STATE OF MICHIGAN

COURT OF APPEALS

LEETTA OTTMAN,

Plaintiff-Appellant,

v

GREAT LAKES GAMING OF MICHIGAN, LLC, a/k/a, LAKES GAMING AND RESORT, a/k/a, LAKES ENTERTAINMENT, LLC,

Defendant-Appellee,

and

POKAGON GAMING AUTHORITY,

Defendant.

UNPUBLISHED
December 11, 2012

No. 309188
Berrien Circuit Court
LC No. 2010-000063-NO

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In this slip and fall case, plaintiff asserts a claim of premises liability with respect to so-called black ice on a sidewalk leading from the parking lot to the entrance of the Four Winds Casino near New Buffalo, Michigan. The casino is owned by the Pokagon Band of Potawatomi Indians who entered into a management agreement with defendant. The trial court denied defendant's motion for summary disposition on the basis that it did not possess and control the premises. That issue is not before the Court because defendant did not cross appeal. MCR 7.207; *Barnell v Taubman Co*, 203 Mich App 110, 123; 512 NW2d 13 (1993). But the trial court granted defendant's motion for summary disposition on the basis of the open and obvious doctrine. Plaintiff appeals by right and for the reasons discussed below, we affirm.

I. SUMMARY OF FACTS AND PROCEEDINGS

The accident happened in the early evening of January 31, 2009. On that day, temperatures ranged from below freezing to just above freezing. Plaintiff, her wheel-chair bound husband, her sister, Jackquline Bennett and Mr. and Mrs. Gonzalez all went to the casino together. Mr. Gonzalez drove. Gonzalez dropped off plaintiff's husband, Bennett, and his own wife at the casino entrance. Plaintiff stayed in the vehicle while Gonzalez parked it in a handicap

space adjacent to a sidewalk not far from the entrance to the casino. A surveillance video depicts the area and the incident. The video shows the parking area and sidewalk had been cleared of recent snow, but the parking area is glistening black with patches of icy snow where cars park. Snow is piled on parking-lot islands; the sidewalk on which plaintiff slipped is bordered by snow about eight inches deep.[1] After Gonzalez parked the vehicle, plaintiff exited the passenger side and walked a couple of steps, crossing over about four feet of snow-covered ground to reach the sidewalk. She slipped and fell on ice when she stepped down on the sidewalk. Plaintiff testified she did not see the ice before falling, explaining that she was not looking down before falling but at the casino or straight ahead. Plaintiff concedes that lighting adequately illuminated the area.

Both plaintiff and Gonzalez asserted the ice was not visible but also gave conflicting statements in that regard. Describing going to assist plaintiff after she fell, Gonzalez testified, "After I passed the snow bank and I go into the sidewalk, it was so slippery. I mean, you can see it was so slippery." Gonzalez later explained that he could tell it was slippery by standing on the ice but he couldn't see it. As noted, plaintiff did not specifically look at the sidewalk before she fell but stated that it "looked like clean sidewalk." Plaintiff, however, also stated that her sister took photographs of the area where she fell. In answers to interrogatories, plaintiff described these photographs as showing "[w]here I fell and show[ing] black ice and where salt stopped." In answering another interrogatory, plaintiff stated: "There was ice on the sidewalk[.] . . . You could see where they had put salt and stopped, but I didn't see it until after I fell."

In ruling on defendant's motion for summary disposition, the trial court found that the following facts were not open to reasonable dispute:

> 1. [Plaintiff] has lived in southern Michigan and northern Indiana, known as Michiana, and she is generally familiar with winter weather in the Michiana area.
>
> 2. This incident occurred in January in Michigan.
>
> 3. At the time of the incident, mounds of snow were visible on the sides of the Casino parking area.
>
> 4. When [plaintiff] arrived at the Casino parking area, ice was visible in various spots throughout the parking area, including some ice in the area where her vehicle was parked.
>
> 5. Snow, at least 8" deep, was visible along the side of the walkway onto which [plaintiff] stepped.

Based on these facts, the trial court ruled as follows:

[1] Gonzalez testified the snow through which he and plaintiff walked to reach the sidewalk was about eight inches deep.

> At the location where [plaintiff] exited the vehicle in the Casino parking area, a reasonable person would have foreseen the danger of black ice on the sidewalk next to the pile of snow where [plaintiff] stepped.
>
> Since the test is "not whether [[plaintiff] herself] knew or should have known that the condition was hazardous," [citing *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008)], I find that the open and obvious danger doctrine applies. Since other routes existed for [plaintiff], instead of taking the route over, or onto, the snow adjacent to the sidewalk, I find no special condition which required [plaintiff] to take the route she chose.

Based on the foregoing reasoning, the trial court granted defendant's motion for summary disposition and denied plaintiff's motion for reconsideration. Plaintiff now appeals by right.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden*, 461 Mich at 120. A court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id*. at 120-121. The motion may be granted when the evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Slaughter*, 281 Mich App at 474. "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

A party in possession and control of real property owes a duty of care to persons entering the property that varies with the person's status. *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 596-597; 614 NW2d 88 (2000). A property possessor owes the highest duty of care to an invitee—one who enters the land of another on an invitation that carries with it the implied assurance that reasonable care has been taken to render the premises reasonably safe. *Id*. Thus, a property possessor owes a duty to make reasonable efforts to make the premises reasonably safe for its invitees and to exercise reasonable care to protect the invitee from an unreasonable risk of harm from a dangerous condition on the property. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012); *Slaughter*, 281 Mich App at 477-478. This general duty of care that a property possessor owes to invitees extends to ice and snow hazards on the premises. *Hoffner*, 492 Mich at 463-464. Although "not an absolute insurer of the safety of the invitee," a property possessor "has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation" and must take "reasonable measures . . . within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975).

A property possessor's duty of care owed to invitees is, however, tempered by the requirement that an invitee take reasonable care for his or her own safety. *Slaughter*, 281 Mich App at 478. "The 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." *Hoffner*, 492 Mich at 460-461. Under the open and obvious doctrine, "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products*, 440 Mich 85, 96; 485 NW2d 676 (1992). A property possessor has a duty to take reasonable precautions to protect invitees from open and obvious dangers only "if special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001). "Special aspects" exist in two circumstances: "when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Hoffner*, 492 Mich at 463 (emphasis in original). These principles apply as equally to snowy or icy conditions as to any other condition of land. *Id*. at 463-464; *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3-4, 8-9; 649 NW2d 392 (2002).

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461. This objective standard calls for an examination of "'the objective nature of the condition of the premises at issue.'" *Id*., citing *Lugo*, 464 Mich at 523-524. "Black ice" conditions are "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[,]'" such as "wintry conditions [that] by their nature would have alerted 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), quoting *Slaughter*, 281 Mich App at 483. In sum, the test is objective and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff was actually aware of the hazardous condition. *Slaughter*, 281 Mich App at 479; *Corey*, 251 Mich App at 5.

We find that the trial court correctly ruled that the icy sidewalk on which plaintiff fell was an open and obvious condition. While plaintiff asserts the ice was not readily observable, this claim is belied by her admission that the demarcation between the "black ice" and the safely-salted sidewalk could be visually captured in a photograph. More importantly, the objective nature of the premises, including the presence of snow and ice in the parking lot, the glistening black surfaces indicating at a minimum they were wet, with sidewalks bracketed by walls of snow, and the winter temperatures that ranged from below to above freezing (making conditions ripe for freezing of melted snow), "would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection." *Janson*, 486 Mich at 935. We conclude the trial court correctly found that the icy sidewalk on which plaintiff slipped and fell was an open and obvious condition. *Hoffner*, 492 Mich at 464; *Royce v Chatwell Club Apartments*, 276 Mich App 389, 390, 394; 740 NW2d 547 (2007) (snow-covered black ice on a parking lot was an open and obvious condition). Because the condition was open and obvious, plaintiff may avoid summary disposition only if there were special aspects present. *Hoffner*, 492 Mich at 464.

We agree with the trial court that no special aspects were present to permit the imposition of premises liability despite the fact that the icy sidewalk was an open and obvious condition. There can be no dispute that condition was not "effectively unavoidable." An "effectively unavoidable" condition is one that is an "inherently dangerous hazard that a person is inescapably required to confront under the circumstances." *Id*. at 456. It must be such that a plaintiff is "unavoidably compelled to confront" it. *Id*. If a person has a choice whether to confront a hazard, it cannot be "effectively unavoidable." *Id*. at 469. Here, plaintiff could have entered the casino with the other passengers whom Gonzalez dropped off at the casino's entrance. Plaintiff could also have chosen to not cross snow to the sidewalk and instead walked through the parking lot to the casino entrance. Plaintiff was not for all practical purposes compelled to confront the icy sidewalk; hence, it was not "effectively unavoidable." *Id*. at 468-469.

Finally, a winter time icy sidewalk is not an unreasonably dangerous condition. *Janson*, 486 Mich at 935; *Royce*, 276 Mich App at 396; *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002). Icy sidewalks are common during Michigan winters, and "neither a common condition nor an avoidable condition is uniquely dangerous." *Hoffner*, 492 Mich at 463.

We affirm. Defendant as the prevailing party may tax costs. MCR 7.219.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan