STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. PIFER and ALLYCE K. PIFER, Plaintiffs-Appellants,	UNPUBLISHED June 6, 2013
v	No. 311361 Midland Circuit Court
DOW CHEMICAL COMPANY, Defendant-Appellee.	LC No. 10-006354-NI

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right from an order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

Although the parties dispute many of the ancillary facts in this case, they do not dispute the facts necessary to this Court's resolution of the issues on appeal. Plaintiff Thomas J. Pifer ("plaintiff") was employed by Bierlien Companies, Inc., which provided services to defendant at defendant's Midland premises. Early one January morning, plaintiff parked his car in a gravel parking lot reserved for Bierlien's employees. As he was walking from the car, he slipped and fell on snow-covered black ice and sustained injuries. Plaintiff brought a premises liability action against defendant. Defendant moved for summary disposition, arguing that the parking lot condition was open and obvious as a matter of law. The trial court determined there were no genuine factual issues and ruled that the parking lot condition was open and obvious. The court also noted that the condition was not effectively unavoidable and granted summary disposition in favor of defendant.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When analyzing a motion for summary disposition under MCR 2.116(C)(10), the court evaluates whether a genuine issue of material fact exists. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes a matter in which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Further, the court may not make factual findings on disputed factual issues during a motion for summary disposition and may not

make credibility determinations. *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004).

To prevail in a premises liability action, a plaintiff must prove the essential elements of negligence: (1) duty; (2) breach; (3) proximate causation; and (4) damages. *Jones v Enertel, Inc*, 254 Mich App 432, 436-437; 656 NW2d 870 (2002). Although premises possessors generally owe a legal duty to protect invitees from unreasonably dangerous conditions, that duty does not generally extend to protecting invitees from open and obvious dangers. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004). Our Supreme Court recently explained:

> 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. This is an *objective standard,* calling for an examination of the objective nature of the condition of the premises at issue. [*Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012) (internal quotation marks and citations omitted.]

Plaintiffs argue that they raised a genuine issue of material fact by attesting that plaintiff was unaware that the snow-covered lot was slippery and contained black ice. Essentially, plaintiffs assert that a subjective lack of awareness of the severity of the slippery condition on the lot meant that the condition was not open and obvious. However, this Court uses an objective standard when considering whether a hazardous condition is open and obvious. *Hoffner*, 492 Mich at 461. Plaintiffs admitted that the lot was covered by approximately two inches of snow. Regardless of whether plaintiff knew that ice rested beneath the snow, snow by itself is an indicia of a slippery condition, such that a reasonable person should be on notice that the road could be hazardous and should either take extra precautions or avoid the risk entirely. *Ververis*, 271 Mich App at 66-67 ("[W]e hold 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.") Because this case presents the same scenario as *Ververis*, the trial court correctly concluded as a matter of law that the snow-covered icy condition on the parking lot presented an open and obvious hazard.

Plaintiffs next argue that defendant remains liable for the hazardous condition, notwithstanding its open and obvious state, because the hazard was effectively unavoidable to plaintiff. We disagree. A premises possessor may be liable for failing to protect invitees from open and obvious conditions if the hazard contains a special aspect that renders the risk either unreasonably dangerous or effectively unavoidable. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-519; 629 NW2d 384 (2001). The *Hoffner* Court stated:

> Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is "unreasonably dangerous" because it "present[s] an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented." [*Hoffner*, 492 Mich at 462 (citation omitted).]

The risk presented by these hazards must be "so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature." *Hoffner*, 492 Mich at 462 (noting also that common conditions and avoidable conditions are not uniquely dangerous).

Plaintiffs do not contend that the snow-covered icy lot was unreasonably dangerous; rather, they argue that the condition was effectively unavoidable because plaintiff was not aware of any other means of ingress to his worksite from the parking lot and because the lot was completely covered in ice. Defendant contends that plaintiff had an alternative route because plaintiff's supervisor was willing to pick him up at his vehicle and drive him to the facility.

A hazardous condition that is avoidable by using any alternative route is not unavoidable. *Hoffner*, 492 Mich at 465-469. In the instant case, plaintiff presented no evidence that he was required to confront the slippery lot, other than as an incidental requirement of his employment. Although his attendance at the facility was necessary to maintain his employment, *Hoffner* suggests that plaintiff's personal obligation does not make the hazard effectively unavoidable. And, as the condition here was a routine one, *Hoffner* further requires us to conclude that it could not fall within the "unreasonably dangerous" exception. We thus conclude, as a matter of law, that defendant owed no duty to protect plaintiff from this hazard. Accordingly, plaintiffs failed to raise a genuine issue of material fact, and defendant was entitled to summary disposition.

Affirmed.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell