STATE OF MICHIGAN

COURT OF APPEALS

MARILYNNE BURTON,

Plaintiff-Appellant,

v

MUFFLER MAN,

Defendant-Appellee,

and

JAMES CHRISTENSEN PROPERTIES, JAMES CHRISTENSEN, CMS OIL COMPANY, INC., WILSON ASSOCIATES, HUBBELL ROTH & CLARK, INC., VILLAGE OF LAKE ORION, CARL SCHULTZ, INC., and CARL SCHULTZ,

Defendants.

UNPUBLISHED
January 12, 2010

No. 288749
Oakland Circuit Court
LC No. 2007-087750-NO

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

In this action involving a fall on snow-covered ice, plaintiff appeals by right the circuit court's order granting summary disposition to defendant Muffler Man (defendant) pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

After defendant repaired plaintiff's car, defendant's employee transported plaintiff to defendant's premises to pick up the car. The car was parked in defendant's parking lot, but at a different location than where plaintiff had originally parked it. It was cold outside and snowing "a bit." Plaintiff fell on some ice as she was walking toward her car. Plaintiff did not see the ice before she fell because snow was covering it. She had not experienced any slipperiness in the parking lot before the fall.

At her deposition, plaintiff stated that there was a retaining wall with a hole for water drainage near the area. She theorized that there was an unnatural accumulation of ice in the area where she fell because of that drain. She admitted, however, that she did not see the hole or the water drainage on the day she fell. Also, she did see any ice formations between the place where

she fell and the water drain. She did not know if ice or water had been coming out of the drain on the date of her fall, and she did not know how long the ice had been there.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the alleged hazardous condition was open and obvious, that there were no "special aspects," and that it had no notice of the condition. The circuit court granted defendant's motion.

Summary disposition should be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." We review de novo the circuit court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 65; 718 NW2d 382 (2006), this Court held "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." Plaintiff testified that it was snowing on the day she fell and that she slipped on a snow-covered surface. Pursuant to *Ververis*, the alleged hazardous condition was open and obvious as a matter of law.

Plaintiff attempts to differentiate this case from a typical snow-covered ice case by asserting that the ice was attributable to discharge from the drain in the retention wall near the area of her fall, and from a resulting pooling of water because of heaved areas of pavement. However, this distinction is factually unsupported. The evidence showed that there was a drainpipe in the retention wall near the area of the fall, but there was no evidence that the ice on which plaintiff slipped was attributable to drainage from that pipe or the condition of the pavement. Plaintiff suggests that it can be inferred that water discharged from the drainpipe and flowed to the area of her fall because she did not encounter slipperiness in other areas of the parking lot. This theory is based on pure conjecture and is not supported by evidence. There was no evidence that water was draining from the pipe at the time of the accident or that any water that may have drained from the pipe would flow in the direction of the area of plaintiff's fall. Absent such evidence, plaintiff's theory that the ice was attributable to the drainpipe is not deducible as a reasonable inference. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). "[C]ausation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying [a] defendant's motion for summary disposition." *Id*. at 172-173.

Plaintiff also argues that even if the hazardous condition was open and obvious, the unavoidability of the condition was a "special aspect" that gave rise to a duty to take reasonable measures to protect invitees from the risk. "Neither a common condition nor an avoidable condition is uniquely dangerous." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 117; 689 NW2d 737 (2004) (GRIFFIN, J., dissenting), adopted 472 Mich 929 (2005). The presence of an accumulation of snow and ice in a parking lot in winter does not present a uniquely high likelihood of harm or severity of harm. *Id*. at 121. Thus, there were no special aspects to preclude summary disposition.

For these reasons, the trial court did not err by granting defendant's motion for summary disposition. In light of our decision, it is unnecessary to address the issue of defendant's notice or whether plaintiff should have the opportunity to seek reconsideration of the trial court's order suppressing medical records.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra