STATE OF MICHIGAN

COURT OF APPEALS

MAUREEN LEFEVRE,

Plaintiff-Appellee,

v

MACK/MOROSS CORPORATION and POINTE PLAZA,

Defendants,

and

AFFILIATED HEALTH SERVICES, INC.,

Defendant-Appellant.

UNPUBLISHED
November 10, 2009

No. 287664
Wayne Circuit Court
LC No. 07-712467-NO

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

In this premises liability action, defendant Affiliated Health Services, Inc., appeals by leave granted from an order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Id.*; *Singerman v Muni Service Bureau*, 455 Mich 135, 139; 565 NW2d 383 (1997). The court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Singerman*, *supra* at 139. "The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence." *ER Zeiler Excavating, Inc v Valenti, Trobec & Chandler, Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006). "The responding party must then present legally admissible evidence to demonstrate that a genuine issue of material fact remains for trial." *Id.* "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a

matter of law." *Universal Underwriters Group v Allstate Ins* Co, 246 Mich App 713, 720; 635 NW2d 52 (2001).

Defendant first argues that plaintiff's claim is barred by the exclusive remedy provision of the Worker's Disability Compensation Act ("WDCA"), MCL 418.101 *et seq*. The WDCA provides that an employee's "right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." MCL 418.131(1). Whether a defendant is a plaintiff's "employer" for purposes of the WDCA "is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single inference." *Clark v United Technologies Automotive, Inc,* 459 Mich 681, 693-694; 594 NW2d 447 (1999). Where the evidence is disputed, or more than one inference can be drawn from the evidence, the issue is for the trier of fact. *Id.*

In determining whether an entity is a plaintiff's employer for purposes of the exclusive remedy provision, courts generally apply the "economic realities test." *Id.* at 687. This test requires the court to examine "the totality of the circumstances" and consider these factors: "'(1) the control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a certain goal.'" *Id.* at 688, quoting *Askew v Macomber,* 398 Mich 212, 217-218; 247 NW2d 288 (1976). "In evaluating all the circumstances, courts analyze the employment situation in relation to the statutory scheme of worker's compensation law with the goal of preserving and securing the rights and privileges of all the parties. No one factor controls." *James v Commercial Carriers, Inc,* 230 Mich App 533, 537; 583 NW2d 913 (1998).

Plaintiff worked for St. John Hospital and Medical Center, and the parking structure in which plaintiff was injured was leased by defendant Affiliated Health Services. Both entities are wholly owned subsidiaries of St. John Health. Therefore, the corporate structure in this case is not a parent-subsidiary relationship, such as that in *Wells v Firestone Tire & Rubber Co,* 421 Mich 641; 364 NW2d 670 (1984). The corporate structure in this case more closely resembles that found in *James, supra,* which involves wholly owned subsidiaries of a corporate parent.

In *James,* the plaintiff worked for Fleet Carrier Corporation. Fleet and the defendant Commercial Carriers, Inc., were both wholly owned subsidiaries of Ryder System, Inc ("Ryder"). Fleet sent the plaintiff to one of the defendant's locations where the plaintiff was injured. The plaintiff applied for worker's compensation benefits from Fleet and received the benefits from Ryder Automotive Operations, Inc., another wholly owned Ryder subsidiary that was responsible for administering all worker's compensation claims for Ryder and its wholly owned subsidiaries. However, the worker's compensation check indicated that the insured was Fleet. The plaintiff later filed a negligence lawsuit against the defendant. This Court concluded that the defendant should be considered the plaintiff's employer for purposes of the exclusive remedy provision of the WDCA, explaining:.

> The circuit court noted correctly that no appellate court of this state has yet found that two wholly owned subsidiaries were each deemed under the economic-reality test to be an employer of the workers of the other such that the subsidiary that was not the employer-in-fact would be shielded from tort liability by the exclusive remedy provision of the WDCA. However, we believe that

> under the totality of the circumstances of the present case, Fleet and defendant must be considered components of the same employer, their parent corporation Ryder, for purposes of the WDCA. In addition to sharing a filing for worker's compensation self-insurer status, these subsidiaries share numerous financial functions through their connection to the parent corporation. Cash management and treasury functions for all Ryder subsidiaries are performed by Ryder's central staff at its corporate headquarters in Miami. All Ryder customers send their payments to depository accounts that are dispensed into concentration accounts at the end of every day. The money in the concentration accounts is transferred into disbursement accounts that process all Ryder's subsidiaries' disbursements. Moreover, there is a unity of management between the parent corporation Ryder and each of its subsidiaries. Defendant and Fleet share the same three directors, one who is also a director, president, and CEO of Ryder, and another who is a senior executive vice president of Ryder. Defendant has twenty-seven officers and Fleet has twenty-two officers, nineteen of which they share.
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> We believe that, given the totality of the circumstances, the parent corporation Ryder should be considered plaintiff's employer for purposes of the exclusive remedy provision of the WDCA. Furthermore, we hold that defendant and Fleet are each integral components of Ryder, such that defendant is also entitled to the exclusive remedy provision. Accordingly, the trial court erred in denying defendant's motion for summary disposition. [*Id.* at pp 539, 542-543, 544-545 (citation omitted).]

In the present case, defendant Affiliated Health Services presented documentary evidence that it and plaintiff's primary employer, St. John Hospital and Medical Center, were both wholly owned subsidiaries of St. John Health, that worker's compensation benefits for all three business entities were administered jointly and paid from the same funding source, and that plaintiff received worker's compensation benefits. However, the documentary evidence did not establish whether either defendant or St. John Health could be considered plaintiff's employer under the economic realities test. No evidence was presented that St. John Health controlled plaintiff's duties, paid her wages, or had the right to hire, fire, or discipline her, or that the performance of plaintiff's duties were an integral part of St. John Health's business. *Clark, supra* at 688. Furthermore, unlike in *James*, there was no evidence that the two subsidiaries were "integral components" of St. John Health, that they "share[d] numerous financial functions through their connection to the parent corporation," or that there was "unity of management" between St. John Health and its subsidiaries. *James, supra* at 542-543. Under these circumstances, the trial court did not err in denying defendant summary disposition based on the exclusive remedy provision of the WDCA. Although further development of the evidence could lead to the conclusion that defendant is entitled to the protection of that provision, the evidence presented with the motion for summary disposition, viewed in the light most favorable to plaintiff, failed to establish that there was no genuine issue of material fact with respect to this issue.

Next, defendant argues that it is entitled to summary disposition because plaintiff is unable to establish that it had notice of the icy condition. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the

plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000). Generally, a premises possessor "owes 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." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001).[1] A business invitor is liable for injury resulting from (1) an unsafe condition that was either caused by the active negligence of itself or its employees or (2) an unsafe condition that is known to the invitor or is of such a character or has existed a sufficient length of time that the invitor should have had knowledge of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Derbabian v Mariner's Pointe Assocs LP*, 249 Mich App 695, 706; 644 NW2d 779 (2002).

Defendant did not support its position that it had no actual or constructive notice of the icy condition with documentary evidence accompanying its motion for summary disposition. No documentary evidence established what steps defendant, as the possessor of the parking structure, took that day (or routinely took) to maintain the structure and keep it free of accumulated water or ice, particularly on the open roof deck and in an area closest to the exit leading to a skywalk. *ER Zeiler*, *supra* at 644. Plaintiff, on the other hand, submitted climate data showing that there had been some rain on April 2, 3, and 4, and that the temperature had dropped to 31 degrees on both April 4 and April 5 (the day of plaintiff's fall), thereby establishing the presence of weather conditions that should have alerted defendant to the possibility that accumulated rainwater would turn into ice. Because plaintiff presented admissible evidence demonstrating a genuine issue of fact, the trial court did not err in denying summary disposition to defendant on this ground.

Finally, defendant argues that it had no duty to plaintiff because the icy condition was open and obvious. "In general, a premises possessor must exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land." *Ghaffari v Turner Constr Co*, 473 Mich 16, 21; 699 NW2d 687 (2005); see also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). "However, this duty does not generally require the removal of open and obvious dangers." *Ghaffari*, *supra*. "The standard for determining whether a particular danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

"[A]bsent special circumstances, Michigan courts have generally held that 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*, *supra* at 481. In *Slaughter*, However, his Court "decline[d] to extend the [open and obvious] doctrine to

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[1] An invitee is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).

black ice without evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition." *Id.* at 483. See also *Janson v Sajewski Funeral Home, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 284607, issued August 25, 2009).

Plaintiff testified in her deposition that she did not see the icy patch as she approached it, did not fall until she had taken a couple of steps on the ice, and did not even see the ice until she got up after she fell. Although Michigan "courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months[,]" *Slaughter, supra* at 479, the evidence of the conditions that existed at the time of plaintiff's did not give rise to notice of a potential icy condition. The fall took place in early April, and plaintiff testified that there was no accumulation of snow or ice on the roads as she drove into work that day, she did not remember the last time there had been an accumulation of snow or ice before she fell, and she did not have to scrape her car that morning. Further, there was no snow on top of the icy patch. Further, defendant failed to show that there was no genuine issue of material fact that the ice on which plaintiff fell would have been visible on causal inspection. Therefore, defendant was not entitled to summary disposition on this ground.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens