STATE OF MICHIGAN

COURT OF APPEALS

BILL BELHABIB,

Plaintiff-Appellant,

v

J&B OF MICHIGAN, INC., a/k/a U.S. BLADES, INC.,

Defendant-Appellee.

UNPUBLISHED
June 17, 2008

No. 278380
Oakland Circuit Court
LC No. 2006-075801-NI

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition for defendant under MCR 2.116(C)(10) in this premises liability action. We affirm.

While taking his son to hockey practice at defendant's ice rink on December 15, 2004, plaintiff slipped and fell on snow-covered ice in defendant's parking lot, suffering serious injuries. Plaintiff filed a common-law premises liability claim against defendant as well as a nuisance claim under MCL 600.2940. Defendant moved for summary disposition based in part on the open and obvious danger doctrine. The trial court granted defendant's motion, ruling that the snow-covered ice was an open and obvious condition and that there existed no special aspects making the condition unreasonably dangerous.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31.

Plaintiff first argues that the trial court erred by granting summary disposition for defendant on his statutory nuisance claim because the common-law open and obvious danger doctrine cannot overcome a statutory duty. Although it is unclear whether defendant's motion for summary disposition was intended to encompass plaintiff's statutory claim, the trial court

granted summary disposition for defendant on both of plaintiff's claims, including the statutory claim, based on the open and obvious danger doctrine. Thus, although the trial court did not specifically mention plaintiff's statutory claim, it addressed the claim to some extent in its ruling. In any event, even if the court did not adequately address this issue, appellate review is not precluded where the lower court record provides the necessary facts. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

Plaintiff argues that the open and obvious danger doctrine does not apply to claims based on a statute. He relies on several cases involving MCL 554.139, which provides:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant[']s wilful or irresponsible conduct or lack of conduct.
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

In *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003), abrogated by *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007), this Court held that

> [t]he open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b).

This Court further stated that

> [t]he application of the open and obvious danger doctrine may . . . be avoided in a premises liability claim involving the lease or license of residential property by

> the statutory imposition of a specific duty to maintain the premises in reasonable repair and in compliance with state and local health and safety laws.[1] [*Id*. at 582.]

This Court has repeatedly applied the holding in *O'Donnell* in cases involving MCL 554.139. See, e.g., *Royce v Chatwell Club Apartments*, 276 Mich App 389, 397-399; 740 NW2d 547 (2007), app for lv held in abeyance 743 NW2d 213 (2008); *Allison v AEW Capital Mgt, LLP*, 274 Mich App 663, 666-667; 736 NW2d 307, lv gtd 480 Mich 894 (2007); *Benton v Dart Properties, Inc*, 270 Mich App 437, 441-444; 715 NW2d 335 (2006). Plaintiff in essence urges this Court to extend the holding in *O'Donnell* outside the context of MCL 554.139, specifically to MCL 600.2940. We decline to do so.

When interpreting statutory language, courts must ascertain the legislative intent that may reasonably be inferred from the words in a statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). When the Legislature has unambiguously conveyed its intent, the statute speaks for itself and judicial construction is neither necessary nor permitted. *Id*. Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute. *Id*.

MCL 600.2940 provides:

> (1) All claims based on or to abate nuisance may be brought in the circuit court. The circuit court may grant injunctions to stay and prevent nuisance.
>
> (2) When the plaintiff prevails on a claim based on a private nuisance, he may have judgment for damages and may have judgment that the nuisance be abated and removed unless the judge finds that the abatement of the nuisance is unnecessary.
>
> (3) If the judgment is that the nuisance shall be abated, the court may issue a warrant to the proper officer, requiring him to abate and remove the nuisance at the expense of the defendant, in the manner that public nuisances are abated and removed. The court may stay the warrant for as long as 6 months to give the defendant an opportunity to remove the nuisance, upon the defendant giving satisfactory security to do so.
>
> (4) The expense of abating and removing the nuisance pursuant to such warrant, shall be collected by the officer in the same manner as damages and costs are collected upon execution, excepting that the materials of any buildings, fences, or other things that may be removed as a nuisance, may be sold by the

[1] In *Mullen, supra* at 989, our Supreme Court abrogated this Court's decision in *O'Donnell* only to the extent that this Court "indicat[ed] that MCL 554.139(1) establishes a duty on the part of owners of leased residential property to invitees or licensees generally." Our Supreme Court explained that the covenants created by MCL 554.139 establish duties owed by a lessor or licensor to a lessee or licensee of residential property. *Id*. at 990. Thus, the duties owed under the statute are between the contracting parties and no duty is owed to a social guest of a tenant. *Id*.

> officer, in like manner as goods are sold on execution for the payment of debts. The officer may apply the proceeds of such sale to defray the expenses of the removal, and shall pay over the balance thereof, if any, to the defendant upon demand. If the proceeds of the sale are not sufficient to defray the said expenses, he shall collect the residue thereof as before provided.
>
> (5) Actions under this section are equitable in nature unless only money damages are claimed.

Unlike MCL 554.139, MCL 600.2940 does not give rise to a duty. Rather, it merely provides rules applicable to the abatement of nuisances and for a cause of action in circuit court regarding nuisance claims. The statutory language imposes no duty on property owners or occupiers with respect to conditions present on their premises. Thus, MCL 600.2940 is markedly different from MCL 544.139 and cannot be similarly read. Because MCL 600.2940 does not create a statutory duty, there can be no breach of any such duty regarding which the common-law open and obvious danger doctrine would be inapplicable. See *O'Donnell*, *supra* at 581-582. Accordingly, the trial court did not err by granting summary disposition for defendant on plaintiff's statutory claim.[2]

Plaintiff next argues that the trial court erred by granting summary disposition for defendant on his common-law premises liability claim because there existed a genuine issue of material fact regarding whether special aspects made the condition unreasonably dangerous.[3] We disagree.

"In general, a premises possessor owes a duty to an invitee[4] 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). This duty does not extend to open and obvious dangers, however, unless a "special aspect" of the condition makes even an open and obvious risk unreasonably dangerous. *Id*. at 517. In such cases, the premises possessor has a duty to take reasonable measures to protect invitees from the risk. *Id*. "[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." *Id*. at 518-519.

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[2] Plaintiff's reliance on *Bishop v Northwind Investments, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2004 (Docket No. 250083), rev'd in part 473 Mich 861 (2005), is unavailing. Unpublished decisions are not binding on this Court under MCR 7.215(J)(1). Moreover, plaintiff may not simply relabel his negligence claim a nuisance claim in an attempt to avoid the open and obvious defense. See *Bishop*, (GRIFFIN, J., dissenting), *supra*, slip op at 6, adopted by our Supreme Court in 473 Mich 861 (2005).

[3] For purposes of this appeal, plaintiff does not challenge the trial court's determination that the snow-covered ice was an open and obvious condition.

[4] Michigan law recognizes a person on a premises for reasons directly tied to the property owner's commercial business interests as an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000).

> [W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., 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. [*Lugo*, *supra* at 517-518.]

To prevent the application of the open and obvious doctrine "to a typical and obvious condition, the condition must be 'effectively unavoidable' or 'unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.'" *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 716; 737 NW2d 179 (2007), citing *Lugo*, *supra* at 518. "'However, typical open and obvious dangers . . . do not give rise to these special aspects.'" *Id*., citing *Lugo*, *supra* at 520.

Plaintiff contends that the icy condition located just outside the only entrance to the building was effectively unavoidable. He relies on *Robertson v Blue Water Oil Co*, 268 Mich App 588, 590; 708 NW2d 749 (2005), which involved a plaintiff slipping and falling on ice covering the entire area surrounding the defendant's service station. Customers described the parking lot as "'a disaster,' 'a mess,' and 'a sheet of ice.'" *Id*. The plaintiff fell while walking to the convenience store of the service station after fueling his truck. *Id*. at 591. In determining whether the condition was unavoidable, this Court stated that "the only inquiry is whether the condition was effectively unavoidable *on the premises*." *Id*. at 593 (emphasis in original). This Court determined that "there was clearly no alternative, ice-free path from the gasoline pumps to the service station" and, therefore, "[t]he ice was effectively unavoidable." *Id*. at 593-594. Further, this Court declined to absolve the defendant of liability on the basis that the plaintiff could have gone elsewhere considering the hazardous condition of the parking lot, because the defendant specifically invited the public, including the plaintiff, onto its premises for commercial purposes. *Id*. at 595.

This case is factually distinguishable from *Robertson*. Unlike *Robertson*, defendant's parking lot was not "a sheet of ice" that posed a uniquely high risk of serious injury. Rather, it was snowing at the time of plaintiff's fall and very cold, conditions typical of a Michigan winter. These typical winter conditions are a far cry from the "unusually severe and uniform ice storm" that caused the hazardous condition in *Robertson*.

Moreover, the *Lugo* Court stated that a special aspect creating an unreasonable risk of harm may exist where, for example, the floor of the sole exit of a commercial building is covered with standing water, requiring persons to enter and exit through the water and creating an unavoidable risk. *Lugo*, *supra* at 518. Here, even considering that the snow-covered ice was located near the sole entrance to defendant's facility, the danger was not unavoidable as plaintiff contends. A photograph of the premises indicates that it was possible to enter the building without stepping on the patch of ice where plaintiff fell.

Similarly, the condition was not "unreasonably dangerous because of special aspects that impose[d] an unreasonably high risk of severe harm." *Kennedy*, *supra* at 716. In a dissenting opinion in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 114; 689 NW2d 737 (2004),

rev'd 472 Mich 929 (2005), Judge Griffin addressed whether snow-covered ice presented an unreasonable risk of harm:

> Finally, plaintiff has presented no evidence of the alleged "special aspects" of the snow-covered and icy parking lot that created "a uniquely high likelihood of harm or severity of harm . . . ." *Lugo*, *supra* at 518-519; *Joyce* [*v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002)], *supra* at 242-243. Previously, this Court held that a layer of snow on a sidewalk did not constitute a unique danger creating a "risk of death or severe injury," *Joyce*, *supra* at 243, and that falling down ice-coated stairs likewise does not give rise to the type of severe harm contemplated in *Lugo*. *Corey* [*v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 392 (2002)], *supra* at 6-7. Snow and ice in a Michigan parking lot on December 27 are a common, not unique, occurrence. Under the *Lugo*, *supra* at 518-519, definition of "special aspects," ice and snow do not present "a *uniquely high* likelihood of harm or severity of harm." *Joyce*, *supra* at 241-243[.]

Our Supreme Court adopted Judge Griffin's reasoning in *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005), and it governs the instant case. Thus, there existed no "'special aspects' of the open and obvious condition that differentiate[d] the risk from typical open and obvious risks so as to create an unreasonable risk of harm[.]" *Lugo*, *supra* at 517-518.

Plaintiff also argues that the open and obvious doctrine cannot be reconciled with the comparative fault statute, MCL 600.2958, and urges this Court to call upon the Supreme Court to overrule the doctrine. Because plaintiff raises this issue for the first time in this Court, we decline to address it. *Kosch v Kosch*, 233 Mich App 346, 353-354; 592 NW2d 434 (1999). In any event, we note that our decision affirming the trial court's ruling is based on reasoning focusing on the objective circumstances surrounding the premises rather than on subjective factors involving plaintiff.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen