STATE OF MICHIGAN

COURT OF APPEALS

NANCY TORRES,

Plaintiff-Appellant,

v

GOODWILL INDUSTRIES OF GREATER GRAND RAPIDS, INC.,

Defendant-Appellee.

UNPUBLISHED
December 7, 2010

No. 292138
Kent Circuit Court
LC No. 08-008861-NO

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ

PER CURIAM.

In this slip-and-fall action, plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEEDINGS

On the afternoon December 17, 2007, plaintiff slipped on ice and fell on defendant's premises as she walked toward the entrance of defendant's retail store. The fall caused serious injuries to plaintiff's knee.

At deposition, plaintiff testified that her daughter had driven her to the store, and parked her car. As plaintiff exited the vehicle, she noticed snow several inches deep on the parking lot, but the concrete walkway leading to the entrance appeared dry, but for what appeared to plaintiff to be some dampness near a pillar. Plaintiff stepped upon that walkway in order to avoid the snow, and alighted upon the damp area thinking it safe, but then slipped. Plaintiff's daughter likewise testified that the icy area appeared merely damp, and that ice was not visually apparent to her until she bent down to see it.

Plaintiff agreed that she had been aware that she could have reached the front door by walking up a concrete ramp toward that door, and added that not wanting to get snow in her shoes was the only reason she did not walk toward the back of the parked car and up that ramp. Asked if, upon stepping up on the curb, she could have walked around the dark area to the front door, plaintiff answered in the affirmative.

The assistant manager of the store admitted that the roof leaked over the entryway, allowing water to drip onto the concrete below, and reported that she was aware that the area sometimes posed a risk to customers, and so she occasionally broke the ice up with a hammer, cleaned up the area, then salted it.

Plaintiff filed suit in August 2008. Defendant moved for summary disposition on the ground that the hazard causing plaintiff to slip and fall was an open and obvious one. The trial court provided the following brief explanation for its decision to grant the motion: "The Court's of the opinion that this spot on the [pavement] there at the entrance to the Goodwill store was open and obvious. It was avoidable or not effectively unavoidable, clearly, and there were no special aspects."

On appeal, plaintiff challenges both prongs of the trial court's conclusions. This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

II. OPEN AND OBVIOUS

"An owner '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.'" *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "Absent special aspects, this duty generally does not require the owner to protect an invitee from open and obvious dangers." *Benton*, 270 Mich App at 440-441. The standard for determining if a condition 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, 474-475; 499 NW2d 379 (1993). The test is objective; the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether a particular plaintiff knew or should have known that the condition was hazardous. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

Our Supreme Court has held that a premises owner has a duty to a business invitee to "take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to the invitee," and rejected the proposition that ice and snow are obvious hazards in all circumstances and thus can never give rise to liability. *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975).

Janson v Sajewski Funeral Home, Inc, 486 Mich 934, 782 NW2d 201 (2010), made very clear that "alleged 'black ice' conditions [are] open and obvious when there are 'indicia of a potentially hazardous condition,' including the 'specific weather conditions present at the time of the plaintiff's fall.'" Accordingly, when a slip and fall occurs in winter, wintry conditions such as temperatures below freezing, "the presence of snow, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening,"

should alert "an average user of ordinary intelligence to discover the danger upon casual inspection." *Id.* Here, plaintiff testified to seeing snow all over, on that December day. When there is abundant snow on the ground, a reasonable person observing wet pavement should understand that the apparent moisture might have begun to freeze, and thus present an extremely slippery surface. Accordingly, the combination of winter temperatures and abundant snow on the ground rendered the ice lurking within a wet area of concrete an open and obvious hazard.

Plaintiff points out that this Court has recognized the existence of a question of fact concerning whether rainy conditions in December should have alerted the plaintiff to a slipping hazard, on the ground that "the danger and risk presented by a wet surface is not the same as that presented by an icy surface." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008). But *Slaughter* concerned a plaintiff who fell at a time and place where there was no snow on the ground, and in fact there had been none for a week. *Id.* The abundant snow present at the time and place the instant plaintiff fell constitutes a crucial distinction. That pavement moistened by dripping water would tend to freeze in such an environment should have been apparent.

For these reasons, we affirm the trial court's conclusion that the slippery pavement at issue was an open and obvious hazard.

III. SPECIAL ASPECTS

If a condition is open and obvious, a duty to mitigate or warn of the condition arises only if some special aspect renders it unreasonably dangerous. See *Mann v Schusteric Enterprises, Inc*, 470 Mich 320, 332-333, 320; 683 NW2d 573 (2004). Such special aspects exist where the person confronting the dangerous condition should be expected to hazard it despite the apparent danger, or where the severity of the potential harm the condition may cause is extreme. See *Lugo v Ameritech Corp*, 464 Mich 512, 518-519; 629 NW2d 384 (2001). In this case, plaintiff does not suggest that the hazard of slipping and falling was sufficiently extreme as to constitute a special condition, but does argue that the hazard in question was effectively unavoidable.

But a reasonable person shopping for anything other than an urgent necessity that sees no way to enter a store other than by confronting a serious hazard would elect to postpone the errand, or take her business elsewhere. Further, assuming without deciding that wishing to peruse defendant's wares in this instance was compelling enough a matter as to cause a reasonable person to brave dire hazards in the endeavor, the one here at issue could have been avoided in the process. Plaintiff's own testimony included that she was aware that a ramp was available, and also that she could have walked around the plainly wet area, suffering no greater hardship from taking these evasions than additional snow in her shoes.

For these reasons, we affirm the trial court's conclusion that no special aspects rendered the open and obvious condition actionable.

Affirmed.

/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly