STATE OF MICHIGAN

COURT OF APPEALS

LUWANNA HARRINGTON, Plaintiff-Appellant,	UNPUBLISHED December 28, 2010
v	No. 294365 Wayne Circuit Court
REGINA SIMPSON, Defendant-Appellee.	LC No. 08-123881-NS

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

In this premises liability action, plaintiff Luwanna Harrington appeals as of right the trial court's order granting summary disposition in favor of defendant Regina Simpson. The only issue on appeal is whether the trial court erred when it determined that defendant's snow-covered driveway did not have "special aspects" sufficient to defeat Simpson's open and obvious defense. Because we conclude that there was a question of fact as to whether the driveway's condition had special aspects—specifically, whether the condition was "effectively unavoidable"—we reverse. We have decided this case without oral argument under MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of an alleged slip-and-fall that occurred in Detroit on December 19, 2007. Harrington and Simpson were friends. Sometime before December 19, Simpson's brother died. According to Harrington, in anticipation of having family and friends over to her house during the period before the funeral, Simpson offered Harrington money to come over and help her clean her home. Harrington said she accepted the offer. Although it apparently snowed on December 16 and 17, no snow had fallen on December 18 or 19. Despite this, when Harrington pulled her car into Simpson's driveway on December 19, it did not appear as though any measures had been taken to remove the snow. Harrington testified that she walked through the snow and entered the home. After approximately an hour, she returned to her car to fetch a compact disc, slipped, fell on the snow, and allegedly sustained injuries.

Harrington sued Simpson for damages arising from the slip and fall. In June 2009, Simpson moved for summary disposition under MCR 2.116(C)(10), arguing that any alleged dangerous condition on her premises was open and obvious and without special aspects that would impose a continuing duty of care. For purposes of the motion, Simpson did not contest Harrington's version of events and did not contest her status as an invitee.

In response, Harrington argued that, although open and obvious, Simpson's slippery driveway had special aspects that made the open and obvious doctrine inapplicable. Specifically, she argued that, because she could not walk between her vehicle and Simpson's front door without traversing the slippery conditions, the dangerous condition was unavoidable.

At a hearing on the motion, the trial court determined that any dangerous condition on Simpson's driveway was open and obvious and without special aspects that made it unreasonably dangerous. Accordingly, the trial court entered an order granting Simpson's motion.

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

The duty that a landowner owes a visitor is dependent upon the visitor's status on the premises. A visitor can be a trespasser, licensee, or invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). For the purpose of her motion and this appeal, Simpson assumes that Harrington was an invitee. An invitee enters the land of another by invitation, "which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Id.* at 596-597 (quotation marks and citation omitted).

Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from a dangerous condition on the land that poses an unreasonable risk of harm. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Under the open and obvious danger doctrine, however, where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover the condition, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). This Court has declared that, "by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006).

Harrington concedes that the snow-covered driveway presented an open and obvious condition. However, she maintains that special aspects existed that render the open and obvious danger doctrine inapplicable. The doctrine provides that if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the landowner has a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo*, 464 Mich at 516-517. A special aspect exists when the danger, although open and obvious, is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm. *Id.* at 518-519. In considering what constitutes a special aspect, a court must evaluate the objective nature of the condition, not the subjective degree of care used by the plaintiff or other idiosyncratic factors related to the particular plaintiff. *Bragen ex rel Bragen v Symanzik*, 263 Mich App 324, 332; 687 NW2d 881 (2004).

Here, defendant conflates the two types of special aspects described in *Lugo* by essentially arguing that an unavoidable condition must also impose a uniquely high likelihood of harm or severity of harm. However, "'[s]pecial aspects' exist if the condition 'is effectively unavoidable' *or* constitutes 'an unreasonably high risk of severe harm.'" *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005) (emphasis added), quoting *Lugo*, 464 Mich at 518.

In *Robertson*, the plaintiff suffered an injury after a slip and fall at the defendant's gas station. A severe ice storm made the parking lot extremely icy and the plaintiff slipped and fell as he walked from the pump to the station's convenience store, where he wished to purchase windshield wiper fluid and coffee. *Robertson*, 268 Mich App at 591-592. The defendant argued that the condition was avoidable because plaintiff could have gone to a different service station to make his purchases of fuel, coffee, and windshield washer fluid, but this Court rejected that argument:

> Even if there were [available alternatives], the scope of the inquiry is limited to"the objective nature of the condition of the premises at issue." Therefore, the only inquiry is whether the condition was effectively unavoidable *on the premises*. Here, there was clearly no alternative, ice-free path from the gasoline pumps to the service station, a fact of which defendant had been made aware several hours previously. The ice was effectively unavoidable. [*Id.* at 593-594 (citations omitted).]

The *Robertson* Court also found it noteworthy that the defendant owed a heightened duty of care to the plaintiff as an invitee:

> Finally, and more significantly, plaintiff was a *paying customer* who was on defendant's premises for defendant's commercial purposes, and thus he was an *invitee* of defendant. As our Supreme Court noted, "invitee status necessarily turns on the existence of an 'invitation.'" Defendant's contention that plaintiff should have gone elsewhere is simply inconsistent with defendant's purpose in operating its gas station. The logical consequence of defendant's argument would be the irrational conclusion that a business owner who invites customers onto its premises would never have any liability to those customers for hazardous

> conditions as long as the customers even technically had the option of declining the invitation. . . .
>
> Even if the record showed that plaintiff was aware of a realistic, safe alternative location to purchase his fuel, coffee and windshield washer fluid, where defendant has *invited* the public, and by extension plaintiff, onto its premises for commercial purposes, we decline to absolve defendant of its duty of care on that basis. To do so would be disingenuous. . . . [*Id.* at 594-595 (citations omitted).]

This Court came to a similar conclusion in *Hoffner v Lanctoe*, ____Mich App____; ___ NW2d___ (2010). There, the plaintiff slipped and fell on ice on the sidewalk in front of the only entrance to an exercise facility. In upholding the trial court's denial of summary disposition, this Court adopted the reasoning stated in *Robertson*:

> Because there was only one customer entrance to the facility that was fronted by the icy sidewalk, "the objective nature of the condition of the premises at issue" reveals that the icy sidewalk was effectively unavoidable as it related to the use of the premises. There was no alternate route Hoffner could take in order to enter the exercise facility. Additionally, Hoffner was an invitee by virtue of her contract … and the *Robertson* Court found that it would be disingenuous to relieve defendants of their duty of care based on similar circumstances. [*Id.* at ___ (citations omitted).]

Here, Simpson does not contest that Harrington was an invitee or that snow covered the entire driveway rendering it impossible to enter the house without traversing the slippery condition. Given these facts, Harrington has demonstrated that the condition was effectively unavoidable and, for that reason, the open and obvious doctrine did not relieve Simpson of her duty to take reasonable steps to protect Harrington from the slippery condition. Consequently, the trial court erred in granting summary disposition in favor of Simpson on the ground that the slippery condition was an open and obvious hazard. Accordingly, we reverse the trial court's order dismissing Harrington's suit and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. As the prevailing party, Harrington may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Stephen L. Borrello