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S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JONATHAN CAMPBELL,

Plaintiff-Appellant,

v

TRACEY SWIDER and JEFFREY SWIDER,

Defendants-Appellees.

UNPUBLISHED
September 10, 2020

No. 350031
Wayne Circuit Court
LC No. 18-000370-NO

Before: JANSEN, P.J., and K.F. KELLY and CAMERON, JJ.

PER CURIAM.

In this premises liability action, plaintiff-appellant Jonathan Campbell appeals the trial court's order granting defendants-appellees Jeffrey Swider and Tracey Swider's motion for summary disposition. We affirm.

I. BACKGROUND

This action arises from Campbell slipping and falling while he was leaving a home that his sister rented from the Swiders in Garden City, Michigan. On January 11, 2015, Campbell arrived at the home to babysit his nephew in exchange for payment. Campbell could not recall what time he arrived or what the weather was like when he arrived. However, he believed that it was in the "early afternoon" and that it was not snowing. Campbell's sister returned home sometime after 8:00 p.m. that evening. Sometime thereafter, Campbell exited the home through the front door. He noted that it was snowing and that the sidewalk that was connected to the front porch was covered in snow. After Campbell reached the sidewalk and took "probably three steps," his "feet went out from underneath" him. Campbell fell on his left side and he felt "immense pain" in his arm. Campbell was transported to the hospital and was diagnosed with a dislocated elbow and a fractured forearm.

On January 10, 2018, Campbell filed a complaint against the Swiders. In relevant part, Campbell alleged that he was an invitee at all relevant times and that he sustained injuries as a result of slipping and falling on ice that was created by "the discharge of water from the gutters onto the walkway[.]" The Swiders answered the complaint and denied liability. Discovery commenced, and the Swiders later filed a motion for summary disposition under MCR

2.116(C)(10). In relevant part, the Swiders argued that, even assuming that Campbell fell on ice, the undisputed evidence established that it was an open and obvious condition that had no special aspects. Campbell opposed the motion, arguing that genuine issues of material fact existed for trial. After hearing oral argument, the trial court granted the Swiders' motion for summary disposition. Thereafter, Campbell filed a motion for reconsideration, which was denied. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's grant of summary disposition under . . . [MCR 2.116](C)(10)." *McLean v Dearborn*, 302 Mich App 68, 72; 836 NW2d 916 (2013). "In reviewing a motion for summary disposition under subrule (C)(10), we consider the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012) (quotation marks and citation omitted). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

III. ANALYSIS

Campbell argues that the trial court erred by granting the Swiders' motion for summary disposition because a genuine issue of material fact existed as to whether the ice was an open and obvious condition. We disagree.

"In a premises liability action, a plaintiff must prove the elements of negligence[.]" *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013) (quotation marks and citation omitted). "To establish a prima facie case of negligence, [a] plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Finazzo v Fire Equip Co*, 323 Mich App 620, 635; 918 NW2d 200 (2018). "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*, 303 Mich App at 4. In this case, it is undisputed that Campbell was an invitee at the time he was injured.

Generally, "a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). 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 citation omitted). The standard for determining if a condition 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*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008), this Court held the following:

> When applying the open and obvious danger doctrine to conditions involving the natural accumulation of ice and snow, our courts have progressively

> imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months.

Our Supreme Court has held that certain weather conditions, such as "temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening," "by their nature would . . . alert[] an average user of ordinary intelligence to discover the danger upon casual inspection." *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010). As a matter of law, "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).

We conclude that the alleged hazard that Campbell encountered on the date of his injuries was open and obvious. The fall occurred on January 11, 2015, and weather reports establish that the temperature was below freezing in the days before Campbell sustained his injuries. On January 11, 2015, the maximum temperature was 31 degrees, and the average temperature was 24 degrees. Additionally, Campbell—who was a life-long Michigan resident—observed the wintry conditions when he exited the home. Specifically, Campbell testified that it was snowing outside and that the sidewalk was covered in snow. Furthermore, after the fall occurred, one of the individuals who arrived to help Campbell was able to see ice in the area where Campbell fell. We conclude that a reasonable person in Campbell's position would have gleaned from the circumstances that the snow-covered sidewalk could be slippery. Consequently, the trial court did not err by determining that there was no question of fact that the alleged hazard was open and obvious.

Although there is no question of fact as to whether the snow-covered ice presented an open and obvious hazard, liability may still arise if a hazard had special aspects that make it unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001). The special aspects of an open and obvious risk that could give rise to liability are: (1) when the danger is effectively unavoidable or (2) when the danger is unreasonably dangerous. *Id*. at 518-519.

In *Lugo*, our Supreme Court provided illustrations of hazards that could be considered effectively unavoidable and unreasonably dangerous:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider 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. [*Id*. at 518.]

We conclude that the snow-covered ice did not have any special aspects. First, "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Hoffner*, 492 Mich at 469. In contrast, "situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. In this case, the snow-covered ice was avoidable because Campbell was not required or compelled to confront it. Indeed, he could have elected to leave the home through the back door or to walk across the grass, as opposed to on the sidewalk. Campbell also could have left his sister's home at a later time. Thus, the undisputed evidence establishes that the ice was not effectively unavoidable for all practical purposes.

Second, the snow-covered ice did not rise to the level of danger posed by "an unguarded thirty foot deep pit in the middle of a parking lot." See *Lugo*, 464 Mich at 518. Rather, ice is a common condition in Michigan and slipping and falling on it does not create the type of "uniquely high likelihood of harm or severity of harm" contemplated in *Lugo*. See *Royce v Chatwell Club Apartments*, 276 Mich App 389, 395-396; 740 NW2d 547 (2007) ("The 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."). Indeed, the two individuals who assisted Campbell after he fell were able to do so without falling. Consequently, the undisputed facts establish that the ice in question did not have special aspects.

In sum, Campbell has failed to establish that the condition was not open and obvious and that the condition presented special aspects that would preclude application of the open and obvious danger doctrine. Even when considering the record evidence in a light most favorable to Campbell, we perceive no disputed material facts. Consequently, the trial court did not err by granting summary disposition in favor of the Swiders.[1]

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Thomas C. Cameron

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[1] Based on this holding, the remainder of Campbell's arguments on appeal are rendered moot and need not be considered. See *Attorney Gen v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005).