STATE OF MICHIGAN

COURT OF APPEALS

ANGELO VERARDI,

Plaintiff-Appellant,

v

TEMPLETON COWLES and LENA COWLES,

Defendants-Appellees.

UNPUBLISHED
March 26, 2009

No. 282010
Macomb Circuit Court
LC No. 2006-004080-NO

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition. We affirm.

Plaintiff slipped and fell on a snow-covered ice rut in defendants' driveway. On appeal, plaintiff first argues that this condition was not open and obvious, and even if it were, it had "special aspects." We disagree.

This Court reviews a motion for summary disposition brought under MCR 2.116(C)(10) de novo, "considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When reviewing the trial court's ruling, this Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham, supra* at 111.

"Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Pena, supra* at 310, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

To state a valid claim sounding in premises liability, "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*, 270 Mich App 437, 440; 715 NW2d 335 (2006); see also *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "In premises liability cases, the duty owed by the landowner is determined by the plaintiff's status at the time of the injury." *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001), citing *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000); see also, *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003). A social guest, like plaintiff in the case at bar, is a licensee. *Stitt, supra* at 596. As our Supreme Court explained in *Stitt*,

> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit. [*Id.*]

The landowner must also "refrain from wilful and wanton misconduct that injures the guest." *Taylor v Laban*, 241 Mich App 449, 455-456; 616 NW2d 229 (2000).

A landowner generally owes no duty to warn licensees of open and obvious dangers; such dangers are necessarily not "hidden," but instead, by their nature "come with their own warning." *Ghaffari v Turner Construction Co*, 473 Mich 16, 21; 699 NW2d 687 (2005); *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001); *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). To determine if a condition is open and obvious, this Court considers whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 64; 718 NW2d 382 (2006), quoting *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 [the] plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Corey v Davenport College of Bus*, 251 Mich App 1, 5; 649 NW2d 392 (2002), quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Liability may still be imposed on the landowner, however, if there are "'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." *Lugo, supra* at 517. Like a commercial building with only one exit blocked by a hazardous condition or an unguarded 30-foot pit in the middle of a parking lot, "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 519.

This Court recently confirmed that inviters (who are held to a higher standard than licensors) have "no general duty . . . to take reasonable measures to remove snow and ice for the benefit of invitees unless the accumulation" has some special aspect that creates an unreasonable risk of danger. *Benton, supra* at 443 n 2, citing *Mann v Shusteric Enterprises, Inc*, 470 Mich 320; 683 NW2d 573 (2004). "An open and obvious accumulation of snow and ice, by itself,

does not feature any 'special aspects.'" *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005), citing *Mann, supra* at 332-333.

In *Ververis, supra*, the plaintiff slipped and fell in the parking lot of a bowling alley "where there was no independent factor, beyond the snowy surface itself, that would reasonably have alerted [him] to the fact that it was slippery." *Ververis, supra* at 66. This Court held, as a matter of law, that "the potential slipperiness of a snow-covered surface is an open and obvious danger even in the absence of any separate factor suggesting that, in fact, the surface is slippery." *Id.* at 63. The Court did not address whether there were any "special aspects" to the ice patch because the plaintiff did not raise the issue. *Id.* at 63, n 1.

In the case at bar, plaintiff argues that this case "is not an 'ice' case but a 'hole' case," and therefore, the trial court erred in granting summary disposition in favor of defendants. We disagree. In his deposition, plaintiff claimed both that he "slipped and fell on some ice" and that his "foot slipped into a hole." In either instance, case law supports the conclusion that the snow-covered ice rut was an open and obvious danger.

Plaintiff testified that it was "a little snowy" on the day of his fall. He stated that there was snow on the driveway (although he could not say how much) and it did not appear that it had been shoveled. Therefore, here, as in *Ververis, supra* at 63, "the potential slipperiness" of the snow-covered driveway is an open and obvious danger as a matter of law.

The question, then, is whether there were any "special aspects" to the snow-covered driveway that gave rise "to a uniquely high likelihood of harm" (because it was effectively unavoidable) "or severity of harm if the risk is not avoided" (such as that posed by an unguarded 30-foot pit). *Lugo, supra* at 518. It is difficult to characterize the driveway as "unreasonably dangerous" in light of the fact that plaintiff actually traversed the driveway on his way into the home without any difficulty. In fact, he testified that he took the same path out of the house that he had taken on the way in. Plaintiff also noticed other footprints on the driveway, though he did not present any evidence that anyone else had fallen, as one should expect from a condition that creates "a uniquely high likelihood of harm."

Plaintiff described the "hole" into which he stepped with his right foot as "a rut," though he could not say for certain how deep it was, only that he could "feel the depth" with his foot. It therefore does not appear that this ice rut was any deeper than an ordinary pothole in a parking lot, which the *Lugo* Court termed a "typical open and obvious danger[]." *Lugo, supra* at 520. According to *Lugo*, such a pothole does not involve an especially high likelihood of injury and it presents "little risk of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Id.*

A similar example is found in *Corey, supra*, where that plaintiff slipped and fell on icy steps outside of a college dormitory. This Court held that the steps were open and obvious and, although they had "some potential for severe harm," under *Lugo*, the steps still did not rise to the level of "special aspects." *Corey, supra* at 6-7. "In this case, the stairway on which plaintiff fell consisted of three steps and was elevated only a couple of feet. Falling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit." *Id.* at 7. Even if the ice rut in the case at bar was somehow deeper than a typical pothole, it was clearly not as

drastic as a fall down a 30-foot pit, or even three steps. Moreover, the *Corey* Court noted that the plaintiff could have taken an alternate route, thus, the hazard was avoidable and not a "special aspect." *Id.* at 7. Similarly, in the case at bar, even though guests typically used the back door, plaintiff could have used the front or side doors if he were worried about his safety. Therefore, the snow-covered ice rut was an open and obvious danger as a matter of law and exhibited no special aspects.

Plaintiff also argues on appeal that defendants' actions were in violation of a local ordinance, which bars use of the open and obvious doctrine. However, plaintiff, did not raise this issue at the motion hearing and the trial court did not address it. Thus, this issue was not properly preserved for appeal. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Nevertheless, "[t]his Court will review issues not raised below if a miscarriage of justice will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case." *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004), quoting *Providence Hosp Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194-195; 412 NW2d 690 (1987).

Here, the question is one of law: "a violation of an ordinance . . . is only evidence of negligence. However, before the violation of an ordinance . . . may be considered as bearing on the question of negligence, the court must determine that the purpose of the ordinance was to prevent the type of injury and harm suffered." *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991), citing *Cassibo v Bodwin*, 149 Mich App 474, 477; 386 NW2d 559 (1986), and *Beals v Walker*, 416 Mich 469, 481; 331 NW2d 700 (1982). In this case, plaintiff cites a Clinton Township ordinance that applies to sidewalks open to the public; it does not address private driveways. Thus, the harm suffered by plaintiff is not the type of harm the statute is designed to protect, and therefore, the statute has no bearing on application of open and obvious doctrine in the instant case. Thus, it was proper for the trial court to grant defendants' motion for summary disposition.

We affirm. Defendants, being the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra