STATE OF MICHIGAN

COURT OF APPEALS

FRANCISCO VILLANUEVA GARCES, Plaintiff-Appellant,	UNPUBLISHED November 6, 2012
v	No. 304332 Ottawa Circuit Court
LA PROVIDENCIA, L.L.C., Defendant-Appellee.	LC No. 10-002004-NO

Before: BECKERING, P.J., and OWENS and KRAUSE, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff's claim arises from injuries he suffered when he slipped and fell on snow-covered ice in defendant's grocery store parking lot. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that the danger was open and obvious as a matter of law and did not have any special aspects.

"A trial court's decision to grant or deny a motion for summary disposition is reviewed de novo on appeal." *Young v Sellers*, 254 Mich App 447, 449; 657 NW2d 555 (2002) (citation omitted). "The threshold issue of the duty of care in negligence actions [is] decided by the trial court as a matter of law." *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). Questions of law are also reviewed de novo. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994). MCR 2.116(C)(10) provides that summary disposition is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

A claim of negligence requires proof that (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the breach was a proximate cause of the plaintiff's damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993) (citation omitted). Plaintiff was an invitee on defendant's property. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). In the context of premises liability claims, "[t]he invitor's legal duty is 'to exercise

reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995) (citations omitted).

Generally, "[a] premises possessor is [ ] not required to protect an invitee from open and obvious dangers." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008) (citation omitted). The standard applied to determine whether a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger upon casual inspection. *Slaughter*, 281 Mich App at 478 (citation omitted). "[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." *Id*. at 481. However, even an open and obvious condition gives rise to a duty to undertake reasonable precautions where special aspects of the condition make the condition "effectively unavoidable" or "impose an unreasonably high risk of severe harm." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-518; 629 NW2d 384 (2001).

This Court has held "as a matter of law 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 (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006). See also *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007). This Court's holding in *Ververis* applies to the facts of this case. Plaintiff failed to establish a genuine issue of material fact as to whether the danger was open and obvious, and the trial court did not err in finding that the snow-covered ice was open and obvious as a matter of law.

We find unpersuasive plaintiff's assertions that he used care in parking in a spot away from the visible ice, wearing work boots, and watching where he was walking. This Court has noted that "[w]hen deciding a summary disposition motion based on the open and obvious danger doctrine, 'it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.'" *Bialick v Megan Mary, Inc*, 286 Mich App 359, 363; 780 NW2d 599 (2009), citing *Lugo*, 464 Mich at 523-524. Regardless of the amount of care exercised by plaintiff, this Court's analysis turns on the nature of the danger. Here, the snow-covered ice encountered by plaintiff constituted an open and obvious danger.

Defendant next asserts that even if the ice was open and obvious, it was effectively unavoidable because the entire parking lot was covered in snow and plaintiff had to cross the parking lot to enter the store. We disagree. In *Lugo*, 464 Mich at 518, the Michigan Supreme Court noted, as an example, that "a commercial building with only one exit for the general public where the floor is covered with standing water" would present an effectively unavoidable condition. Here, plaintiff does not allege and no evidence supports that it was necessary to cross the patch of ice on which plaintiff fell to enter defendant's store. The evidence in this case, when viewed in the light most favorable to plaintiff, fails to establish a question of fact as to whether the snow-covered ice in defendant's parking lot was effectively unavoidable.

Indeed, our Supreme Court recently articulated what constitutes an "unavoidable" condition in *Hoffner v Lanctoe*, ___ Mich. ____; ___ NW2d ____ (2012) issued July 31, 2012 (Docket No. 142267), slip op at 16–17:

> The "special aspects" exception to the open and obvious doctrine for hazards that are effectively unavoidable is a limited exception designed to avoid application of the open and obvious doctrine only when a person is subjected to an unreasonable risk of harm. Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome. The discussion of unavoidability in *Lugo* was tempered by the use of the word "effectively," thus providing that a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*. Accordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so.

Plaintiff argues that the icy parking lot was unavoidable, but he clearly could have avoided the icy parking lot by choosing to go to a different store where the parking lot had been plowed, or by deciding to grocery shop some other time. Thus, as we are constrained to follow *Hoffner*, plaintiff was not "*required* or *compelled* to confront a dangerous hazard," and his claim is, therefore, without merit. *Hoffner*, ___Mich. ____, slip op at 17.

The trial court did not err in granting defendant's summary disposition motion.

Affirmed.

/s/ Donald S. Owens
/s/ Amy Ronayne Krause