Circuit Court for Howard County
Case No. 13-C-15-106183

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1524

September Term, 2016

IRENE BOROWICZ

v.

COUNCIL OF UNIT OWNERS OF THE PINES AT DICKINSON, INC., ET AL.

Wright,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 11, 2017

On December 28, 2015, Irene Borowicz, appellant, filed a complaint in the Circuit Court for Howard County against: the Council of Unit Owners of the Pines at Dickinson, Inc. ("Council"); American Community Management, Inc. ("ACM"); and Columbia Grounds Management Corporation ("CGM") (collectively, the appellees). She alleged that she suffered injury due to appellees' negligence when she slipped and fell on ice in the parking lot of her condominium building on February 16, 2014. The appellees individually moved for summary judgment, contending that Borowicz had assumed the risk of injury by walking on patently visible ice next to her car. Following a hearing on August 26, 2016, the court granted the appellees' motions, ruling that Borowicz had assumed the risk of injury, which barred recovery. She noted this timely appeal, in which she asks one question:

> Did the trial court improperly conclude as a matter of law that the Plaintiff voluntarily assumed the risk of walking over the unplowed portion of a parking lot to reach her vehicle?

For the reasons stated below, we answer this question in the negative and affirm.

BACKGROUND

In February 2014, Borowicz lived at 7555B Weather Worn Way, Columbia, Maryland 21046, which is a condominium in the Pines at Dickinson community. From February 12-13, a series of snowstorms blanketed the area with approximately eighteen inches of snow and sleet. Prior to the snowfall, Borowicz had parked her vehicle at the end of a row in the open parking lot next to her building. On the morning of February 14th, Borowicz went outside to check her mail and clean her patio. In her deposition, Borowicz

stated that the sidewalks and stairs were cleared of snow and salted. She also took several pictures of the parking lot, which showed that a path had been plowed, but not near her car.

At 10:10 A.M. on February 14th, Borowicz sent an e-mail to the President of the Council and a representative of ACM. She complained that the company that plowed the parking lot (CGM) "did [a] very bad job" and had dumped snow behind residents' vehicles. She attached two pictures to this e-mail, showing her vehicle and a significant amount of snow behind her car. ACM responded, indicating that they would "look into" the situation. At 5:10 P.M., ACM e-mailed Borowicz, stating that CGM would "address" the issue by the "close of business today." Shortly after 8:00 P.M., Borowicz sent another e-mail, in which she stated that there was "12 FT" of snow behind her car.[1] She stated that she was leaving at 8:00 A.M. the following morning for work, and she would take a taxi or hire someone to clear snow around her car if the snow was not removed before then.[2]

On the morning of February 15th, however, Borowicz did not leave for work. Instead, she walked outside to check her mail. Seeing that there was still snow around her vehicle, Borowicz walked to a grocery store that was less than a mile away and purchased some items. At the store, she asked a clerk if he would shovel the snow from around her

[1] Presumably, Borowicz meant 12 inches. At her deposition, Borowicz, a native of Poland, stated that she has difficulty with the American system of measurement.

[2] At her deposition, Borowicz stated that she did not have regular employment at this time. Rather, she would accept "mystery shopping" appointments in which she would go to various businesses to shop and would later write a report about her experience as a customer. She said that she had accepted a mystery shopping job at a car dealership at the time of the snowstorm, but she needed her car in order to get there.

car for $40, but he declined. Borowicz returned home, and she noted that there was less snow around her car because of the sunshine that day and the one prior.

On February 16th, Borowicz was determined to drive to the grocery store and Walmart to purchase more items. Seeing that there was still snow around her vehicle, she paid a neighbor to shovel the snow from around her car. After the neighbor shoveled around the vehicle, Borowicz walked out into the parking lot and turned to approach her door from the rear of the vehicle.[3] As she approached the driver-side door, she slipped and fell, putting her left hand out to break her fall. A man walking by helped Borowicz to her feet and assisted her in getting into her car. Borowicz then drove to the grocery store and purchased some items. Then, she drove to Walmart to purchase other items.

When she returned home, however, she felt pain and observed that her left hand was purple and swollen. A neighbor drove Borowicz to the hospital, where she was treated for a fractured forearm. Her treatment eventually included two surgeries and a course of physical therapy.

On December 28, 2015, Borowicz filed suit. Because Borowicz had stated in a recorded interview on April 24, 2014, that "there was a lot of ice and snow" in the parking lot at the time of the accident, appellees individually moved for summary judgment, contending that Borowicz had assumed the risk of injury by walking on ice and snow. Following a hearing, the court granted appellees' motions.

[3] At the deposition, Borowicz drew her path of travel on a picture taken after the neighbor had shoveled around the car.

STANDARD OF REVIEW

Pursuant to Rule 2-501(f), when a party moves for summary judgment, a court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." We review the grant of a motion for summary judgment as a question of law. *See Okwa v. Harper*, 360 Md. 161, 178 (2000). We first determine if there exists a dispute of material fact, and, if not, then we "'determine[] whether the [c]ircuit [c]ourt correctly entered summary judgment as a matter of law.'" *Duffy v. CBS Corp.*, 232 Md. App. 602, 611 (2017) (quoting *James G. Davis Constr. Corp. v. Erie Ins. Exch.*, 226 Md. App. 25, 34 (2015), *cert. denied*, 446 Md. 705 (2016)). Our review is, therefore, *de novo*. *Collins v. Li*, 176 Md. App. 502, 590 (2007), *aff'd*, 409 Md. 218 (2009).

DISCUSSION

Borowicz contends that the court erred in determining that, as a matter of law, she had assumed the risk of injury by walking on the surface of the parking lot. She maintains that she subjectively lacked the knowledge of the risk of the danger of the ice underneath the snow next to her car. She relies primarily upon *Poole v. Coakley & Williams Construction, Inc.*, 423 Md. 91 (2011) and *Thomas v. Panco Management of Maryland, LLC*, 423 Md. 387 (2011). Borowicz argues, then, that the court erred in granting appellees' motions for summary judgment because whether she possessed knowledge of the risk is a question for the trier of fact. Furthermore, she contends that the court should

have submitted the issues of voluntariness and whether she had an alternative route to the trier of fact.

Appellees maintain that the court properly granted their motions. Appellees contend that courts assess whether a plaintiff had knowledge of a risk by an objective standard, especially for an obvious danger like visible ice and snow. Because a reasonable person would have appreciated that snow and ice can be slippery, appellees maintain, the court correctly determined that Borowicz assumed the risk of injury when she walked on ice and snow next to her car. Appellees distinguish the cases Borowicz relies upon as involving black ice, not white ice, which was present here. Moreover, appellees maintain, Borowicz voluntarily confronted the known risk of the ice and had other reasonable alternatives to attempting to drive her car.

This Court has explained that "assumption of the risk is an affirmative defense that completely bars a plaintiff's recovery." *Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 639 (2009). We observed that the defense "'is grounded on the theory that a plaintiff who voluntarily consents, either expressly or impliedly, to exposure to a known risk cannot later sue for damages incurred from exposure to that risk.'" *Id.* (quoting *Crews v. Hollenbach*, 358 Md. 627, 640 (2000)). To establish the defense, a defendant must prove three elements: "(1) the plaintiff had knowledge of the risk of the danger; (2) the plaintiff appreciated that risk; and (3) the plaintiff voluntarily confronted the risk of danger." *Thomas*, 423 Md. at 395.

The Court of Appeals has held that "[t]he question of whether the plaintiff had knowledge and appreciation of the particular risk at issue is ordinarily a question for the

jury, 'unless the undisputed evidence and all permissible inferences therefrom clearly establish that the risk of danger was fully known to and understood by the plaintiff.'" *Id.* (emphasis omitted) (quoting *Schroyer v. McNeal*, 323 Md. 275, 283 (1991)). In situations where "'a person of normal intelligence in the position of the plaintiff must have understood the danger,'" however, "'the issue is for the court.'" *Id.* (emphasis omitted) (quoting *Schroyer*, 323 Md. at 283-84).

Courts assess whether a plaintiff had knowledge and appreciation of the risk using an objective standard. *See Schroyer*, 323 Md. at 283. Indeed, in applying an objective standard, "'a plaintiff will not be heard to say that he did not comprehend a risk which must have been obvious to him.'" *ADM P'ship v. Martin*, 348 Md. 84, 91 (1997) (quoting *Gibson v. Beaver & S. States Howard Cnty. Petroleum Coop., Inc.*, 245 Md. 418, 421 (1967)). Accordingly, "'when it is clear that a person of normal intelligence in the position of the plaintiff must have understood the danger, the issue is for the court.'" *Id.* at 91-92 (quoting *Schroyer*, 323 Md. at 283-84). Furthermore, the Court of Appeals has "noted, with approval, the proposition formulated by Prosser and Keeton that 'there are certain risks which anyone of adult age must be taken to appreciate: **the danger of slipping on ice**, of falling through unguarded openings, of lifting heavy objects . . . and doubtless many others.'" *C & M Builders, LLC v. Strub*, 420 Md. 268, 295 (2011) (emphasis added) (quoting *Morgan State Univ. v. Walker*, 397 Md. 509, 515 (2007)). Because the circuit court in this case determined that Borowicz assumed the risk as a matter of law, the dispositive inquiry, then, is whether she had knowledge and appreciation of a risk that a reasonable person would have.

The danger of slipping on ice is one that a reasonable adult "'must be taken to appreciate.'" *Id.* (quoting *Walker*, 397 Md. at 515). For example, in *Schroyer*, *supra*, McNeal slipped on ice in a hotel parking lot. 323 Md. at 276-77. McNeal conceded that the main lobby area of the parking lot was "reasonably" clear of ice and snow, but the rest of the parking lot "had neither been shoveled nor otherwise cleared of the ice and snow." *Id.* at 278. She, nevertheless, requested a room near an exit because of her need to "cart" boxes and paperwork from her car to her room. *Id.* In parking near her room, she "parked on packed ice and snow." *Id.* Furthermore, she observed that the sidewalk near the entrance had not been shoveled, and that it was slippery. *Id.* at 278-79. She slipped in traversing the icy surface. *Id.* at 279.

The Court of Appeals determined that McNeal "took an informed chance" because she was "[f]ully aware of the danger posed by an ice and snow covered parking lot and sidewalk, [but] she voluntarily chose to park and traverse it[.]'" *Id.* at 288. "With full knowledge that the parking lot and sidewalk were ice and snow covered and aware that the ice and snow were slippery, McNeal voluntarily chose to park on the parking lot and to walk across it and the sidewalk, thus indicating her willingness to accept the risk" and relieve the hotel owners of liability. *Id.* McNeal had, therefore, assumed the risk as a matter of law. *Id.* at 288-89.

In *Martin*, *supra*, Martin slipped on an icy sidewalk when she was making a delivery. 348 Md. at 88. She testified that when she arrived to make the delivery, she observed that ice and unplowed snow "surrounded" the building she needed to enter. *Id.* She believed that she would face negative job consequences if she failed to make the

delivery. *Id.* at 88-89. Martin slipped in exiting her vehicle and retrieving the blueprints she was to deliver, but she managed to hold onto the car and avoid falling. *Id.* at 89. On the return trip, however, she slipped and fell, sustaining injury. *Id.* The Court of Appeals concluded that Martin had knowingly and voluntarily encountered a known risk. *Id.* at 103.

In *Walker*, *supra*, the Court of Appeals determined that a parent had assumed the risk of injury when she traversed an icy parking lot in order to visit her daughter. 397 Md. at 511. The parent, Walker, stated that as she drove her car onto the parking lot, she "noticed that she was driving on 'crunchy ice and snow.'" *Id.* Additionally, she observed snow and ice on the ground between her car and her daughter's dorm. *Id.* at 512. Walker successfully traversed the uncleared lot – holding onto parked cars as she walked – and icy stairs and visited her daughter. *Id.* On the return trip, however, still observing ice and snow and still holding onto parked cars as she walked, she slipped and fractured her leg. *Id.*

The Court of Appeals determined that Walker had assumed the risk as a matter of law. *Id.* at 514. The Court remarked that Walker's "own testimony made clear that she was aware of the snow and ice in the parking lot." *Id.* at 519. Furthermore, Walker's "behavior demonstrates that she was also aware of the risk, and appreciated the risk, of danger of walking on snow and ice." *Id.*

Those cases are applicable here. The snow and ice next to Borowicz's car were visible and obvious to her, and a reasonable person would have appreciated the risk of walking on that snow and ice. Indeed, Borowicz admitted that there was snow and ice on the surface of the parking lot next to her vehicle. In a recorded phone conversation in April 2014, Borowicz stated that "there was a lot of ice and snow on the parking [lot]." At her

deposition, Borowicz agreed with one of appellees' counsel's statement that "there was snow and ice on the parking lot, and that you decided to walk across it anyway[.]" Additionally, Borowicz stated that she could see the ice around her car prior to her attempt to walk on it. Furthermore, in a photograph that Borowicz took after the neighbor had shoveled snow – the picture on which Borowicz had drawn her path of travel – the snow and ice are clearly visible around her car. Because this snow and ice was patently obvious, and a reasonable person would have appreciated the risk of slipping on that ice and snow, we conclude that Borowicz assumed the risk of injury, and the court correctly granted appellees' motions.

The cases that Borowicz relies upon are inapposite. We explain. In *Poole*, *supra*, Poole slipped and fell while walking across a parking lot to get to his place of employment. 423 Md. at 98-99. He believed that he slipped on black ice, which the Court of Appeals defined as "a unique weather condition that does not necessarily pose the same risk as snow or visible 'white ice.' Black ice is difficult to see because it reflects less light than regular ice, and therefore does not appear glossy or slick[.]" *Id.* at 99 n.2. At the time of the incident, construction was being done, and a company was pumping water onto the parking lot, resulting in a small stream leading to a drain. *Id.* at 99-100. Poole stated that he did not see any ice. *Id.* at 100.

The Court of Appeals contrasted Poole's case with *Walker*, *Martin*, and *Schroyer* and observed that the snow and ice in those cases was visible and obvious. *Id.* at 117. The Court noted that Poole had seen ice on other parts of the parking lot that he chose not to traverse, "but that he did not see ice, or suspect that it could be, in the stream of water that

he believed would be a safe path to the building." *Id.* at 118. The Court concluded that Poole could not be held to have assumed the risk as a matter of law because "one's ability to identify black ice, when by its nature it is not perceivable or knowable until the moment of experience, means the danger is not necessarily patent." *Id.* at 119. As such, the issues of whether Poole knew of and appreciated the risk of black ice were for the finder of fact. *Id.* at 119-21.

Similarly, in *Thomas*, *supra*, Thomas slipped on an icy sidewalk in front of her apartment building. 423 Md. at 390-91. When she returned home from work, she observed that the ice and snow that had been present that morning had melted, and the sidewalk was wet. *Id.* at 392. In returning from taking her granddaughter to a church meeting, Thomas noted that the sidewalk was still wet, but there was no salt or melting pellets. *Id.* When she left to go pick up her granddaughter, she slipped on the sidewalk on black ice. *Id.* The Court of Appeals concluded that Thomas had not assumed the risk as a matter of law for the same reasons explained in *Poole*. *Id.* at 398. It was, therefore, a jury question as to whether Thomas had knowledge and appreciation of the black ice. *Id.* at 401-02 (explaining that evidence that the high temperature on the day of the accident was fifty-one degrees, that Thomas had traversed the sidewalk without incident two hours prior to the accident, and that the temperature fell below freezing just an hour prior to the accident supported an inference that Thomas did not know about the ice).

Accordingly, *Poole* and *Thomas* involved encounters with black ice, not visible white ice, as in this case. Unlike in *Poole* and *Thomas*, where "the facts and inferences applicable to the issue of [the plaintiff's] knowledge lend themselves to more than one

conclusion[,]" *id.* at 402, the facts and inferences in Borowicz's case lend themselves to one conclusion – namely, that a reasonable person would have known of and appreciated the risk involved in walking across visible snow and ice.

To the extent that Borowicz challenges whether she voluntarily encountered that risk – the final element necessary for the affirmative defense of assumption of the risk – we conclude that she did. Although Borowicz contends that she was trapped in her condominium and that she could not leave because of the negligence of appellees, the evidence presented does not support her.

Discussing the voluntariness of encountering a risky situation, the Court of Appeals has commented that "'if the plaintiff proceeds to enter voluntarily into a situation which exposes him to the risk, notwithstanding any protests, his conduct will normally indicate that he does not stand on his objection, and has consented, however reluctantly, to accept the risk[.]'" *Martin*, 348 Md. at 92 (quoting W. PAGE, PROSSER & KEETON ON THE LAW OF TORTS § 68 at 490 (5th ed. 1984)). Stated another way, a plaintiff's action is voluntary where he or she "'is acting under the compulsion of circumstances, not created by the tortious conduct of the defendant, which have left him [or her] no reasonable alternative.'" *Thomas*, 423 Md. at 403 (quoting *Martin*, 348 Md. at 93). In a situation where the defendant did not create the risk to the plaintiff, "'and the plaintiff finds himself confronted by a choice of risks, or is driven by his own necessities to accept a danger, the situation is not to be charged against the defendant.'" *Id.* at 403-04 (quoting *Martin*, 348 Md. at 93).

In this case, Borowicz voluntarily confronted the risk posed by the icy parking lot. She testified that she was determined to drive her car that day, notwithstanding that she

had walked to the store the previous day. Moreover, she stated that she had clear ingress and egress from her condominium, and she was not trapped. As such, the court correctly concluded that Borowicz had assumed the risk as a matter of law and properly granted appellees' motions.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.