STATE OF MICHIGAN

COURT OF APPEALS

MARY A. WALDER,

Plaintiff-Appellant,

v

ST. JOHN THE EVANGELIST PARISH, a/k/a THE ORDINARY (BISHOP) OF THE ROMAN CATHOLIC DIOCESE OF LANSING IN TRUST FOR ST JOHN THE EVANGELIST,

Defendant-Appellee.

UNPUBLISHED
September 27, 2011

No. 298178
Genesee Circuit Court
LC No. 09-091572-NO

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent.

On February 27, 2008, plaintiff, Mary Walder, age 74, was to work as a bingo caller at defendant's church.[1] Because she had health problems for which she was prescribed a handicap parking tag, plaintiff parked in one of the parking spots reserved and marked for handicap parking on the front side of the church. To get from the handicap parking to the entrance, one must walk across the surface of the parking lot. There is no dedicated walkway or sidewalk by which plaintiff or any other person could avoid doing so. Plaintiff testified that she did not see any ice in the parking lot as she exited the car, but that on her second step, she slipped and fell on black ice. She suffered a bimalleolar fracture of her right ankle. Given the severity of the fracture, surgery was required, and a plate and 10 screws were internally affixed to her ankle bones in order to reconstruct the joint.

The weather records reveal that on the day before plaintiff's fall, slightly less than two inches of snow fell. The snow was plowed sometime that day by a snowplow company with which defendant contracts. At some point after the snowfall, the temperature rose above freezing. The following day, the day of plaintiff's fall, there was no precipitation and the temperature remained below freezing all day. Defendant's business manager testified that his

[1] At this point in the litigation, it is not disputed that plaintiff was an invitee.

custodial staff salts the sidewalks and handicap parking spots as needed, but will not apply salt to any portion of the parking lot other than the handicap parking, even if they see that it is icy. Defendant concedes that they do not have the snowplow company apply any salt at all.

Plaintiff filed suit alleging that she slipped on black ice and that defendant had negligently maintained its parking lot by failing to take any action to eliminate or reduce the presence of the ice despite a period sufficient to provide defendant with notice of the condition. Defendant filed a motion for summary disposition. The trial court granted the motion, having found that there was no question but that the hazard fell within the "open and obvious" doctrine. The trial court further found no question of fact that there was a reasonably safe alternative path available to plaintiff at the time of her fall, thus obviating plaintiff's claim that, even if the ice was "open and obvious," it was "effectively unavoidable," as described in *Lugo v Ameritech*, 464 Mich 512; 629 NW2d 384 (2001). Plaintiff appeals, not from the trial court's conclusion that the appearance of the ice was within the "open and obvious" doctrine, but rather from the trial court's conclusion that there was a reasonably safe alternative path available to her.

According to the record, the church had two entrances, one in the front and one in the back. Each had an adjacent parking lot. There was also a side parking lot, but no side entrance. Charlene and Richard Hamper, husband and wife, were at the church on the day of the incident and on the day prior and each testified as to the conditions. Charlene Hamper testified that on the day before plaintiff's injury, they were at the church and she saw the parking lots on both sides:

> We had to go over the day before for something, and whoever had plowed the lot, I told my husband, I said, "I don't know what they got paid, but if it was $5, they got overpaid." And he said "This is sad because," he said, "it's going to melt and it's going to be icy." That's what happened.

Charlene also testified as to the conditions the next day, i.e. the day of plaintiff's fall and injury. She agreed that her "predictions came to fruition." She testified that she and her husband parked in the back lot and that there was black ice in that parking lot and that it was bad enough that her husband got some salt out of his car to spread. She testified that he did so "because we have a lot of elderly people. In fact we've had some fall." When asked if there was black ice in the front parking lot on the day of plaintiff's injury, she testified, "I can swear there was in the back . . . . I was not in the front parking lot. But it would be my assumption if it's in the back, it's going to be in the front."[2] She testified that the black ice was worse in the areas where cars actually park because there are many "indentations" in the parking spots. She also testified that she told "Steve,"[3] "you need to get somebody out there [with a salt] spreader."

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[2] The deposition pages provided only go through page 25, which cuts off the phrase "going to be in the front." However, the remainder of the quote is provided within the text of the brief and there is no contention that this was inaccurately quoted.

[3] It is unclear from the record who "Steve" is.

Richard Hamper also testified as to the conditions of the parking lot on the evening of plaintiff's fall. He stated that when he and his wife arrived at 5:00 p.m., the parking lot "was in bad condition." He further described the lot as "very bad. You had to be very careful. And it – it had been salted on the sidewalk part of it but the parking lot didn't indicate there had been any salt applied to that." He confirmed that he spread some salt that he kept in his car trunk. Consistent with his wife's description, he testified that "during the night before this bingo it had froze, and it was ice, snow and – it was just – it was just a mess."

The majority concludes that *Robertson v Blue Water Oil Co*, 268 Mich App 588, 590; 708 NW2d 749 (2005) is inapplicable because "after she fell, plaintiff was able to safely traverse an alternative route to the entrance." I do not agree. First, there is no evidence that whatever route plaintiff took into the building after her fall was ice-free or even relatively so. Rather, there was simply evidence that she did not fall again. The fact that plaintiff was able to traverse over an icy area without falling, as, presumably, did the other bingo helpers and participants, does not remove this case from the realm of *Robertson*. Indeed, it is safe to assume that the gas station in *Robertson* had other patrons that made it into the building without falling that day, but that did not preclude the ice from being deemed effectively unavoidable. To be effectively unavoidable, a hazard is not required to make everyone, or even a high percentage of those who traverse over it, fall. Rather, it simply means that everyone must traverse over or through it, such that there is no way to avoid the *risk* of falling. This is most evident from the example of an effectively unavoidable hazard from *Lugo*—only one exit for the general public where the floor is covered with standing water. Standing water on a floor will not cause everyone, or even, necessarily, any of the people traversing it, to fall. It is effectively unavoidable because everyone must *risk* slipping and falling in order to exit the store.

For this simple reason, the existence of an alternative path does not, by itself, rectify the unavoidability. Rather, the alternative path must *not* include the risk associated with the hazard. Thus, if there are two exits for the general public to use, but they are both covered with standing water, the result is the same. Accordingly, the existence of a back entrance to the church does not change the unavoidability of the black ice hazard where there was evidence that black ice was also present at that location. The record indicates that it made no difference through which entrance plaintiff attempted to enter the church; they all exposed her to the *risk* of slipping and falling on black ice.

The majority's assertion that the ice was not effectively unavoidable is based on its conclusion that "the evidence does not indicate that the parking lot and sidewalk area were completely covered with ice." I disagree with both the majority's conclusion that this was factually demonstrated and the majority's view that, if true, it would be controlling in this case. Richard Hamper was asked to describe the parking lot and he stated "it was ice." Charlene Hamper testified that there was ice in the back parking lot and distinguished it from the sidewalk which had "spots" of ice, which is consistent with defendant's policy of salting the sidewalks only. Plaintiff testified that "there was a lot of snow and ice" in the parking lot and that the ice in the parking lot had never been as bad as it was that night. Even defense counsel referred to "the sheet of ice" in his deposition questions. The sole evidence on which the majority relies for this factual conclusion is the testimony of Charlene Hamper regarding there being "spots" of ice. However, this was a statement that there were "spots on the *sidewalk*" and testimony had already established that the sidewalk had been salted, but the parking lot had not.

More important, I disagree with the suggestion that, in order for ice to be actionable as an effectively unavoidable hazard, it must be continuous and completely cover the entire surface of the parking lot. I do not agree that the duty to make generally icy premises reasonably safe disappears because invitees might be able to leap from non-icy area to non-icy area through a parking lot. An obstacle course is not reasonably safe simply because it is possible to get through it unscathed. And why we as a state would find it more sensible to encourage 74-year-old women to leap over icy stretches of parking lot rather than encourage commercial premises owners to apply salt to their lots eludes me.

Defendant's assertion that the existence of a side parking lot and plaintiff's failure to provide any evidence regarding its condition precludes the condition from being effectively unavoidable lacks merit. Even assuming that the unsalted side parking lot was ice free—a meteorological miracle to be sure—there is no side entrance. Thus, even if plaintiff had parked in the side lot, she would still have had to traverse the icy area around the front entrance. In addition, defendant's business manager testified that he would expect that anyone who parked on the front side of the church would use the front doors. Indeed, he testified that it would be "unreasonable" for someone to park in the front of the church and then walk all the way around to enter through the back doors. Why, then, is it anything other than unreasonable to assert that a handicapped individual should be forced to utilize a parking space on a side of the building with *no* entrance?

As to the back entrance, there are no proofs that handicap parking spaces existed on that side of the building. In addition, plaintiff testified that she was unaware that the back door was unlocked. Indeed, to determine if it was unlocked, she would have had to park in back and traverse over the icy area to check the door. Ironically, had plaintiff done so and fallen while doing so, defendant would simply have reversed the roles of the front and back entrances in its argument and asserted that the ice in the pathway to the backdoor was open and obvious and that the front entrance constituted an alternative path.

Defendant's position seems to be that invitees must be able to divine which entrances to any particular building are open and, as among the multiple choices, carefully inspect each of them before deciding which entrance to attempt, and woe be it on the invitee who happens to select an entrance where, ultimately, the trial court determines that a less icy entrance existed. To expect plaintiff, a person who has been prescribed a handicap parking sticker, to park further away from the entrance and walk a longer distance around the building on the *chance* that it *might* be safer is to stretch the open and obvious doctrine to the point of farce.

Moreover, there are many businesses with entrances of which the general public is unaware. Invitees are not required to drive around buildings attempting to locate every single entrance and correctly assess their relative safety before embarking across a parking area toward an entrance. This position is even more absurd when one considers that plaintiff went to the *front* door. Why invitees should ever assume, unless they have been instructed otherwise, that a side or back entrance will be better tended than a front/main entrance is difficult to understand. Invitees ought to be able to at least assume that all front/main entrances are equal unless there is

clear evidence to the contrary.[4] In any event, the repudiation of a defendant's duty to maintain a reasonably safe premises applies only where the hazards are "apparent on casual inspection" by an invitee, not where they are discoverable by an invitee as a result of a detailed investigation. *Novotney v Burger King Corp*, 198 Mich App 470, 474; 499 NW2d 379 (1993).

Because plaintiff presented evidence that the icy condition was effectively unavoidable, I would reverse the trial court's grant of summary disposition and remand for trial.

/s/ Douglas B. Shapiro

[4] For example, where it is evidence that one entrance has been plowed and another has not, or where orange construction cones evidence potholes or other hazards around one entrance but not another, or even the existence of a sign advising patrons to use a different entrance.