STATE OF MICHIGAN

COURT OF APPEALS

ROBERT DUFF, Plaintiff-Appellant,	UNPUBLISHED October 24, 2017
v	No. 337421 Marquette Circuit Court
J. WELLINGTON ENTERPRISES, INC., doing business as HORSESHOE LAKE CAMPGROUND & RV PARK, Defendant-Appellee.	LC No. 16-054435-NO

Before: K. F. KELLY, P.J., and BECKERING and RIORDAN, JJ.

PER CURIAM.

In this premises liability action, plaintiff, Robert Duff, appeals as of right the trial court's order granting summary disposition to defendant, J. Wellington Enterprises, Inc., doing business as Horseshoe Lake Campground and RV Park, pursuant to MCR 2.116(C)(10) (no genuine issue of material fact, and moving party entitled to judgment as a matter of law). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

At the time of the incident that gave rise to this litigation, plaintiff had lived and worked at the Horseshoe Lake Campground and RV Park for several months under an arrangement whereby he performed repair services for defendant, who would deduct rent for a campground trailer from plaintiff's wages and then pay plaintiff the remainder. At his deposition, plaintiff testified that between 11:00 p.m. and midnight on April 2, 2013, he slipped and fell on black ice near the campground's convenience store while escorting home another tenant of the campground and her two small children. Plaintiff testified that he was walking on the asphalt driveway near the campground store so as "not to walk through the snowbanks . . . ." It was cold and the temperature was below freezing. He did not see any snowbanks or clumps of snow where he fell, but there was "snow all around." Specifically, he testified that Horseshoe Lake Drive was dry in certain spots and had patches of snow in certain spots that he walked around. He described the snow patches as compacted snow that had turned to ice from the process of snow-plowing, wherein the blade does not get all of the snow off the asphalt. As plaintiff described it, this process "[m]akes it very, very slippery with snow covered ice like that." Plaintiff further stated that the motion sensor light on the "back side" of the store was inoperative and suggested that if the light had been working, it might have shown a glare where he was

walking, although he admitted, "I don't know." He noted that the person he was escorting also fell as she was trying to keep him from falling. Plaintiff averred that, because of the fall, he broke his ankle, required surgery, and was unable to work for two and a half years.

Plaintiff filed a negligence complaint under theories of premises liability and violation of a landlord's statutory duty to keep common areas fit for their intended use, MCL 554.139.[1] Following discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(10), contending that the condition was open and obvious and that reasonable minds could not disagree with the conclusion that the area where plaintiff allegedly slipped and fell was fit for its primary intended use as a roadway, and thus, that it had complied with any statutory duty owned under MCL 554.139. Opposing the motion, plaintiff asserted that the open and obvious danger doctrine was inapplicable because he slipped on black ice, which is invisible, and that defendant could not escape its statutory duties under MCL 554.139 because the area where he fell should be considered primarily a walkway. After a hearing on the motion, the trial court agreed with and granted summary disposition to defendant.

II. ANALYSIS

A. OPEN AND OBVIOUS DANGER

Plaintiff argues on appeal that the trial court erred in granting summary disposition to defendant because the invisibility of the black ice and the absence of indicia of a potential hazard created a genuine issue of material fact regarding whether the black ice was an open and obvious condition. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v. Burchell,* 249 Mich App 468, 479; 642 NW2d 406 (2002). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). "[A] trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the documentary evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, the trial court may grant the motion. *Id*. MCR 2.116(C)(10), (G)(4).

"To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Kosmalski ex rel Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). The duty a premises possessor owes visitors to the premises depends upon the status of the visitors. *Stitt v*

[1] MCL 554.139(1)(a) states in relevant part: "In every lease or license of residential premises, the lessor or licensor covenants [t]hat the premises and all common areas are fit for the use intended by the parties."

Holland Abundant Life Fellowship, 462 Mich 591, 596-597; 614 NW2d 88 (2000). A person invited onto the land for the possessor's commercial purposes or pecuniary gain is an invitee. *Id*. at 604. The parties agree that, at the time of his fall, plaintiff was considered defendant's tenant and, therefore, he was an invitee. See *Benton v Dart Props, Inc* 270 Mich App 437, 440; 715 NW2d 335 (2006) (observing, "a tenant is an invitee of the landlord").

Generally, a premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty does not extend to dangers that are open and obvious unless "special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Id*. at 517. Special aspects are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." *Lugo*, 464 Mich at 519. Neither a common condition nor an avoidable condition is uniquely dangerous. See *Cory v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002). The test for determining whether a danger 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, 475; 499 NW2d 379 (1993). "The test is objective, and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008).

"[A]bsent special circumstances, Michigan courts have generally held that the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." *Slaughter*, 281 Mich App at 481. However, as this Court discussed in *Slaughter*, standard definitions of black ice, i.e., ice "that is either invisible or nearly invisible, transparent, or nearly transparent[,]" are "inherently inconsistent with the open and obvious danger doctrine." *Id*. at 483. In order for the open and obvious doctrine to apply to black ice, the ice has to be visible upon casual inspection or there must be indicia of a potentially hazardous condition. *Id*. There is no dispute in the present case that the alleged black ice was not visible at the time of plaintiff's slip and fall. The disputed question is whether there were indicia of a potentially hazardous condition that would render the black ice upon which plaintiff fell open and obvious as a matter of law. *Id*.

The existence of indicia of potentially hazardous conditions is a fact-intensive inquiry. Michigan courts have generally found some combination of the following conditions sufficient to render black ice an open and obvious danger: temperatures consistently at or below freezing, recent thaws with a return to freezing temperatures, snow or ice observable in the area of the fall, recent freezing rain or falling snow, and areas that appear wet. See e.g., *Cole v Henry Ford Health Sys* (Mem), 497 Mich 881; 854 NW2d 717 (2014); *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010). Moreover, analyses give weight to inferences from weather conditions a day or two prior to an incident, even if the particular conditions had ceased at the time of the incident. See *Cole*, 497 Mich 881 (considering precipitation the day prior to the plaintiff's fall as among the indicia of potentially hazardous conditions). Absent some combination of these or similar wintry conditions, this Court has declined to find black ice to be an open and obvious danger. See *Slaughter*, 281 Mich App at 483 (concluding that black ice was not open and obvious because it was not visible to casual inspection prior to the plaintiff's

fall, and there was no snow on the ground, it had not snowed for a week, and plaintiff had not seen anyone else slip or hold onto an object to maintain balance).

In the present case, plaintiff testified that although there were patches of icy, compacted snow on the driveway left behind or caused by the snow plow, he walked around those patches, and the area where he was walking at the time he fell looked clear. Record evidence indicated that the last precipitation had been a light snow two days prior to the incident, and temperatures were not such as to produce a thawing-refreezing effect. However, plaintiff also testified that the temperature was below freezing when he fell and there were snowbanks in the area. Horseshoe Lake Drive had patches of hard-packed, icy snow left behind by the plow, and he fell on asphalt that he testified gets plowed. Viewing the evidence in the light most favorable to plaintiff, the conditions surrounding plaintiff's fall were sufficient to alert a reasonable person of the potential for black ice on the asphalt in addition to the visibly icy spots. Freezing temperatures, an abundance of snow, and the presence of hard-packed icy snow patches on the driveway are sufficient indices of wintery conditions to alert a reasonable person to the potential of hazardous conditions, including black ice.

Plaintiff implies that an inoperative motion-sensor light on a nearby building should weigh against determining that the black ice was open and obvious. This position is unavailing. In some instances, lighting can be a factor weighing against determining that a particular dangerous condition is open and obvious. *Abke v Vandenberg*, 239 Mich App 359; 608 NW2d 73 (2000).[2] However, "parties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 483, 486; 502 NW2d 742 (1993). In this case, plaintiff admitted that he was speculating and did not know whether, if the motion sensor had been working, light from the sensor would have bounced off the ice where he was walking in a way that would have alerted him to its presence. Other than saying that the sensor was located at the back of the nearby store, plaintiff provides no evidence of whether his path of travel would have triggered the light or whether the light's beam would actually have illuminated the place where he fell, let alone whether it would have bounced off the ice in a revealing way. Accordingly, plaintiff's speculations are not sufficient to create a genuine issue of material fact regarding whether the black ice upon which he fell was open and obvious. *Id.*

B. STATUTORY DUTY

Plaintiff next contends that the trial court erred in concluding that the area where plaintiff fell was a driveway intended primarily for use by vehicular, not pedestrian traffic, and that

[2] *Abke* involved a plaintiff injured when he fell off a loading dock and into a truck bay while being led by the defendant through a dark area of the defendant's storage barn. *Abke*, 239 Mich App at 360. Among other things, the parties disputed whether the lights in the loading dock were illuminated, thus rendering the truck visible. *Id.* at 362. The reasonable assumption was that if the defendant had turned on the light at issue, the plaintiff would have seen the truck bay and not fallen into it.

reasonable minds could not disagree that it was fit for its intended use, thereby meeting defendant's statutory duty set forth in MCL 554.139. We again disagree.

We review de novo issues involving the interpretation of a statute. *Benton*, 270 Mich App at 440. MCL 554.139(1)(a) mandates that "[i]n every lease or license of residential premises, the lessor or licensor covenants [t]hat the premises and all common areas are fit for the use intended by the parties." "MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law," *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008), and is to be liberally construed, MCL 554.139(3). Thus, "the open and obvious doctrine cannot bar a claim against a landlord for violation of this statutory duty." *Benton*, 270 Mich App at 438. As Michigan's Supreme Court has explained,

> The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease. Therefore, a breach of the duty to maintain the premises under MCL 554.139(1)(a) or (b) would be construed as a breach of the terms of the lease between the parties and any remedy under the statute would consist exclusively of a contract remedy. [*Allison*, 481 Mich at 425-426.]

Plaintiff does not claim to be, nor has he presented any evidence that he in fact is, a tenant under a residential lease with defendant. Thus, to the extent that the plain language of MCL 554.139(1) and the foregoing explanation of our Supreme Court indicate that the statutory protection arises "from the existence of a residential lease," plaintiff's claim fails as a matter of law. Assuming for the sake of argument that plaintiff was a lessee, addressing the merits of plaintiff's claim produces the same result. Viewing the evidence in the light most favorable to plaintiff, the trial court did not err in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) because plaintiff failed to present evidence establishing a genuine issue of material fact regarding whether walking was the primary purpose of the asphalt upon which he slipped and fell. *Quinto*, 451 Mich at 363 ("If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.").

The *Allison* Court provided the analytical framework to use when a plaintiff alleges a violation of MCL 554.139(1)(a). After determining that the area of the slip and fall is a common area, the Court must identify "the intended use" of the common area, and then determine whether conditions made the common area unfit for this intended use. *Allison*, 481 Mich at 428-430. The relevant issue in *Allison* was whether accumulations of snow and ice in the defendant's parking lot violated the defendant's duty to keep the parking lot fit for its intended purpose. *Id.* at 429. The Supreme Court concluded that the intended purpose of a parking lot in a leased residential property is to allow the tenants "to park their vehicles in the lot and have reasonable access to their vehicles." *Id.* The *Allison* Court's analysis indicates that, unless the lease provides for other or additional purposes of the parking lot, whatever else one might do in a parking lot or use a parking lot for was secondary to the aforementioned intended purpose of parking and accessing vehicles. *Id.* at 429-430. As long as accumulations of ice and snow did not obstruct the entrance to or the exit from the parking lot, or tenants' access to their vehicles,

the parking lot was fit for its intended purpose, and the defendant in compliance with MCL 554.139(1)(a). *Id*. at 429-430.

In the instant case, neither party disputes that the area where plaintiff fell is common area. Rather, their dispute revolves around the intended use of the area. Plaintiff contends that the area where he fell was intended for use as a walkway for customers to enter the campground store, especially since the campground has no sidewalks, and snow can obstruct the campground's paths. Thus, plaintiff contends that the instant case is similar to *Benton*, 270 Mich App 437 (2006) and *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124; 782 NW2d 800 (2010). *Benton*, 270 Mich App at 438-439, involved a plaintiff who slipped and fell on an icy sidewalk at the apartment complex where he lived, while *Hadden*, 287 Mich App at 126, involved a plaintiff who slipped and fell on an icy exterior stairway at the apartment complex where she lived. In each case, the plaintiff slipped in a common area clearly intended for walking. *Benton*, 270 Mich App at 444; *Hadden*, 287 Mich App at 130. However, by merely asserting similarities between these two cases and the instant case, plaintiff assumes that for which he ought to be "set[ting] forth specific facts showing that a genuine issue of material fact exists." *Quinto*, 451 Mich at 362. Plaintiff offers no evidence in support of this assertion, other than the fact that he was walking in the subject area when he slipped and fell. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Plaintiff does not seriously dispute that the intended purpose of a driveway is to accommodate vehicular traffic; he merely asserts that the particular area where he fell was intended for walking. However, plaintiff also testified that he fell on asphalt "that gets plowed," and that he "crawled over in the middle of the road, in the parking lot here, over to the store to the step to sit down." Further, one of the color photographs attached as an exhibit to defendant's motion for summary disposition shows a plowed roadway (or parking lot) within a very few feet of the entrance to the store. Plaintiff was not heading into the store; rather, he was walking on the roadway to get to a trailer. There is no evidence that the roadway was unfit for vehicular traffic or accessing vehicles. Given this testimonial and photographic evidence, and considering the *Allison* Court's reasoning, plaintiff's unsupported assertion that the subject area was intended primarily for walking does not create a question of fact sufficient to survive summary disposition. See *Quinto*, 451 Mich at 362.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering
/s/ Michael J. Riordan