STATE OF MICHIGAN

COURT OF APPEALS

CARL LEMIN and JACQUELINE LEMIN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2013
v	No. 307539 Dickinson County Circuit Court
JOHN MICHAEL GARRETT, M.D., P.C., Defendant-Appellant	LC No. 11-016524-NO
and	
HERZOG-DYER EXCAVATING & SANITATION, INC. Defendant.	

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Defendant[1] applied for leave to appeal following the trial court's denial of his motion for summary disposition. This Court originally denied defendant's application.[2] Defendant then appealed to our Supreme Court, which remanded to this Court "for consideration as on leave granted in light of *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012)."[3] On remand, we consider whether defendant's snow-covered parking lot fits the "special aspects" exception to the general rule that property possessors owe no duty to protect invitees from open and obvious dangers. In light of the Supreme Court's decision in *Hoffner*, as well as previous precedent, we reverse the decision of the trial court denying defendant's motion for summary disposition.

[1] For clarity, "defendant" refers to defendant-appellant Garrett. Defendant Herzog-Dyer Excavating & Sanitation, Inc. did not apply for leave to appeal the denial of its motion for summary disposition.

[2] *Lemin v Garrett*, unpublished order of the Court of Appeals, issued June 6, 2012 (Docket No. 307539).

[3] *Lemin v Garrett*, 493 Mich 900; 822 NW2d 796 (2012).

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff Carl Lemin (hereinafter "plaintiff") had an appointment at defendant's eye clinic at 8:30 a.m. on December 9, 2009. In scheduling that appointment, plaintiff sought and obtained defendant's first appointment of the day. During the preceding night there had been a large snowfall, and plaintiff arrived to find the parking lot covered with 12 to 18 inches of snow. Plaintiff testified that the parking lot had not been plowed, but that the city street where he parked had been plowed. Plaintiff stated that he then walked the shortest route into the building, which would involve going through a side entrance. Plaintiff testified that there was a main entrance to the clinic as well, and agreed that the main entrance was more or less flat, while the side entrance had "a little slope when you first go in there."

Defendant moved for summary disposition on plaintiffs' premises liability claim, pursuant to MCR 2.116(C)(10), on the ground that the hazard that caused plaintiff's injury was open and obvious. At the hearing on defendant's motion, the trial court held that there appeared to be a question of fact as to whether the condition plaintiff came across was an open and obvious condition. The court went on to state that the real question was whether the condition fit the "special aspects" exception to the open and obvious doctrine. The trial court found that the condition did fit the "special aspects" exception, because the condition was "effectively unavoidable."[4]

II. STANDARD OF REVIEW

The standard of review concerning "a grant or denial of summary disposition" is de novo. *Hoffner*, 492 Mich at 459. "'In evaluating a motion for summary disposition'" the Court should "'consider[] affidavits, pleadings, deposition, admissions and other evidence,'" *Joyce v Rubin*, 249 Mich App 231, 234; 632 NW2d 360 (2002), quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and ask whether a genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the "record which might be developed . . . would leave open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (citations and quotation marks omitted).

Whether a defendant owes a duty to a particular plaintiff is a question of law that we review de novo. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011).

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[4] The trial court also granted summary disposition to defendant on plaintiff's nuisance claim; that ruling is not challenged on appeal. Plaintiff Jacqueline Lemin's claim for loss of consortium, being derivative of Plaintiff Carl Lemin's claims, presumably survived summary disposition; however, because we determine that plaintiff's premises liability claim against defendant fails, we also hold that Jacqueline Lemin's claim for loss of consortium fails. See *Long v Chelsea Community Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996) (a derivative claim for loss of consortium can no longer stand when the primary claim fails).

III. DISCUSSION

The duty of a premises possessor is "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*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty is limited and "does not generally encompass removal of open and obvious dangers." *Id.*, citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). This "open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Id.* An exception to the open and obvious doctrine exists "if special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Id.* at 517. When deciding whether a special aspects exception exists, the test is "whether there is evidence that creates a genuine issue of a material fact whether there truly are 'special aspects' . . . that differentiate the risks from typical open and obvious risks." *Id.*

In *Lugo*, our Supreme Court gave two often-referenced examples of conditions that would satisfy a special aspects exception, that of a 30-foot pit and that of the "standing pool of water in front of the only exit to a premises." *Id.* at 518. The 30-foot pit meets the special aspects exception because it is a condition that creates "a substantial risk of death or severe injury," while the pool of water example creates a special aspects exception because the condition is "effectively unavoidable" for one seeking to exit the premises. *Id.* In *Hoffner*, the Supreme Court summarized these examples as representing the "two instances" that have been discussed that would create a special aspects exception because the condition is either "*unreasonably dangerous* or . . . *effectively unavoidable*." *Hoffner*, 492 Mich at 463 (emphasis in original). The *Hoffner* Court did not explicitly state that these are the only two categories of special aspects exceptions, but it did state that the "touchstone" of the analysis is whether the hazard "presents a risk of harm that is so unreasonably high that its presence is inexcusable." *Id.* at 462-463. Similarly, the Court in *Lugo* stated that "only those special aspects that give a uniquely high likelihood of harm or severity of harm . . . will serve to remove that condition from the open and obvious danger doctrine." *Lugo*, 464 Mich at 519.

In *Hoffner*, the plaintiff was a member of a fitness center owned by the defendant. The plaintiff arrived at the fitness center mid-morning and observed that the entrance was icy, but attempted to gain access anyway. The plaintiff fell while attempting to enter and sustained injuries. *Hoffner*, 492 Mich at 456-457. The Supreme Court held that this condition was not "effectively unavoidable" and that no special aspects exception existed. *Id.* at 473. The Court reasoned that the "[p]laintiff was not forced to confront the risk[;] . . . she was not 'trapped' in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Id.*

Similarly, in *Kenny v Kaatz Funeral Home Inc*, 472 Mich 929, 697 NW2d 526 (2005), the Supreme Court, "in lieu of granting leave to appeal," reversed this Court's decision for the reasons stated in the dissent. The facts showed that the plaintiff fell while traversing the defendant's snow-covered parking lot to gain access to the defendant's place of business. *Kenny v Kaatz Funeral Home Inc*, 264 Mich App 99, 115; 689 NW2d 737 (2004) (Griffin, J., dissenting). The dissent concluded that "[s]now and ice in a Michigan parking lot on December 27 are common, not unique, occurrence[s]." *Id.* at 121. The Supreme Court's adoption of the

dissent's reasoning indicates that a snow-covered parking lot is not the type of unique situation that falls within the special aspects exception.

This Court's decisions in *Joyce*, 249 Mich App at 242-243, and *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002), also indicate that visible snow and ice are open and obvious hazards. In *Joyce*, the plaintiff tripped while attempting to gain access to the defendant's home, where she had previously worked as a caregiver, to collect her belongings. *Joyce*, 249 Mich App at 242-243. We held that the plaintiff could have removed her belongings on a different day and that she also had a safer route to access the defendant's house. *Id.* at 242. We therefore held that the condition was not a special aspects exception and distinguished the *Lugo* example of a standing pool of water because the plaintiff in *Joyce* was not required to "encounter the open and obvious condition in order to get out." *Id.* Similarly, in *Corey*, we held that the snowy and icy steps outside of the defendant's dormitory did not constitute a special aspects exception. *Corey*, 251 Mich at 6-7.

The above precedent firmly establishes that snowy and wintery conditions do not give rise to a special aspects exception for someone attempting to enter a place of business. The conditions faced by plaintiff on the morning of his eye appointment were not substantially different from those confronted by the plaintiffs in *Hoffner*, *Kenny*, *Joyce*, and *Corey*. Plaintiff admitted to seeing a large amount of snow at the entrance to defendant's eye clinic, but chose to confront the hazard anyway. While, unlike in *Joyce*, 249 Mich App at 242, the record here does not definitively settle the question of whether the main entrance to defendant's clinic was a safer alternative than the side entrance plaintiff actually traversed, plaintiff was not required to confront the hazard at all; he could have simply come back another day. He thus was not "unavoidably compelled to confront" the hazard. *Hoffner*, 492 Mich at 456.

In *Hoffner*, the Supreme Court also dispelled the notion that an existing business relationship enhances the duty of the invitor. *Hoffner*, 492 Mich at 471. Having a "right to use services" does not "heighten[] a landlord's duties to remove or warn of hazards or affect[] an invitee's choice whether to confront an obvious hazard." *Id.* at 471. Therefore, the fact that plaintiff had a prior appointment at defendant's eye clinic did not enhance defendant's duty. Plaintiff argues that the standard for whether a special aspects exception exists is not whether a condition is "unreasonably dangerous" or "effectively unavoidable," but whether a reasonable premises possessor would anticipate an invitee confronting a hazard despite its open and obvious nature. However, our Supreme Court has directed that the focus must be on an "objective examination of the *premises*," not the anticipation of an invitor. *Id.* (emphasis in original). The decisions in *Kenny*, *Joyce*, and *Corey* also all focus on the nature of the hazard, not the reasonableness of the invitor. *Kenny*, 264 Mich App 119 (Griffin, J., dissenting), adopted by *Kenny*, 472 Mich at 929; *Joyce*, 249 Mich App 242-243; *Corey*, 251 Mich App 6-7.

The *Hoffner* Court held that "exceptions to the open and obvious doctrine are intended to be *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations." *Hoffner*, 492 Mich at 472 (emphasis in original). The factual similarities between *Hoffner* and the present case are great. Both accidents occurred "in Michigan's Upper Peninsula, in the dead of winter." *Id.* at 480. In both cases, the hazard was located at the entrance to a building a plaintiff had a prior interest in entering. Finally, in both cases there was nothing to suggest that the plaintiffs confronted "anything other than what every Michigan citizen is compelled to

confront countless times every winter." *Id.* We thus hold that *Hoffner* compels reversal of the trial court's denial of defendant's motion for summary disposition.

Reversed and remanded to the Dickinson Circuit Court for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra