Order

Michigan Supreme Court
Lansing, Michigan

October 8, 2021

Bridget M. McCormack,
Chief Justice

161687

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

KATHLEEN WEZALIS,
Plaintiff-Appellant,

v

SC: 161687
COA: 347613
Oakland CC: 2017-158409-NO

ANNE ROSENBERG,
Defendant/Cross-Defendant-
Appellee,

and

WB MAINTENANCE, INC.,
Defendant/Cross-Plaintiff.
_____/

On order of the Court, the application for leave to appeal the April 2, 2020 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the April 2, 2020 judgment of the Court of Appeals and we REMAND this case to the Court of Appeals for reconsideration in light of *Livings v Sage's Investment Group*, ___ Mich ___ (2021) (decided June 30, 2021, Docket No. 159692).

We do not retain jurisdiction.

b0927

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 8, 2021

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN WEZALIS,

Plaintiff-Appellant,

v

ANNE ROSENBERG,

Defendant/Cross-Defendant-Appellee

and

WB MAINTENANCE, INC.,

Defendant/Cross-Plaintiff.

UNPUBLISHED
April 2, 2020

No. 347613
Oakland Circuit Court
LC No. 2017-158409-NO

Before: M. J. KELLY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

In this appeal as of right, plaintiff challenges the trial court's ruling granting summary disposition under MCR 2.116(C)(10) in favor of defendant Anne Rosenberg and dismissing plaintiff's premises liability claim against her.[1] The trial court concluded that there was no genuine issue of material fact that the condition that caused plaintiff's fall was open and obvious and not unavoidable. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

At the time of the incident giving rise to this appeal, plaintiff owned a company that was involved in handling the personal property portion of insurance claims for damage caused by fire or water. Rosenberg had apparently hired plaintiff, and they had arranged for plaintiff to visit

[1] WB Maintenance, Inc., is not a party to this appeal.

Rosenberg's house on December 12, 2016, to "tag" various items of Rosenberg's personal property so as to indicate how those items would be handled.

The night before plaintiff's scheduled appointment at Rosenberg's house, a snowstorm blew into the area. Plaintiff contacted Rosenberg and unsuccessfully attempted to postpone the scheduled appointment due to the 11 inches of snow that had been predicted. Plaintiff asked Rosenberg again on the morning of December 12, 2016, about postponing the appointment scheduled for that morning. Plaintiff testified at her deposition that it was snowing that morning and that there already was "a lot of snow on the ground." Rosenberg replied that she was ready for plaintiff to come and perform the agreed-upon work. According to plaintiff's deposition testimony, Rosenberg insisted that plaintiff keep the appointment, and plaintiff decided to do so. Plaintiff acknowledged that she could have chosen not to accept the job but nonetheless decided to accept and go to Rosenberg's house.

Plaintiff left her house at approximately 8:15 a.m. that morning to drive to Rosenberg's house. A significant amount of snow had accumulated on the roads, and it was cold. Plaintiff testified that she drove with caution because of the road conditions. When plaintiff arrived at Rosenberg's house, plaintiff could see that the driveway had been "somewhat plowed" but that there were still patches of snow on the driveway. She parked her vehicle in Rosenberg's driveway and waited for two of her employees to arrive. When her employees arrived, plaintiff got out of her vehicle and walked around the back of her vehicle to the rear passenger door to get her supplies from the back seat. According to testimony provided by one of her employees, plaintiff was holding onto the vehicle as she walked. Plaintiff testified that she walked around to open the door and fell down, hitting her wrist on the driveway. Plaintiff stated, "I was cautious walking around because there was snow." She further testified that she did not know what caused her to fall. According to plaintiff, she "saw snow" but "did not see ice." Plaintiff's employee testified that there was ice on the driveway.

Plaintiff filed this action, asserting a claim of premises liability against Rosenberg.[2] Rosenberg subsequently moved for summary disposition under MCR 2.116(C)(10). The trial court issued a written order granting summary disposition in favor of Rosenberg and dismissing plaintiff's premises liability claim. The trial court determined that plaintiff was an invitee on Rosenberg's property and, therefore, that the highest duty of care applied under a premises liability framework. However, the trial court concluded that even under this standard, Rosenberg was entitled to summary disposition in her favor because there was no genuine issue of material fact that the hazard presented by the snowy condition of the driveway was open and obvious and not effectively unavoidable.

II. STANDARD OF REVIEW

[2] Plaintiff's premises liability claim against WB Maintenance and her nuisance claims against Rosenberg and WB Maintenance, which were also dismissed on summary disposition, are not at issue in the instant appeal.

We review "de novo a trial court's ruling on a motion for summary disposition." *Jahnke v Allen*, 308 Mich App 472, 474; 865 NW2d 49 (2014) (quotation marks and citation omitted). When deciding motions made under MCR 2.116(C)(10), "a court considers affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment of a matter of law." *Id*. (quotation marks and citations omitted).

III. ANALYSIS

On appeal, plaintiff argues that the trial court erred by determining that the application of the open-and-obvious doctrine warranted granting summary disposition in favor of Rosenberg.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "The duty owed to a visitor by a landowner depends on whether the visitor was a trespasser, licensee, or invitee at the time of the injury." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013). Thus, "the starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012).

Plaintiff begins her appellate argument by asserting that she was an invitee. "[A]n invitee is entitled to the highest level of protection under premises liability law." *Sanders*, 303 Mich App at 5 (quotation marks and citation omitted). Rosenberg counters that plaintiff was a licensee. However, we need not resolve this issue because even were we to assume that plaintiff was an invitee as she claims and entitled to the benefit of the higher standard of care imposed on landowners with respect to invitees, the hazard in this case was still open and obvious for the reasons more fully explained below and plaintiff's claim was therefore barred as a result.[3] Moreover, open-and-obvious-danger principles are relevant to the analysis, regardless of whether a visitor is classified as an invitee or licensee. See *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001).

A landowner owes invitees a duty of reasonable care to protect against "unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner*, 492 Mich at 460. "Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Id*. However, "[t]he possessor of land owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id*. at 460-461 (quotation marks and

[3] We express no opinion whether the trial court was correct in classifying plaintiff as an invitee in this case.

citation omitted). The determination whether a danger is open and obvious is made under an objective standard that considers "whether it is reasonable to expect that an average person with ordinary intelligence would have discovered [the hazard] upon casual inspection." *Id*. at 461. With respect to wintry snow and ice conditions specifically, Michigan courts consider "whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger." *Id*. at 464.

In this case, plaintiff testified that when she arrived at Rosenberg's house, she could see that the driveway had been "somewhat plowed" and that there were patches of snow remaining on the driveway. Plaintiff further testified that she had driven cautiously that morning and also walked cautiously around the car specifically because of the snowy conditions that were apparent to her. Additionally, plaintiff's employee testified that she saw ice on the driveway and that plaintiff steadied herself as she walked around the vehicle by holding onto it. Based on the record evidence, there was no genuine issue of material fact that the hazardous risk was open and obvious because a reasonably prudent person would have observed the snowy and icy conditions of the driveway and foreseen the accompanying danger of slipping. *Id*.; see also *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006) (holding "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").

Although plaintiff argues that "it had to be ice that caused her fall" and that she did not see the exact patch of ice on which she fell, this argument does not advance her cause because the test is an objective one. *Id*. at 461. As our Supreme Court has explained, "if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (quotation marks and citation omitted). Under the factual circumstances present here, a reasonable person of ordinary intelligence would have recognized the wintry icy and snowy conditions on Rosenberg's driveway and the possibility of the concomitant risk of slipping on a snow-covered surface. Thus, simply because plaintiff did not see a particular patch of ice or snow does not negate the application of the open-and-obvious doctrine. *Id*.

Next, plaintiff argues that even if the condition was open and obvious, her claim is still not barred because her only "options were to either traverse the hazard or lose this job" and the condition was therefore effectively unavoidable. When a condition is open and obvious, a possessor of land may still be liable if "special aspects" exist making the open and obvious condition "unreasonable." *Hoffner*, 492 Mich at 461. One situation when "the special aspects of an open and obvious hazard could give rise to liability" is when "the danger is *effectively unavoidable*." *Id*. at 463. "[T]he 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." *Id*. at 469.

Plaintiff argues she faced the same "effectively unavoidable" risks presented in *Lymon v Freedland* 314 Mich App 746; 887 NW2d 456 (2012), to support her argument that the hazardous condition was effectively unavoidable. In *Lymon* we wrote:

> In *Lugo v Ameritech Corp*, 464 Mich 512, 518; 629 NW2d 384 (2001), our Supreme Court provided the following illustration of an unreasonably dangerous condition:
>
> [C]onsider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a *substantial risk of death or severe injury* to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. [Emphasis added.]
>
> Plaintiff contends that the driveway presented [***16] an unreasonable risk of harm because it was steep and covered in snow and ice. Plaintiff also notes that eaves directed water onto the driveway. Although the slippery conditions coupled with the nature of the sloped driveway presented unsafe conditions, our Supreme Court has set an extraordinarily high bar for a condition to constitute an unreasonable risk of harm because the condition must present a "substantial risk of death or severe injury." *Id.* Based on this heightened standard, courts have repeatedly held that ice and snow generally do not meet this threshold. See, e.g., *Perkoviq*, 466 Mich. at 19-20 (holding that "[t]he mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition"); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002) (holding that ice-covered steps did not present a high likelihood of harm or severity of harm); *Royce v Chatwell Club Apartments*, 276 Mich App 389, 395-396; 740 NW2d 547 (2007) (holding that "[t]he risk of slipping and falling on ice is not sufficiently similar to those special aspects discussed in *Lugo* to constitute a *uniquely high* likelihood or severity of harm and remove the condition from the open and obvious danger doctrine"). Similarly, in this case, the ice- and snow-covered driveway did not contain special aspects that created a high likelihood of harm or severity of harm as set forth in *Lugo*, 464 Mich. at 518. *Lymon*, 314 Mich App 759-760. (internal citations omitted).

Here, and contrary to the circumstances presented in *Lymon*, plaintiff drove onto a partially plowed driveway. There was evidence that plaintiff had a partially cleared path to enter the home. Absent was evidence that the driveway was unusually steep, or that plaintiff would have to traverse across a lawn covered with bushes. Under these facts, the trial court did not err in its finding that the open-and-obvious dangers presented in *Lymon*, were not present here. As we stated in *Lymon*, "…courts have repeatedly held that ice and snow generally do not this threshold" of effectively unavoidable. *Id.* at 760.

As to plaintiff's claims that she was compelled to appear in the home, this Court has stated that: "[t]he mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable." *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 412; 864 NW2d 591 (2014). Accordingly, on the facts presented to the trial court in this case, and viewing the evidence in the light most favorable to

plaintiff, we cannot conclude that the trial court erred in finding that the open-and-obvious danger posed by Rosenberg's driveway was not effectively unavoidable.

Plaintiff next argues that Rosenberg had actual notice of the driveway's condition. Even accepting this statement as true, it does not advance plaintiff's claim to relief. Although a premises possessor may be held liable for breaching the duty of reasonable care if "the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect," *Hoffner*, 492 Mich at 460, the premises possessor "owes no duty to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid," *id.* at 460-461 (quotation marks and citation omitted). Thus, in this case, because the hazardous condition was open and obvious (without any special aspects making it nonetheless unreasonable), Rosenberg had no duty to remedy the condition and it was irrelevant whether she knew of the condition. *Id.*

We conclude that the trial court did not err in granting summary disposition in favor of Rosenberg. No costs are awarded. MCR 7.219.

Affirmed.

/s/ Michael J. Kelly
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello