# S T A T E  O F  M I C H I G A N

# C O U R T  O F  A P P E A L S

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| CHRISTINE BLUE,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 13, 2009 |
| v<br><br>ST. JOHN HOSPITAL AND MEDICAL CENTER,<br><br>Defendant-Appellant. | No. 284769<br>Wayne Circuit Court<br>LC No. 06-609722-NO |

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Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this premises liability action, defendant appeals by leave granted the circuit court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for entry of judgment in favor of defendant.

Plaintiff initiated this action after she sustained injuries when she slipped and fell on snow-covered ice in defendant's parking structure. On appeal, defendant argues that the circuit court erred by denying its motion for summary disposition because it lacked notice of the alleged snowy and icy conditions that caused plaintiff's injury, because such conditions were open and obvious, and because it had no duty to remove the snow and ice while it was still snowing.

Summary disposition is properly granted under MCR 2.116(C)(10) when there remains no jury-submissible question of material fact and the moving party is entitled to judgment as a matter of law. We review de novo a circuit court's grant or denial of a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When reviewing a motion brought under MCR 2.116(C)(10), we consider the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id*. We limit our review to the evidence presented to the circuit court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

"To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). An invitor "has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to . . . inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any

discovered hazards." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).

The parties do not dispute plaintiff's status as an invitee when she slipped and fell in defendant's parking lot. Plaintiff testified that on the morning of the incident, she accompanied her friend, Cathy Warrick, to a doctor's appointment at defendant's hospital. When they arrived at the hospital, plaintiff dropped Warrick off at the door and then parked her vehicle in defendant's parking structure.

An invitor is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the invitor or is of such a character or has existed a sufficient length of time that he should have had knowledge of it. *Hampton v Waste Mgmt of Mich, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). Turning to the present case, there is simply no evidence in the record to establish that defendant or its employees caused the ice to form beneath the snow. Likewise, there is no evidence that defendant had *actual* knowledge of the ice beneath the snow. Therefore, the question presented here is whether defendant had *constructive* notice of a dangerous condition on its premises.

Plaintiff argues that the winter weather conditions should have placed defendant on constructive notice that ice had formed in its parking lot. In contrast, defendant relies on *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706-707; 644 NW2d 779 (2002), in which the defendant had no notice of icy conditions in its parking lot where "it had not snowed for several days, had only rained a few hours before reverting to freezing temperature[s]," and no other person, including the plaintiff, had observed the relatively small ice patch *before* the plaintiff fell.

In this case, plaintiff testified that it began to snow overnight and that when she woke up that morning, the temperature was cold. Plaintiff stated that she observed heavy snowfall, significant winds, and blowing snow that morning. At about 7:00 or 7:30 a.m., approximately two inches of snow had already accumulated on plaintiff's vehicle. According to plaintiff's testimony, the weather conditions in this case differ from those at issue in *Derbabian*. However, plaintiff could not establish how long the ice patch had existed before she fell. Therefore, as in *Derbabian*, plaintiff has not shown that the ice patch existed long enough that defendant should have had knowledge of it.

Plaintiff also argues that defendant's facilities remained open to its patrons during the snowstorm and that defendant therefore should have been more diligent in discovering the ice before she arrived. But this argument requires conjecture. "[I]f the evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established. In other words, we cannot permit the jury to guess." *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001) (quotation marks, citations, and emphasis omitted). Even if there was ice beneath the snow, there was no evidence to establish *how long* it had been present. Accordingly, any jury would have been required to merely speculate concerning whether the ice had existed long enough that defendant should have discovered it. We cannot conclude that defendant had constructive notice of the snow-covered ice.

But even assuming arguendo that the weather conditions placed defendant on constructive notice, summary disposition should have been granted in favor of defendant because plaintiff failed to raise a genuine issue of material fact regarding whether the alleged snow-covered ice was open and obvious and whether the snow-covered ice presented any special aspects that would preclude application of the open and obvious danger doctrine.

Generally, an invitor is not required to protect an invitee from open and obvious dangers. This is because when the potentially dangerous condition is wholly revealed by casual observation, the duty to warn serves no purpose. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008). A condition is open and obvious if an average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Id.* at 478-479. However, when the condition is effectively unavoidable, or when the condition imposes an unreasonably high risk of severe harm, the condition is said to bear "special aspects" that reinstate the invitor's duty to undertake reasonable precautions to protect invitees from the open and obvious danger. *Id.*

Plaintiff argues that the snow-covered ice was not open and obvious because an average person of ordinary intelligence could not have perceived it in time to avoid the danger. Plaintiff testified that she drove into defendant's parking structure and parked her vehicle in the first available space. Plaintiff then exited her vehicle and proceeded to walk down the ramp. Plaintiff observed that the entire ramp was covered with snow. However, plaintiff did not notice any ice underneath the snow. While walking and carrying Warrick's son in her arms, plaintiff encountered a slippery surface at the bottom of the ramp, which caused her to slip and fall to the ground. While on the ground, plaintiff observed the ice underneath approximately one and a half inches of snow. Plaintiff testified that she pushed aside some of the snow to uncover more of the ice because she wanted to determine why she had fallen.

In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006), this Court held as a matter of law that "a snow covered surface presents an open and obvious danger because of the high probability that it may be slippery," and that the presence of snow should alert a reasonable Michigan resident of the possibility that ice may have formed below the surface. Here, plaintiff testified that she could see snow covering the entire ramp as she walked from her vehicle toward defendant's hospital. Although plaintiff did not see any ice until *after* she fell, the presence of snow was a sufficient warning of the high probability that the surface was slippery. *Id.*; see also *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007).

Plaintiff argues that the snow-covered ice presented "special aspects" because it was effectively unavoidable and imposed an unreasonably high danger of severe harm. In *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 514; 629 NW2d 384 (2001), the plaintiff fell after stepping into a pothole in the defendant's parking lot. The plaintiff's recovery was precluded by the open and obvious danger doctrine because she did not establish that the pothole presented special aspects that created an unreasonable risk of harm. In *Lugo,* the Supreme Court illustrated conditions that presented special aspects, such as "a commercial building with only one exit for the general public where the floor is covered with standing water" or "an unguarded thirty foot deep pit in the middle of a parking lot." *Id.* at 518. While both of these types of hypothetical conditions would be open and obvious, the risk of harm would remain unreasonable, despite their

obviousness. *Id.* at 516-517. Consequently, in each scenario, the invitor would retain a duty to protect an unsuspecting invitee from the unreasonable danger.

Plaintiff contends that even if the snow-covered parking lot was open and obvious, it would have been impossible to detect the presence of ice beneath the snow. According to plaintiff's testimony, she alighted from her vehicle without incident. Plaintiff took several steps down the snow-covered ramp before encountering the hidden ice that caused her fall. Plaintiff argues that she could not have avoided the danger presented by the snow-covered ice because a uniform blanket of snow covered the parking lot. She also contends that she walked along the most direct path from her vehicle to defendant's pedestrian bridge.

Unlike the hypothetical dangers presented in *Lugo*, plaintiff did not encounter a condition that was "effectively unavoidable" in the instant case. Plaintiff's path through the snow-covered parking structure was not the only path available to her. It is undisputed that plaintiff could have taken other stairwells to reach defendant's hospital. Although plaintiff maintains that the weather conditions were blizzard-like and that the entire parking structure was covered with snow, she presented no evidence to the circuit court to establish that the other routes available to her were also underlain by slippery ice. With no evidence that these other routes presented the same slipping hazard as was presented by the route plaintiff actually took, we simply cannot conclude that the condition was effectively unavoidable. Nor can we conclude that plaintiff faced an "unreasonably dangerous" condition. Citing numerous statistics, plaintiff challenges the logic underlying our case law holding that falling from a standing position does not present an unreasonably high risk of harm. However, contrary to plaintiff's argument, slipping on snow and ice during a snowstorm simply does not present a "uniquely high likelihood" of severe harm. *Id.* at 518-519. The risk presented by the snow-covered ice in this case was open and obvious, and no special aspects made the condition "effectively unavoidable" or "unreasonably dangerous."

We note that defendant contends that it had no duty to protect plaintiff from the hazard presented by the snow-covered ice in its parking lot because plaintiff fell while the snow continued to fall. In support of its argument, defendant cites *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004), in which our Supreme Court stated:

> Under *Lugo*, a premises possessor must protect an invitee against an "open and obvious" danger only if such danger contains "special aspects" that make it "unreasonably dangerous."
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> Thus, in the context of an accumulation of snow and ice, *Lugo* means that, when such an accumulation is "open and obvious," a premises possessor must "take *reasonable measures within a reasonable period of time after the accumulation of snow and ice* to diminish the hazard of injury to [a plaintiff]" only if there is some "special aspect" that makes such accumulation "unreasonably dangerous." [Emphasis added.]

Similarly, in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975), our Supreme Court noted:

> While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a *duty to exercise reasonable care to diminish the hazards of ice and snow accumulation*. . . . As such duty pertains to ice and snow accumulations, it will require that *reasonable measures be taken within a reasonable time after an accumulation of ice and snow* to diminish the hazard of injury to the invitee. [Emphasis added.]

Whether measures are reasonable within the meaning of *Mann* and *Quinlivan* depends upon the circumstances presented in each case. In some cases a warning may suffice, whereas other circumstances may require affirmative action by the invitor. In this case, plaintiff testified that two inches of snow had already accumulated before she departed from her house at approximately 7:00 or 7:30 a.m. While walking through defendant's parking lot, plaintiff observed the accumulated snow, and therefore knew or should have known that there was a likelihood of icy or slippery conditions underneath the snow cover. On the particular facts of this case, we cannot conclude that defendant acted unreasonably by waiting until the blizzard-like snowstorm had stopped before removing the snow from its parking structure or warning its invitees of the potentially dangerous condition. See *Ververis*, 271 Mich App at 67.

In sum, plaintiff has failed to establish that defendant had notice of the hazard presented by the snow and ice in its parking lot, that the condition was not open and obvious, and that the condition presented special aspects that would preclude application of the open and obvious danger doctrine. Considering the record evidence in a light most favorable to plaintiff, we perceive no disputed material facts. Defendant was entitled to judgment as a matter of law.[1]

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction. As the prevailing party, defendant may tax costs under MCR 7.219.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

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[1] We note that plaintiff has also argued that even if the icy condition was open and obvious, defendant had an independent duty to clear the ice from its parking area under a city of Detroit ordinance. However, although such ordinances create a public duty, there is no private right of action for their enforcement. *Taylor v Saxton*, 133 Mich App 302, 306; 349 NW2d 165 (1984).

# STATE OF MICHIGAN

# COURT OF APPEALS

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| CHRISTINE BLUE,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 13, 2009 |
| v<br><br>ST. JOHN HOSPITAL AND MEDICAL CENTER,<br><br>Defendant-Appellant. | No. 284769<br>Wayne Circuit Court<br>LC No. 06-609722-NO |

Before: Stephens, P.J., and Jansen and Wilder, JJ.

STEPHENS, J. (*dissenting*)

I disagree with the majority's opinion that the trial court erred in denying the defendant's motion for summary disposition. The majority has correctly stated the law in Michigan from *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004), which requires us to find that the condition which led to the plaintiff's fall was open and obvious. The majority also applied the appropriate rule of law that finds that the risk of falls on ice does not constitute an unusually high risk of harm. Unlike my colleagues, however, I find the trial judge did not err in finding that the condition was effectively unavoidable and that defendant had constructive notice of its existence.

## I. EFFECTIVELY UNAVOIDABLE

It is helpful to define the term effectively unavoidable. In the seminal case of *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 514; 629 NW2d 384 (2001), the Court, by way of example, offered a water-covered floor as a situation where the risk was effectively unavoidable and created high degree of likely harm. Since the term was coined in *Lugo* the courts have endeavored to give it practical meaning. In *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005), the court rejected the concept that effectively unavoidable meant that the invitee is required to refuse the business owner's invitation to access the premises and must go elsewhere. The published case law on this issue is scant. However, in the unpublished case of *Schaaf v Pullman,* unpublished opinion of the Court of Appeals, issued August 6, 2009 (Docket No 282234), this court determined that a risk is effectively unavoidable if there is no other reasonable alternative. Surely, the courts would not require the invitee to increase her risk of harm to avoid the open and obvious condition. It is reason that is the base of our tort law. In this case the majority has written that the open and obvious condition that was connected to plaintiff's fall was not effectively unavoidable. They state that there were stairwells available to

her. We are confined to the record presented to the trial court in our review. The defense admits that there was snow on the uncovered areas of the parking structure. The only available avenue to access a stairwell would have required that plaintiff ambulate up a ramp covered with snow to traverse toward a stairwell. Plaintiff specifically denied that there was a stairwell that she could have gotten to from her car. Defendant did not offer a schematic diagram or any other evidence to demonstrate that this was not true. Any reasonable doubt on factual questions in a motion for summary disposition must be resolved in favor of the nonmoving party. *West v General Motors Corp*, 467 Mich 177, 183; 665 NW2d 468 (2003). The trial court, therefore correctly opined that there was evidence that the condition was effectively unavoidable.

The majority, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975), has found that even if there was constructive notice of the condition at issue they could not find that defendant's actions in waiting until after the snowstorm ended were unreasonable. The majority has recognized that the reasoning of *Quinlivian* belies the conclusion that under all circumstances a premises owner has no duty to warn or protect an invitee from the risk of ice underneath snow until after the snow ceased. The facts in the light most favorable to plaintiff are that the snow continued unabated for several hours, the premises was open to business invitees and their cars, the structure was open to blowing and blustering snow and defendant did nothing. A premises owner is bound to act reasonably under the circumstances presented. It is for the jury to decide what, if anything, this defendant should have done where it invited the public to use its parking structure.

## II. NOTICE

A premises owner must have either actual or constructive notice before the duty to warn or protect an invitee accrues. The determination of whether there is constructive notice is fact dependent. *Hampton v Waste Mgmt of Mich, Inc*; 236 Mich App 598, 604; 601 NW2d 172 (1999). In general all persons are held to have constructive knowledge that ice may be under snow. This court has announced, "as a matter of law[,] . . . by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes* (On Remand), 271 Mich App 61, 67; 718 NW2d 382 (2006). The condition in this case is very different from the circumstances in *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706-707; 644 NW2d 779 (2002). In *Derbabian*, the plaintiff fell on a small patch of ice created days after the last snowfall. *Id*. at 698-699. The ice was created when rain fell on the snow and was subject to freezing hours before her fall. *Id*. In the instant case, plaintiff testified that when she awoke there was a 2-inch accumulation of snow on her vehicle. The snow was blowing due to a blustery April wind. The plaintiff testified that her driving speed was reduced due to the weather conditions. She further testified that the patch of ice that she observed while on the ground covered over a foot of ground surface. The court received internet records that indicated that the airport area that was miles west of the premises where the incident occurred experienced temperatures on April 4, 2003, that ranged between 30-35 degrees, which provided the opportunity for melting and re-freezing. Those papers report that a light rain replaced the snowfall with less than one inch of additional precipitation. However, where the record offers no basis for admissibility of these hearsay documents the court cannot use these statements to create a question of fact. *Maiden v Rozwood*, 461 Mich 109, 597 NW2d 817 (1999). Therefore, the court correctly found that the plaintiff met her burden of going forward with evidence that the nature and duration of the weather condition provided the defendant with constructive notice of the risk.

## III. CONCLUSION

Because the evidence properly submitted to the trial court demonstrated that the dangerous condition was effectively unavoidable and that defendant was on constructive notice of the existence of the dangerous condition, the trial court did not err in denying defendant's motion for summary disposition. I would therefore affirm.

/s/ Cynthia Diane Stephens