhalis's design and construction claims fail. Trinity presented unrebutted evidence that it did not design or construct the improvements on the premises. In the absence of such evidence, Trinity cannot be liable for a defect in their design or construction. See MCR 2.116(C)(10).

VI. REGULATORY AND STATUTORY CLAIMS

We also reject Ms. Buhalis's claim that she has a cause of action under Mich Admin Code, R 325.21304(2), which requires nursing homes to maintain the premises in "a safe and sanitary condition and in a manner consistent with the public health and welfare." Ms. Buhalis presents no argument or authority that this regulation provides a private cause of action. See *Lash v City of Traverse City*, 479 Mich 180, 192-193; 735 NW2d 628 (2007) (setting forth the test for determining when a private right of action for damages can be inferred from a statute). And this Court will not search for authority to support or reject her position. See *Flint City Council v State of Mich*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002). Therefore, we hold that Ms. Buhalis failed to establish that she had a viable claim under that regulation.

Further, were we to assume (without deciding) that MCL 125.471 applies to Trinity's facility and to a guest of an occupant, see MCL 125.401 (applying the housing law to certain classes of municipalities); MCL 125.536 (stating that an occupant has a cause of action under the housing law), we hold that MCL 125.471 does not provide an independent cause of action under the facts of this case. Although the statute imposes an obligation to maintain the roof of a dwelling and to drain rain water, it specifically provides that the duty is imposed to "avoid dampness in the walls and ceilings and insanitary conditions." *Id.* That is, it plainly does not impose a duty to remove snow and ice on the grounds outside the dwelling. And Ms. Buhalis did not otherwise allege that her injuries resulted from a failure to maintain the dwelling in good repair. See *Morningstar v Strich*, 326 Mich 541, 545; 40 NW2d 719 (1950). Accordingly, under these facts, the trial court should have dismissed Ms. Buhalis's claim to the extent that it relied on MCL 125.471.

There is also no merit to Ms. Buhalis's argument that the trial court erred when it dismissed her claim premised on the duty imposed on landlords under MCL 554.139(1). Our Supreme Court has held that MCL 554.139(1) does not apply to social guests of a tenant. See *Mullen v Zerfas*, 480 Mich 989, 990; 742 NW2d 114 (2007). Accordingly, MCL 554.139(1) does not apply.

VII. CONCLUSION

For the above reasons, the trial court should have granted summary disposition to Trinity on all of Ms. Buhalis's claims. In light of our resolution of these issues, we need not address the parties' remaining arguments.

Reversed and remanded for entry of summary disposition for defendant in Docket Nos. 296535 and 300163. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Peter D. O'Connell