STATE OF MICHIGAN

COURT OF APPEALS

MELISSA SANCHEZ,

Plaintiff-Appellant,

v

BATTLE CREEK REALTY, d/b/a, AVON WOODS MOBILE HOME PARK,

Defendant-Appellee,

and

DENMARK MANAGEMENT CO.,

Non-Participating Defendant.

UNPUBLISHED
June 22, 2004

No. 249437
Calhoun Circuit Court
LC No. 02-000461-NO

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right a trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

We review a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10) de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). The motion should be granted if the affidavits or other documentary evidence demonstrate that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

This case arises out of injuries plaintiff sustained when she slipped and fell on a small patch of ice while getting into her car. The car was parked on the street in front of her mobile home, situated on a trailer lot she leased from defendant. Plaintiff sued defendant arguing that defendant breached its duties to: maintain the premises in a safe condition free from danger; warn her of dangers that may cause an unreasonable risk of harm to persons on the premises; remove the hazard of ice in the roadway within a reasonable time after the hazard was formed; and operate its business in accordance with state law.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that it had no duty to remove snow and ice from the road where plaintiff fell. Defendant relied on community rules and regulations which provide that plaintiff is responsible for removing snow and ice from her "parking area." Defendant argued that this includes the road in front of her mobile home, where it was the custom and habit of mobile home residents to park. Defendant also argued that even if it had a duty to remove snow from the road where plaintiff fell, the ice on which plaintiff slipped and fell was open and obvious, thereby relieving it of liability under the general rule that a premises possessor is not required to protect an invitee from open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001).

The trial court determined that summary disposition in favor of defendant was appropriate because there was no genuine issue of material fact regarding necessary elements of plaintiff's claim, stating the following reasons for its decision:

> 1. The Plaintiff has failed to establish by admissible evidence that the Defendant owed a duty to Plaintiff to take reasonable measures to diminish the hazard of injury due to snow or ice accumulations in the area where she fell. The Plaintiff entered into a one-year lease with the Defendant, and by statute, the parties may modify or shift responsibilities and obligations imposed by the statute where, as here, the lease is for one year or longer. MCL 554.139(2). In this case, the evidence clearly establishes that it was the Plaintiff's duty – and not the Defendant's duty – to shovel and clear the area of ice and snow in her parking area, which is where the Plaintiff slipped and fell.
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> Indeed, the undisputed evidence is that it was Plaintiff's father who had in fact previously shoveled the area. As there is no genuine issue of material fact regarding any duty of the Defendant to keep the area where Plaintiff fell clear of ice and snow, a necessary element of Plaintiff's claim has not been established, and Summary Disposition is appropriate.
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> 2. Even if there was a genuine issue of material fact regarding a duty of the Defendant to keep the area where Plaintiff fell clear of accumulated ice and snow, from the evidence presented, there is no showing by the Plaintiff that Defendant failed to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to Plaintiff.
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> The evidence submitted establishes that there had not been any recent appreciable accumulation of snow and or ice. In fact, the records indicate that there had been a total accumulation of two inches of snow since January 1, with ground accumulation steadily decreasing from 16 inches on January 1, to eight inches on January 28. Temperatures during this same period of time generally were at or above freezing during the day and below freezing at night. There is no evidence that reasonable measures prior to the Plaintiff's fall on this patch of ice would have included sanding, plowing, shoveling, etc. The presence of a nine inch patch of ice in an outdoor parking area in Michigan in the middle of winter is not *prima facie* evidence of an unreasonable risk of harm. Nor is it sufficient evidence to create a genuine issue of material fact that the Defendant breached a duty to

> properly maintain the premises by taking action to diminish the hazard. As stated in *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244[; 235 NW2d 732] (1975), invitors are not absolute insurers of the safety of their invitees.
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> Since there is no genuine issue of material fact that the Defendant owed a duty to Plaintiff to keep the area where she fell clear of accumulated ice and snow; and since there is no genuine issue of material fact that the Defendant knew or should have known of the presence of the hazard and that the hazard constituted an unreasonable risk of harm, the Defendant's Motion should be granted.

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition on the basis that it was her duty to clear the snow and ice from her "parking area," even though it was on the road. We agree.[1] Defendant's community rules and regulations, which all lessees are bound to through the terms of the lease agreement, contain the following provision regarding snow removal:

> Snow removal is the responsibility of the Resident. Snow and ice are to be removed from all driveways (parking areas), sidewalks, steps and patios on the home site. Do not shovel snow into the streets. Management will plow the roads when necessary, but they are not responsible for the above mentioned items.

Defendant argued, and the trial court agreed, that it was clearly plaintiff's responsibility to remove snow from her "parking area" on the street. However, under the clear terms of the rules and regulations, the terms "parking areas" and "driveways" are synonymous. A "road" is clearly a separate area, for which defendant specifically undertook plowing responsibility. While these provisions may arguably have been modified by the residents' habit or custom of parking on and shoveling the road, there is at least a genuine issue of material fact that plaintiff's duty to remove snow does not extend to the road. Therefore, the trial court's grant of summary disposition in favor of defendant on this basis was error.

However, plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant on the basis that even if defendant had a duty to remove snow from the road, she failed to demonstrate a genuine issue of material fact that the patch of ice constituted an unreasonable risk of harm, or that if it did, that defendant failed to take reasonable measures to

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[1] We note plaintiff's argument that defendant, as a lessor, covenants to its lessees to keep the residential premises in reasonable repair, pursuant to MCL 554.139(b), and that defendant cannot delegate such statutory duty through community rules and regulations. However, MCL 750.139(2) provides that parties to a lease of at least one year duration may modify the obligations imposed by MCL 554.139. Here, plaintiff and defendant entered into a one-year lease; therefore, the statutorily imposed obligations were properly modifiable through the provisions set out in the community rules and regulations.

diminish the hazard.[2] We disagree. Our Supreme Court has held that an "invitor's legal duty is 'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).

We agree with the trial court's determination that plaintiff did not come forward with enough evidence to demonstrate a genuine issue of material fact that defendant's breach of its duty by failing to plow was the proximate cause of her slipping on the extremely small patch of ice at issue here. Plaintiff did not show that the conditions made it necessary for defendant to plow the road. Indeed, the weather records reveal that there had been no precipitation for at least forty-three hours before plaintiff fell, and that there had been only a light dusting of snow before that. Further, even if plaintiff had demonstrated that it was necessary for defendant to plow the road, she did not show that defendant's failure to do so was the proximate cause of her injuries. That is, plaintiff did not show that plowing the road would have eliminated the patch of ice upon

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[2] We note that defendant moved for summary disposition on the alternative basis that even if it did owe plaintiff a duty, the icy patch was open and obvious, and therefore it was relieved of liability for plaintiff's injuries. While the trial court did not feel the need to reach this argument, we will briefly address it in any event. "In general, a premises possessor 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*, *supra* at 516. "However, this duty does not generally encompass removal of open and obvious dangers," which exist "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

> 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 the 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). [*Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).]

Here, while a reasonable person in plaintiff's position may possibly have been able to foresee the danger of black ice on a winter day in Michigan, we are not convinced that an average user with ordinary intelligence would have been able to discover the danger and risk of the black ice upon casual inspection. Plaintiff's mother testified that when plaintiff fell, a "little bit" of snow was brushed away, revealing a patch of the size of a nine-inch pie plate. Plaintiff's friend also testified that when plaintiff fell, "a thin layer of snow [] was moved," revealing a patch of ice. Therefore, we are not persuaded that the patch of ice upon which plaintiff fell was open and obvious.

which she was injured or prevented its concealment by blowing snow. Therefore, we agree with the trial court that summary disposition in favor of defendant was appropriate; there was no genuine issue as to any material fact that defendant's breach of duty, if any, was the proximate cause of plaintiff's injuries.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette