STATE OF MICHIGAN

COURT OF APPEALS

IRENE E. JARABEK,

Plaintiff-Appellant,

v

PAXON OIL COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 20, 2003

No. 241957
Saginaw Circuit Court
LC No. 01-040615-NO

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Plaintiff Irene E. Jarabek appeals as of right from an order granting summary disposition under MCR 2.116(C)(10) in favor of defendant Paxon Oil Company. We affirm.

The pertinent facts are not in dispute and were accurately summarized by the lower court in its opinion and order granting summary disposition in favor of defendant:

> At approximately noon on December 21, 2000, plaintiff entered onto defendant's premises for the purpose of purchasing gasoline, pulling her vehicle to what has been determined to be pump # 6. Plaintiff had difficulty operating the pump and left her vehicle, walking toward the store to seek assistance from station personnel. As she approached the east side of pumps #1 and #3 she was confronted with a pile of slush approximately 2 inches deep and covering an area of approximately 4 ft. by 2. ft. The store manager described the slush as being up to a foot deep. In any event, plaintiff, instead of avoiding the slush, walked directly through it, slipping on what she believed to be a patch of ice that had accumulated in a small depression in the pavement. Plaintiff theorizes that the ice had formed prior to it being covered with the slush. She further stated that the most direct route into the store was through the slush which did not pose a concern as she was wearing winter boots. It is undisputed that the station lot had been recently plowed. Plaintiff acknowledged that the lot appeared to have been plowed and was relatively clear of any snow or ice with the exception of the slush piles located at the far east and west end of the pumps. The manager testified that during the morning hours of the day in question, slush was being tracked or deposited onto the premises by customer vehicles. She stated that between 10:30 and 11:00 that morning she used a hand shovel to clear the accumulated slush

from between the pumps, shoveling it into the small piles described above. The temperature was below freezing and had been so for at least the past 24 hours.

Plaintiff brought suit, and defendant moved for summary disposition pursuant to MCR 2.116(C)(10) based on the open and obvious doctrine. Plaintiff claimed there was ice beneath the slush which caused her fall and that such condition was not discoverable on casual inspection. Plaintiff further argued that defendant's employee's action in attempting to make the area safer, by shoveling the slush into piles at the end of the pumps, inadvertently created a danger for plaintiff and others, and therefore, the open and obvious doctrine had no application to the case. Nonetheless, circuit court Judge William A. Crane held that there was "no sound basis to conclude the open and obvious doctrine has no application in this case, nor does it find the existence of any 'special aspects' that differentiate the risk from typical open and obvious risks." The trial court thus granted defendant's summary disposition motion. Plaintiff now appeals.

This Court reviews de novo trial court rulings on a motion for summary disposition. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* The nonmoving party may not rest on mere allegations or denials in the pleadings, but must set forth specific facts at the time of the motion showing a genuine issue for trial. *Id*. at 121. Summary disposition is appropriate only if the opposing party fails to present admissible evidence establishing the existence of a material factual dispute. *Id.* at 120*; Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

It is undisputed in this case that plaintiff was an invitee on the premises of defendant's business. As such, defendant 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. However, this duty does not generally encompass removal of open and obvious dangers." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The open and obvious doctrine is applicable to situations involving ice and snow, see *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002); *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002), and, as explained by the *Joyce* Court, *supra* at 238-239:

> The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, this Court "look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Here, plaintiff first argues that the trial court improperly held that the condition which caused plaintiff to slip and fall constituted an open and obvious danger. She maintains that an ice-filled depression was the dangerous condition, not the shoveled slush covering the

depression. Plaintiff argues that the deposition testimony of defendant's store manager clearly shows the manager had knowledge that, in the past, water accumulated in a depression located at pump # 1, where plaintiff fell, and that in the past the accumulated water had frozen into ice, yet the manager nonetheless moved all the shoveled slush over to that area and therefore covered up the depression. Thus, plaintiff posits that, "There was a previously open and obvious condition (i.e. the icy depression) that was subsequently turned into a 'hidden defect' as a result of the Defendant-Appellee's 'negligent maintenance of the premises' (i.e. shoveling the slush over the icy depression and, therefore, covering it up)."

However, we agree with Judge Crane's well-reasoned assessment that

> Anyone living in Michigan for any length of time knows the hazards posed by slush. Slush, by definition is partly melted or watery snow and contains a high percentage of water. Slush can present a varying degree of risk depending upon how much is present and, in particular, the ambient air temperature to which it is exposed. In the instant case, it had been below freezing for some considerable time. Under the circumstances, any reasonable person walking through slush should have been aware of the possibility of the presence of ice. It matters little whether the ice had formed previously and been covered by the slush, as plaintiff claims happened here, whether the ice was already present in the slush, or whether it formed in the one hour period between the manager's clearing operations and plaintiff's fall. If a business owner clears a pathway to his/her door by shoveling snow/ice/slush to the side, and an invitee chooses to ignore the pathway and walk instead through the very snow/ice/slush cleared, injuring himself/herself in a fall, it makes no difference whether the fall was caused by slipping on the ice/snow/slush cleared or slipping on existing ice underneath that snow/ice/slush. The result is still the same – the invitee ignored an open and obvious hazard and cannot now be heard to hold the landowner responsible. The same can be said of the instant case. The slush pile was readily visible and could have easily been avoided. The dangers posed by slush, including the existence of ice, are well known. The Court finds no sound basis to conclude the open and obvious doctrine has no application in this case . . . .

Plaintiff's relevant deposition testimony indicates that on the date of the incident, she was fully aware of the conditions she claims caused her slip and fall. Plaintiff estimated that there was approximately "two, three inches" of snow on the ground. Plaintiff described the condition of the parking lot as "fairly clean" between the stalls, indicating that "there was a little bit of snow, but nothing major. Looked like it had been scraped or plowed out." Plaintiff testified that "what happened was at the end of these stalls there was like two inches of slush, which I didn't think nothing of since I had my boots on." Plaintiff stated "that's where they scraped the [slush], in between they left a whole mess of it on each end. And not only the one that I slipped, but on all of them."

As previously noted, plaintiff had some difficulty operating the pump and decided to walk into the station for assistance. She testified that she left her vehicle at pump #6 and walked around the east side of pumps #1 and #3. As she approached these pumps, she observed that "[t]here was about two inches of slush. *On – and I thought, well, I had my boots on, so it didn't bother me. So I started to walk through it.*" (Emphasis added.)

Testimony was also elicited concerning the availability of alternate routes for plaintiff's efforts to enter the store on the premises. When asked why she did not walk around the west side of pump #2 to seek access to the store, plaintiff responded, "The office is over on this end [east], I tried to get to the shortest distance." When questioned why, when encountering the pile of slush in which she fell, she did not attempt to avoid it by stepping around it to the east, plaintiff again responded, "I just went the shortest way to me that could get through to go to the office to find out why – I should have drove away from that pump." Plaintiff acknowledged that she could have avoided the area of slush, stating, "Probably, but like everyone else you take the shortest route." Plaintiff also testified that she was not concerned with traversing the slush, because she "had boots," and those boots possessed "good grips, good tread."

As stated above, *Joyce, supra* at 238-239, the test for determining whether a condition is open and obvious is objective and focuses not on whether plaintiff herself should have known that the condition was hazardous, "but whether a reasonable person in his position would foresee the danger." Applying this test to the present circumstances, the circuit court, for the reasons set forth in its well-written opinion, *supra*, properly concluded that traversing the pavement through the pile of slush posed an open and obvious danger.

However, this does not end the inquiry regarding defendant's duty under the circumstances because if, as plaintiff alleges, "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517. Plaintiff maintains that "there was something out of the ordinary about the open and obvious slush; that . . . 'special aspect' is the fact that there was a depression in the concrete/asphalt below the slush that allowed moisture to accumulate and then freeze inside it."

However, we disagree with plaintiff that the purported "depression" or "indentation" in the pavement below the slush constituted a "special aspect" of the open and obvious condition "that differentiated the risk from typical open and obvious risks so as to create an unreasonable risk of harm. . . ." *Lugo, supra* at 517. The *Lugo* Court offered two examples to aid in the determination "whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability," *id* :

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. *In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.* To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. *In sum, only 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. [*Id*. at 518-519, (Footnotes omitted, emphasis added).]

Here, the record is devoid of any evidence showing that there were "special aspects" of the open and obvious dangerous condition, the pile of slush, that made it unreasonably dangerous within the meaning of *Lugo, supra*. Although plaintiff argues that the pile of slush obscured an icy depression in the pavement which rendered the condition "uniquely dangerous," the evidence of record simply does not support her assertion. Indeed, plaintiff's testimony reflects her uncertainty regarding whether she slipped on the slush pile or ice underneath it and, based on the following deposition testimony, it is clear that plaintiff could not confirm the existence of ice under the slush based on her personal observations:

Q. [Counsel for defendant] All right. Do you know if you slipped on slush or on the ice?

A. [Plaintiff] I thought it was ice.

Q. Do you know?

A. No. But I did see them putting something on it after, as we were leaving.

Q. All right. But you're not able to tell if it was ice under the slush –

A. Ice.

Q. —or whether it was slush?

A. It was ice because I saw them putting something on it. All I know I really went down fast. If it wasn't so fast I could have probably broken my fall or something, you know.

* * *

A. I assumed it was ice under there the way I went out so fast.

Q. Okay. But you don't, you don't know, you never – actually –

A. No.

Q. – went back and inspected for ice or anything?

A. No. I didn't do anything, but get to the hospital. But they were out there putting something on, so you tell me.

It is evident from the above testimony that despite plaintiff's lack of specific knowledge concerning whether there actually was ice under the slush, she nonetheless claims, based solely on her prior experience of stepping on slippery ice and being familiar with that sensation, that a hidden icy depression in the pavement created a "uniquely high likelihood of harm" so as to render the open and obvious doctrine inapplicable. However, her unsupported, speculative

assertions do not support a reasonable inference that "special aspects" existed which made the open and obvious condition so unreasonably dangerous that it would create a risk of death or severe injury. *Lugo, supra; Joyce, supra*.

The reasoning of this Court in *Joyce, supra* at 243, applies with equal force to the present case: "In other words, the common condition in this case was neither remarkable nor unavoidable and clearly does not represent the kind of 'uniquely dangerous' condition that would warrant removing this case from the open and obvious danger doctrine, particularly because [plaintiff] clearly appreciated the risk of harm and, nevertheless, chose to encounter the condition." Because "[plaintiff] failed to raise a genuine issue of material fact, and no reasonable juror could conclude that the open and obvious condition in this case constituted an unreasonable risk of harm," *id*., the trial court did not err in granting summary disposition in favor of defendant.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski