STATE OF MICHIGAN

COURT OF APPEALS

GEORGE GRANTHAM,

Plaintiff-Appellant,

v

JIFFY LUBE INTERNATIONAL, INC., LUBE OIL EXPRESS, INC., GH LUBE EXPRESS and ALLSTATE INSURANCE COMPANY,

Defendants-Appellees,

and

LUBE OIL EXPRESS, INC.,

Cross-Plaintiff,

v

GH LUBE EXPRESS, INC.,

Cross-Defendant,

and

I&M DEVELOPERS, L.L.C., NESSRIN GHAZALI, ISSAM GHAZALI, RABIH GHAALE and MOHAMAD DORRA,

Third-Party Defendants.

UNPUBLISHED
June 30, 2011

No. 298673
Washtenaw Circuit Court
LC No. 09-000009-NI

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant, GH Lube Express (GH Lube). We affirm.

Plaintiff took his vehicle to GH Lube's premises for an oil change. Plaintiff drove his vehicle into the service garage, parked his vehicle, and exited his vehicle without incident. He began walking to GH Lube's office area to pay for his oil change. Once plaintiff was outside the service garage, he walked less than ten steps on the snow covered parking lot before he slipped and fell. While he was on the ground, plaintiff noted that there was oil underneath the snow.

Both defendants filed motions for summary disposition and the trial court granted both motions. On appeal, plaintiff first argues that the trial court erred in granting the motion filed by Allstate. Plaintiff asserts that, contrary to that ruling, there is a genuine issue of material fact regarding whether plaintiff was injured during the use or maintenance of his motor vehicle. We disagree.

This Court reviews the grant or denial of a motion for summary disposition under MCR 2.116(C)(10) de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought under MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. There is a genuine issue of material fact when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt*, 481 Mich 419, 425; 751 NW2d 8 (2008). This Court considers only that evidence which was properly presented to the trial court in deciding the motion. *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Statutory interpretation is a question of law that is reviewed de novo. *Allen*, 281 Mich App at 52.

The no fault act, MCL 500.3105(1), provides, "[u]nder personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." In order for a plaintiff to recover, he must establish that the "causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.'" *Thornton v Allstate Ins Co*, 425 Mich 643, 659; 391 NW2d 320 (1986). This means that the "involvement of the car in the injury should be 'directly related to its character as a motor vehicle.'" *Id*., quoting *Miller v Auto-Owners Ins Co*, 411 Mich 633, 640; 309 NW2d 544 (1981).

In looking at the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether plaintiff's injury arose out of the use or maintenance of his motor vehicle as a motor vehicle. Based on plaintiff's own testimony, there is not a causal connection between plaintiff's injury and his use of his vehicle as a motor vehicle because plaintiff's injury is not directly related to the motor vehicle's character as a motor vehicle. Contrary to plaintiff's argument on appeal, there is no causal connection between plaintiff's injury and his use of his vehicle merely because he was walking to pay for GH's active maintenance of his vehicle, the oil change, when he was injured. Plaintiff's injury was incidental to the oil change. The trial court properly granted the motion for summary disposition.

Plaintiff also argues that the oil under the snow presented a hidden defective condition. We disagree. Generally, an issue is not properly preserved for appeal if it has not been raised before, addressed, and decided by a lower court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). While the parties briefed the issue and argued it before the trial court, this issue is not preserved because the trial court did not address whether the slippery condition was open and obvious. Rather, the trial court ruled that plaintiff failed to present evidence that defendant had actual or constructive notice of the defective condition and declined to address the open and obvious arguments raised by defendant GH in its motion for summary disposition. Nevertheless, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Because consideration of this issue is necessary for a proper determination of the case, presents a question of law, and the parties presented the necessary facts, we will address this issue.

In a premises liability action, the plaintiff must prove: (1) the defendant had a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of duty caused the plaintiff's injuries; and (4) the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

In this case, plaintiff was an invitee on GH Lube's premises. In general, a premises possessor owes a duty to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not an absolute insurer of an invitee's safety to the extent that the danger is open and obvious. *Id*.

The test for whether something is "open and obvious" is objective. *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002). The test is whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon causal inspection[.]'" *Kennedy*, 274 Mich App at 713, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This means the test is not whether a particular plaintiff should have known the condition was hazardous, but whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id.* However, "in a premises liability action, the fact-finder must consider the 'condition of the premises,' not the condition of the plaintiff." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004). This Court has held that "a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006).

Plaintiff does not contest that snow presents a slippery condition that is an open and obvious danger. Rather, plaintiff alleges that the oil under the snow presented a hidden danger. However, plaintiff does not offer any evidence establishing that the slippery condition of oil is different from the slippery condition of snow or ice. Case law establishes that an individual is expected to exercise caution when approaching snow because of the likelihood that the individual could slip. Here, the slippery condition was open and obvious, even if the exact source of the slippery condition was initially unknown. We note that there may be different

types of hidden dangers under snow that would not be slippery in nature, and therefore, not necessarily open and obvious. These types of hidden dangers could include sharp objects, such as broken glass or metal pieces, or substantially uneven terrain, such as raised edges or cavities in the ground.

Plaintiff failed to offer an alternative argument regarding whether special aspects preclude application of the open and obvious doctrine and we decline to address this issue on appeal. See *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002) (failure to brief an issue constitutes abandonment on appeal). Given our conclusions on the foregoing issues, we need not address plaintiff's remaining issue.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens