STATE OF MICHIGAN

COURT OF APPEALS

HORST EHRLER and KAREN GODLEWSKI, Plaintiffs-Appellants, v FRANKENMUTH MOTEL, INC., Defendant-Appellee.	UNPUBLISHED August 2, 2011 No. 296908 Saginaw Circuit Court LC No. 09-005138-NO

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Plaintiffs Horst Ehrler and Karen Godlewski appeal as of right the trial court's award of summary disposition to defendant Frankenmuth Motel, Inc. Plaintiffs' claims arose after they were injured by falling on a glaze of ice that blanketed the premises of defendant's motor courtyard motel following an ice storm. At issue is whether defendant motel owed plaintiffs a duty of due care with respect to the safety of the premises two hours after the ice storm struck. The trial court granted summary disposition to defendant under MCR 2.116(C)(10). We reverse and remand.

I

On January 3, 2009, plaintiffs went to Frankenmuth to shop, have dinner, and stay the night at defendant's motel. According to defendant's front desk attendant Tonya Blanford, as she was driving to work the next morning she encountered a misty rain. She arrived at the motel at approximately 6:40 a.m. to begin work and prepare for the complimentary continental breakfast and coffee service in the front office. At approximately 6:55 a.m., as she prepared to open the front office, Blanford stepped outside to retrieve something from her car. She noticed that the rain had turned to ice, resulting in a layer of ice covering the premises. Blanford testified that she believed a private contractor would arrive that morning to de-ice. She admitted, however, that she was mistaken about the private contractor; the de-icing service was only contracted to come to the motel if specifically called to de-ice. Blanford did not call the private contractor, and no one came to de-ice the parking lot. Nevertheless, Blanford knew that the motel's clientele was "older" and she wanted to make sure that the motel guests had a way to get coffee in the meantime, so she decided to apply salt to areas around the front office, the ramp leading to the office door, areas around the guests' cars, and the walkways leading to their rooms. It was her expectation that the private contractor would arrive to salt the rest of the parking lot. Blanford admitted that there were no signs advising guests where it was safe to

walk. She hoped they would decide to get in their cars and drive across the parking lot to the front office for breakfast, rather than attempting to walk.

Arleen Cronk, the general manager of the motel, testified at deposition that defendant had no written guidelines regarding de-icing. According to Cronk, Blanford should have called Nancy Krick, the assistant general manager, if the de-icing service was needed, but she could not recall if that general guideline was ever conveyed to Blanford. Because she was not at the motel at the time of the accident and did not want to speculate, Cronk declined to state whether the de-icing service should have been called that morning.

At approximately 9:00 a.m., a little over two hours after the motel had become covered with ice, then 64-year old Godlewski left her motel room and headed to the front office because she did not want to miss out on the breakfast service.[1] Godlewski testified at deposition that she walked straight across the parking lot to the office because the office was within walking distance of her room. Walking across the parking lot was the most direct route. Godlewski noticed "a sheet of ice" covering the parking lot and she walked slowly. She did not recall seeing salt in the areas where she walked. Godlewski testified, in part:

> *A.* So I informed [Blanford] because I don't remember it being, *to the best of my knowledge, it wasn't salted or anything, you know, because when something's salted, you see like little white holes in the ice*. And to the best of my knowledge, I don't recall seeing any of that. That's why I said something to her. I didn't know if she realized it was that bad [emphasis added.]
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> * * *
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> *Q.* Do you remember any salt in the parking lot immediately outside your door?
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> *A.* I don't remember any salt at all no place.
>
> *Q.* [On the diagram of the premises, i]n the middle of the parking lot, there is some X marks and there is some testimony that there was some salt in that area. Do you remember that?
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> *A.* I don't remember any salt.
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> *Q.* And then as you get closer, there is some X marks in front of the office and next to the office. Do you remember any [salt] in that area?
>
> *A.* No.

[1] Ehrler was not quite ready, so Godlewski left ahead of him.

Q. And it's my understanding from your testimony that this area that you walked that you refer to on Exhibit No. 3, the line in and the line out back to the X where you fell, was there any salt in that area?

A. Not to the best of my knowledge, no. No.

According to Godlewski, upon reaching the office, she told Blanford that something should be done about the ice, and Blanford told her that she had placed a call an hour before for de-icing. Godlewski testified that she suddenly realized she had to use the bathroom and was told by Blanford that there were no public restrooms in the office.[2] Godlewski left the office to walk back to her room in order to go to the bathroom. Blanford testified that she did not recall having a conversation with Godlewski about using the bathroom, although she confirmed that there were no public restrooms in the office area. Instead, according to Blanford, Godlewski was upset about the icy condition of the parking lot and told Blanford that she was going to have a lawsuit on her hands. After their conversation, Blanford left to fill a pitcher of orange juice and when she returned, Godlewski had left the office and was walking in the direction of her room.

After she left the front office, Godlewski fell on ice somewhere between the office door and the parking lot. She fell on the sidewalk along the front office. Blanford did not see exactly where Godlewski fell. Blanford testified that she did not salt the area where Godlewski claimed she fell and that she had told Godlewski to use a different route—the ramp—when exiting the office. According to Blanford, the route Godlewski took from her room to the office, i.e., walking directly across the parking lot, was the ordinary route a guest would take, but the route Godlewski took to actually enter the office was abnormal, in that she stepped onto the sidewalk from the side of the office building instead of walking up the ramp, which was directly in front of the office door and which Blanford testified she had salted and kept clear of ice. Godlewski testified that she exited the office the same way that she entered, which she thought was the ramp. After Godlewski fell, Blanford and another guest, who was inside the office at the time of the fall, went outside to attend to Godlewski. Blanford then called 9-1-1 and moved her car in front of Godlewski to block any cars that might further injure her.

Matthew Wright of Mobile Medical Response arrived at the scene to attend to Godlewski. He testified at deposition to the conditions he encountered when he arrived. The parking lot was "very icy," the conditions when walking from the ambulance to Godlewski were "extremely treacherous," and he could "barely walk" at the scene. When asked whether he remembered any salt being out there, he testified that he was not sure, but described the conditions as "extremely slippery" and stated, "I just remember how icy it was everywhere." He assumed that Godlewski had fallen where he found her—on the sidewalk—because there was no way that she could have walked in her condition. It was later determined that Godlewski had broken several ribs and suffered a collapsed lung.

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[2] Godlewski testified that the urge to use the bathroom comes on suddenly, and that she was sure she had used the restroom before she left her motel room.

At the time of Godlewski's accident, Ehrler was finishing getting ready for the day. Approximately 20 minutes after Godlewski left the room, Ehrler stepped outside and noticed the icy conditions. Because he did not feel safe walking, Ehrler decided to take his car across the parking lot (he had driven to the motel; Godlweski had ridden with him and did not have her own car). When asked how he knew that Godlewski had fallen, Ehrler testified that while de-icing the car, he turned towards the office and saw the flashing lights of the ambulance. After he drove over to the scene of the accident, Ehrler got out of his car, put both feet on the ice, and fell. Blanford, however, testified that when Ehrler first came to the scene, she told him that Godlewski needed her purse so she could tell the medical team what medications she was taking. According to Blanford, Ehrler then drove quickly back across the parking lot, retrieved Godlewski's purse, and came back to the scene.[3] As Ehrler exited the car the second time, he fell and was injured. Ehrler testified that as a result of his fall, he had surgery on his left rotator cuff and suffered a swollen right knee.

On May 6, 2009, plaintiffs filed suit against defendant. Plaintiffs alleged that defendant breached its duty of care when it failed to inspect and detect the ice on the premises, failed to warn them of the dangerous condition, failed to take measures to correct the dangerous condition, and allowed the ice to remain on the premises when it had knowledge of the unreasonable risk of harm. Defendant asserted, among various affirmative defenses, that plaintiffs' claims were barred by the open and obvious danger doctrine.

Thereafter, defendant moved for summary disposition under MCR 2.116(C)(8) and (10), asserting that under the open and obvious danger doctrine, a premises owner does not have a duty to warn or protect against dangers that are open and obvious. Defendant argued that *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 253 NW2d 732 (1975), which holds that a premises owner must take reasonable measures within a reasonable amount of time to diminish the dangers of ice and snow to an invitee, see *id*. at 261, does not stand for the proposition that a premises owner must take all conceivable measures to abate the dangers of Michigan winters. In response, plaintiffs argued that according to *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001), "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." Plaintiffs argued that the dangerous condition was effectively unavoidable and that defendant took little or no action to abate the dangers. During the motion hearing, plaintiffs argued that there was a question of fact as to

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[3] After the accident, Blanford wrote an incident report, including a detailed statement of the events of the morning of January 4, 2009. The statement was generally in accord with her testimony at deposition, save one discrepancy. In Blanford's statement, she described Ehrler going back to his room to get Godlewski's purse, stating: "[Godlewski] sent him back up to the room to get her purse and that is when I told them not to worry about their stuff in the room it would be fine." At deposition, however, Blanford testified: "I told [Godlewski] that the ambulance is going to need to know if she's on medications or anything like that. And so she told me to tell him, 'cause he was hard of hearing, that her purse and medication list was in the room."

whether defendant actually salted the premises. But the trial court granted defendant's motion, stating:

> Okay. Well, I'm going to grant the motion. It appears that this was not such a special aspect or unique, that the approach to the office had been salted, and kind of aside from that, it was certainly a general condition that applied, salt or no salt, everywhere, and a condition that was well-known to the parties, that would be probably enough by itself.
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> But the fact that there were efforts to salt the area of where people park in front of the door, walk into the door, suggests that it's not a special aspect. The area to the sides of the door, partially occupied by planters, and it's kind of a decorative mode, so in any event, for those reasons I'll deny the motion.
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> I mean grant the motion.

Plaintiffs moved for reconsideration, arguing that the trial court committed palpable error in failing to take into account the question of fact whether Blanford salted the premises and in failing to consider Ehrler's separate claim. The court denied plaintiffs' motion.

II

The question before us is not whether defendant breached a duty of care in the manner in which it handled the ice storm conditions, but rather, whether defendant owed a duty of due care to plaintiffs in the first place. We find that it did. Plaintiffs argue on appeal that the trial court erred in granting defendant summary disposition. We agree with plaintiffs.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Because the trial court did not specify the subsection on which it relied in granting the motion and considered matters outside the pleadings, we construe the motion to have been granted under MCR 2.116(C)(10). See *Driver v Hanley*, 226 Mich App 558, 562; 575 NW2d 31 (1997). We review a trial court's decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 119. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*. at 120. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

To sustain an action for negligence, a plaintiff must establish that the defendant owed the plaintiff a duty of care. *Fultz v Union-Commerce Assocs*, 470 Mich 460, 463; 683 NW2d 587 (2004). The guest of an innkeeper is considered a business invitee. See *Benton v Dart Props Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006) ("[a] person invited on the land for the owner's commercial purposes or pecuniary gain is an invitee"); *Graves v Warner Bros*, 253 Mich App 486, 494; 656 NW2d 195 (2002) (equating the special relationship between an innkeeper and guest to that between a business invitor and invitee). Thus, an innkeeper has the duty to warn guests of any known danger and make the premises safe by inspecting the premises and repairing or warning of known dangers. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). This duty does not generally apply to the removal of dangers that are so open and obvious that the invitee should reasonably be expected to discover them. *Lugo*, 464 Mich at 516. Snow- and visible ice-covered surfaces are considered open and obvious dangerous conditions due to their inherent slipperiness. *Ververis v Hartfield Lanes*, 271 Mich App 61, 67 and n 2; 718 NW2d 382 (2006). However, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, 464 Mich at 517. A special aspect of a condition is found, for example, if the danger is effectively unavoidable, or if it presents a substantial risk of death or severe injury. *Id*. at 518. In determining whether a special aspect exists, 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 plaintiff. *Bragan ex rel Bragan v Symanzik*, 263 Mich App 324, 332; 687 NW2d 881 (2004), citing *Lugo*, 464 Mich at 523-524.

Here, the trial court stated that the icy conditions on the motel premises did not present a special aspect because "the approach to the office had been salted" and the ice was "a condition that was well known to the parties." The court further stated that "the fact that there were efforts to salt the area of where people park in front of the door, walk into the door, suggests that it's not a special aspect." It is not entirely clear whether the trial court determined that efforts to salt (assuming this was true) made the condition effectively avoidable—thus no duty existed—or whether the court presumed that a duty of due care existed and that no reasonable juror could find that defendant breached its duty. Either way, we disagree.

We hold that there was a special aspect to the icy conditions in this case in that they were effectively unavoidable. Plaintiffs had to encounter the icy conditions present at the motel that morning if they desired to leave their room and go to the front office for the complimentary continental breakfast,[4] check out of their motel room on time, or for any other reason.[5] If

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[4] While motels often describe their continental breakfast as "complimentary," the cost is factored into the motel room price charged to the patron.

[5] Godlewski's decision to leave her room and attempt to navigate the icy premises does not eliminate defendant's duty of due care. As stated above, in determining whether a special aspect exists, 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 plaintiff. *Bragan ex rel Bragan v Symanzik*, 263 Mich App 324, 332; 687 NW2d 881 (2004), citing *Lugo*, 464 Mich at

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defendant's position were accepted, motel patrons would be required to remain in their rooms indefinitely until the dangerous conditions presented by an ice storm are completely abated or they are apprised of a safe path of departure by motel management. This position is contrary to current Michigan case law. The *Lugo* Court provided an example of a special aspect related to the unavoidability of a dangerous condition. The Court explained that if a person is trapped inside a building that only has one exit and that exit is blocked by a dangerous condition that is open and obvious (in *Lugo*, the example was a floor covered with standing water), the condition is effectively unavoidable and the open and obvious danger doctrine does not apply. *Lugo*, 464 Mich at 518. By inference, *Lugo* stands for the proposition that if the plaintiff attempts to navigate through the effectively unavoidable condition, the defendant remains liable if the plaintiff is injured in the process. To rule that the defendant no longer owes a duty if the plaintiff attempts to navigate through the effectively unavoidable condition would render *Lugo* meaningless. The only difference between the *Lugo* example and the circumstances of this case is that the danger was not inside the guests' rooms or the front office, but immediately outside the motel buildings. There is no evidence that there was an ice-free path between the guests' rooms and the front office. Therefore, under the reasoning of *Lugo*, the icy conditions in this case were effectively unavoidable. See also, *Hoffner v Lanctoe*, ___ Mich App ___; ___ NW2d ___ 2010 WL 4320340, lv pending 796 NW2d 50 (2011), slip op p 7-9; *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593-595; 708 NW2d 749 (2005). Because there was a special aspect to the dangerous condition, being that it was *effectively*[6] unavoidable, we hold that defendant owed plaintiffs a duty of due care despite the fact that the condition was open and obvious.

Whether defendant complied with the standard of care in responding to the conditions presented by the ice storm presents a genuine issue of material fact for the jury. Blanford testified that she salted around the front office, the ramp in front of the office door, around the guests' cars, and the walkways leading to guests' rooms. Godlewski, on the other hand, testified that to the best of her knowledge it was not salted anywhere she walked that morning. While no one contradicted Blanford's testimony about whether and where she salted, as no one witnessed her conduct, Godlewski's testimony, as well as that of Wright and Ehrler, raises a genuine issue of material fact whether Blanford salted, whether she salted sufficiently and in the appropriate places, and whether she complied with the standard of care in what she did, despite not having called the de-icing contractor. Viewing the evidence in a light most favorable to plaintiffs, we hold that a reasonable jury could decide that defendant breached the applicable standard of care. Thus, it is for the jury to decide whether defendant undertook "reasonable precautions to protect invitees" from the risks presented by the ice storm, and summary disposition was inappropriate.

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523-524. Godlewski's conduct and any attribution of fault on her part is a matter for the jury—if it finds that defendant breached the standard of care—when determining whether Godlewski was comparatively negligent. The same is true of Ehrler's conduct in attempting to assist Godlewski after she fell and was seriously injured.

[6] Note that the Supreme Court in *Lugo* used the qualifier "effectively" unavoidable. *Lugo*, 464 Mich at 518. Such deliberate use of a qualifying word defies the concept that the condition had to be absolutely unavoidable, and that plaintiffs had to remain locked in their motel room until the condition subsided.

See *Lugo*, 464 Mich at 517. Questions of proximate causation and any comparative negligence are also for the jury.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering