Order

Michigan Supreme Court
Lansing, Michigan

October 3, 2023

Elizabeth T. Clement,
Chief Justice

165547 & (42)

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

SHARIA TAYLOR,
Plaintiff-Appellant,

v

SC: 165547
COA: 359616
Macomb CC: 2020-004411-NO

GORDON MANAGEMENT COMPANY, INC.,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the March 2, 2023 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 judgment of the Court of Appeals and REMAND this case to that court for reconsideration in light of *Kandil-Elsayed v F&E Oil, Inc* (Docket No. 162907) and *Pinsky v Kroger Co of Mich* (Docket No. 163430), ___ Mich ___ (2023). The motion to hold application in abeyance is DENIED as moot.

We do not retain jurisdiction.

p0926

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 3, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

SHARIA TAYLOR,

Plaintiff-Appellant,

v

GORDON MANAGEMENT COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED
March 2, 2023

No. 359616
Macomb Circuit Court
LC No. 2020-004411-NO

Before: RICK, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the order granting summary disposition under MCR 2.116(C)(10) in favor of defendant. Because we find that the snow and ice on which plaintiff fell was an open and obvious condition that was not effectively unavoidable, we affirm.

I. BACKGROUND

This case arises out of an injury sustained by plaintiff when she slipped and fell on February 17, 2019, while exiting a vehicle that her fiancé parked under a carport in the parking lot of an apartment complex where her fiancé's mother resided. Defendant serves as the manager of the apartment complex.

Plaintiff testified in her deposition that snow had begun to fall as they were traveling to the apartment complex and that it was dark when they arrived. The parking lot was covered with a layer of snow. Plaintiff testified that she looked at the ground before stepping out of the vehicle and it "looked like it was safe to step on." Plaintiff first noticed the ice on the pavement as she stepped from the vehicle and "felt ice up under [her] foot." Plaintiff maintained that it was not apparent that there was ice beneath the snow. Plaintiff fell backward to the ground and landed on her right side. Plaintiff's fiancé helped her to get up from the ground and it was at this point, plaintiff testified, that she noticed that the whole parking lot was covered in ice, though the ice was allegedly obscured by snow. Weather reports from the date of plaintiff's fall indicated that the temperature was approximately 21 to 26 degrees Fahrenheit throughout the day, with two to three inches of snowfall in the evening around the time when plaintiff fell. This photograph, which

is part of the record, depicts the area where plaintiff fell and the amount of snow present at that time. The lower portion of the image shows the running board of the vehicle that plaintiff exited, with the darker area being where her fall disturbed the snow.

Plaintiff filed this premises liability lawsuit, claiming that the snow-covered ice[1] constituted a dangerous condition on defendant's premises and that defendant breached its duties to her by its "failure to clear snow from the parking lot resulted in hiding unsalted ice below[,] which caused [p]laintiff to slip and fall as she exited her vehicle."

Defendant moved for summary disposition, arguing that snow and ice constituted an open and obvious condition with no special aspects. Plaintiff responded that the ice beneath the snow was not open and obvious because it was hidden by a layer of snow. She also maintained that the snow and ice were effectively unavoidable and, therefore, the open and obvious doctrine did not bar her claim. The trial court found that the snow and ice on which plaintiff slipped was an open and obvious hazard and granted summary disposition in favor of defendant.[2]

II. STANDARD OF REVIEW

"[T]he application of the open and obvious danger doctrine is part of the question of duty that is a question of law for the court to decide." *Jeffrey-Moise v Williamsburg Towne Houses*

[1] We note that plaintiff's complaint alleged that the ice was hidden by a covering of snow. Plaintiff first referred to the ice as "black ice" in her response to defendant's motion for summary disposition. However, snow-covered ice is not the same as black ice. In *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 482-483; 760 NW2d 474 (2008), this Court examined the definition of "black ice" and noted that "[t]he overriding principle behind the many definitions of black ice is that it is either invisible or nearly invisible, transparent, or nearly transparent." Although the ice beneath the snow may have been black ice, plaintiff specifically alleged that it was defendant's failure to clear snow from the parking lot that prevented her from seeing the ice.

[2] Plaintiff argues that the trial court applied an incorrect legal standard when ruling on the motion for summary disposition. Because we review the legal issues independently and without deference to the trial court, the trial court's legal analysis is not relevant on appeal. *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019).

Coop, Inc, 336 Mich App 616, 633; 971 NW2d 716 (2021). This Court reviews a trial court's decision on a motion for summary disposition de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Under MCR 2.116(C)(10), the party moving for summary disposition is entitled to judgment as a matter of law when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact." The reviewing court considers affidavits, pleadings, depositions, and other evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

Plaintiff contends that the black ice[3] beneath the snow on which she slipped was not an open and obvious condition and that, even if it was open and obvious, it was effectively unavoidable. We disagree.

"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 Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Whether a landowner owes a duty to a visitor depends on that visitor's status as either a trespasser, licensee, or invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "[T]enants are invitees of the landlord while in the common areas" because the landlord has "exclusive possession of the common areas" and authorizes tenants to use them in exchange for rent. *Stanley v Town Square Coop*, 203 Mich App 143, 147; 512 NW2d 51 (1993). A landlord also generally gives "tenants the right to invite others onto the property," and therefore "the same duty that a landlord owes to its tenants is also owed to their guests." *Id*. at 148; see also *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993) (holding that "the duties owed by a landlord to the social guests of a tenant are duties owed to invitees, not licensees"). Plaintiff went to the apartment complex to visit her fiancé's mother, one of defendant's tenants. Consequently, with respect to the parking lot, defendant owed plaintiff a duty as an invitee.

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty to invitees requires that "reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Hoffner v Lanctoe*, 492 Mich 450, 464; 821 NW2d 88 (2012) (citation omitted). However, this duty does not extend to conditions that are open and obvious unless special aspects of the condition make the risk unreasonably dangerous. *Lugo*, 464 Mich at 516-517. A condition is open and obvious if "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 475; 499 NW2d 379 (1993). This inquiry is objective and focuses on "whether a reasonable person in the plaintiff's

[3] See n 1.

position would have foreseen the danger, not whether the particular person knew or should have known that the condition was dangerous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008).

"Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Jeffrey-Moise*, 336 Mich App at 634-635 (citation and quotation marks omitted). With respect to wintry weather, "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." *Slaughter*, 281 Mich App at 479. In *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010), the Supreme Court explained that "black ice" is "open and obvious when there are 'indicia of a potentially hazardous condition,' including the 'specific weather conditions present at the time of the plaintiff's fall.' " See also *Ragnoli v North Oakland-North Macomb Imaging, Inc*, 500 Mich 967, 967; 892 NW2d 377 (2017) (holding that the "trial court correctly held that, notwithstanding the low lighting in the parking lot, the presence of wintry weather conditions and of ice on the ground elsewhere on the premises rendered the risk of a black ice patch 'open and obvious such that a reasonably prudent person would foresee the danger' of slipping and falling in the parking lot.").

Here, applying the objective standard, and viewing the evidence in the light most favorable to plaintiff, the ice on which plaintiff slipped was open and obvious as a matter of law. Wintry conditions were clearly present at the time of the plaintiff's fall. It was February in Michigan. The temperature was approximately 21 to 27 degrees Fahrenheit. Snow was falling. Plaintiff admitted that she observed a layer of snow on the parking lot before she stepped from the vehicle. Even if the ice had not been covered with snow, these wintry conditions presented indicia of a potentially hazardous condition in the parking lot to alert an average person with ordinary intelligence to the potential danger of slipping. *Janson*, 486 Mich App at 935. The ice on which plaintiff fell was therefore open and obvious.

That does not end our inquiry, however. Plaintiff argues that the hazardous condition, even if open and obvious, was effectively unavoidable because the entire parking lot was covered with black ice hidden by snow. "[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." *Hoffner*, 492 Mich at 469.[4]

In the present case, plaintiff's testimony demonstrates that the hazard was not effectively unavoidable. Plaintiff testified that after her fall she successfully traversed across the parking lot and into the apartment building without incident. There are a number of possibilities that plaintiff could have chosen to avoid the snow and ice condition. Plaintiff could have asked her fiancé to

[4] Our Supreme Court recently created an exception to the stringent "effectively unavoidable" rule, holding in *Estate of Livings v Sages Investment Group, LLC*, 507 Mich 328, 349; 968 NW2d 397 (2021), that "a hazard can be deemed effectively unavoidable if the plaintiff confronted it to enter his or her place of employment for purposes of work." *Livings*, however, is inapplicable here.

park in a different location, or she could have arranged to have the social visit on a different day. Plaintiff was not "*required or compelled* to confront" a dangerous hazard. The hazardous condition of the snow and ice was not effectively unavoidable for purposes of premises liability.[5] *Hoffner*, 492 Mich at 469. Thus, the trial court properly granted defendant's motion for summary disposition.[6]

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michelle M. Rick
/s/ Michael J. Kelly
/s/ Michael J. Riordan

[5] It is not necessary to address defendant's argument, offered as an alternative ground for affirmance, that, as the apartment complex's management company, it was neither the landowner nor possessor of the premises.

[6] We decline to address plaintiff's request that this Court overrule *Lugo*'s special aspect test "as applied to the duty element." This Court cannot overrule a decision of the Michigan Supreme Court. See *People v Crockran*, 292 Mich App 253, 256; 808 NW2d 499 (2011).