STATE OF MICHIGAN

COURT OF APPEALS

IRENE M. BROWN and GARY N. BROWN,

Plaintiffs-Appellants,

v

TAUBMAN COMPANY, L.L.C., SOUTHEAST SERVICE CORPORATION, d/b/a SSC SERVICE SOLUTIONS, and IPC INTERNATIONAL CORPORATION,

Defendants-Appellees.

UNPUBLISHED
September 24, 2009

No. 283521
Oakland Circuit Court
LC No. 2006-076956-NO

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal from a circuit court order that granted summary disposition in favor of defendant Taubman Company, L.L.C. ("Taubman") in this premises liability action. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff[1] alleges that in January 2006, she slipped and fell on black ice on the walkway leading to the entrance of a mall owned by defendant Taubman. The trial court granted defendant Taubman's motion for summary disposition pursuant to MCR 2.116(C)(10), and reasoned that the black ice was open and obvious.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the

[1] As used in this opinion, the singular term "plaintiff" refers to plaintiff Irene Brown only.

benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra*.

"A premises owner owes, in general, 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." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105; 689 NW2d 737 (2004), rev'd on other grounds 472 Mich 929 (2005). This duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). It does not extend to conditions from which an unreasonable risk of harm cannot be anticipated or to open and obvious dangers. *Id*.; *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995).

An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with ordinary intelligence would be able to discover upon casual inspection. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A landowner does not owe a duty to protect invitees from any harm presented by an open and obvious danger unless special aspects of the condition, i.e., something unusual about the character, location, or surrounding conditions, make the risk of harm unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). However, "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001) (footnote omitted).

In the absence of special circumstances, "the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 481; 760 NW2d 287 (2008) (footnote omitted). Black ice, however, is not open and obvious in all circumstances simply because it might be expected in the winter. It will be found to be open and obvious only if there is evidence that it would have been visible on casual inspection before the plaintiff's fall or there is evidence of other indicia of a potentially hazardous condition. *Id.* at 482-483.

Plaintiff testified that it was sunny and unseasonably warm on the day she fell, but had cooled down by nightfall. However, weather records indicated a daytime temperature hovering around the freezing point. Plaintiff testified that there was no snow on the ground to alert her to the possibility of ice, but David Gagnon testified that there was snow in the shrubbery adjacent to the walkway. Plaintiff testified that it was very dark by the entrance and she did not see the ice before she fell or even when she was trying to get up after she fell. She and a security officer, Matthew Karenko, were able to spot the ice without difficulty later when the area was illuminated by vehicle headlights, but Gagnon testified that when he went out to spread salt, he could not find any ice anywhere and just put salt down in the area indicated by Karenko. In light of this conflicting evidence, reasonable minds could differ regarding whether the black ice was open and obvious. Therefore, the trial court erred in granting Taubman's motion for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra