STATE OF MICHIGAN

COURT OF APPEALS

PHILIP ROBERTSON and SHARON ROBERTSON, Plaintiff-Appellee/Cross-Appellants,	FOR PUBLICATION November 8, 2005 9:00 a.m.
v	No. 254052 St. Clair Circuit Court
BLUE WATER OIL COMPANY, Defendant-Appellant/Cross Appellee.	LC No. 01-001223 Official Reported Version

Before: Kelly, P.J. and Meter and Davis, JJ.

Kelly, P.J. *(dissenting).*

I respectfully dissent. I would conclude that the trial court erred in denying defendant's motions for summary disposition, directed verdict, and judgment notwithstanding the verdict because the icy condition of the premises was not "effectively unavoidable." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001). Accordingly, I would reverse.

I. Applicable Law

"Generally, a premises possessor owes a duty of care 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." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004). This duty does not encompass a duty to protect an invitee from known or "open and obvious" dangers unless the premises possessor should anticipate the harm despite the invitee's knowledge of the condition. *Lugo, supra* at 516. The invitor has a duty to take reasonable precautions to protect invitees from an open and obvious danger only "if special aspects of a condition make even an open and obvious risk unreasonably dangerous . . . ." *Id.* at 517.

This Court has repeatedly recognized that the risks of falling on snow or ice are open and obvious. *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 5; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002). Thus, defendant did not have a duty to protect plaintiff from the dangers associated with the ice-covered lot unless there were special aspects of the condition. Special aspects may impose a duty to warn or protect against even an open and obvious condition when evidence creates a

genuine issue of material fact whether the condition is "effectively unavoidable" or when special aspects of the condition create "an unreasonably high risk of severe harm." *Lugo, supra* at 518. "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519.

We apply an objective analysis to determine whether evidence of special aspects exists. Our Supreme Court explained in *Mann, supra* at 328-329:

> To determine whether a condition is "open and obvious," or whether there are 'special aspects' that render even an "open and obvious" condition "unreasonably dangerous," the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard. That is, in a premises liability action, the fact-finder must consider the "condition of the premises," not the condition of the plaintiff. [Citations omitted.]

Generally, a special aspect is one that is unusual in character, location, or surrounding conditions. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). When considering whether a condition has a special aspect, "it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case." *Lugo, supra* at 518 n 2. An open and obvious accumulation of snow and ice, by itself, does not feature any special aspects. See *Mann, supra* at 332-333.

II. Analysis

As noted by the majority, there is no serious dispute that the parking lot was openly and obviously icy. Yet the majority concludes that the conditions were "effectively unavoidable." I disagree.

Plaintiff erroneously analogizes his fall on the ice with the *Lugo* decision's example of a special aspect that involved "a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water." *Id*. at 518. In the *Lugo* example, the potential plaintiff was *required* to confront an *unexpected* risk. In other words, the plaintiff was already in the fictitious defendant's building and had no alternative but to walk through the water in order to have access to the exit. This example in *Lugo* differs markedly from the facts of this case.

Here, plaintiff was not required to confront an unexpected risk, nor was he "effectively trapped." Plaintiff could have gone to a different service station to make his purchases of fuel, coffee, and windshield washer fluid. Although the majority contends that there was no evidence that any available alternatives existed, the record reveals otherwise. Plaintiff testified that he was aware of other 24-hour service stations around the interstate, some of which were truck stops. Nothing prevented plaintiff from shopping at any of these other stations. Nor was there anything about defendant's premises that forced him to cross the icy premises to reach defendant's store. Plaintiff 's desire or need to purchase coffee and washer fluid, compelling as it may have been in

plaintiff's opinion, does not affect the legal duties defendant owed to plaintiff. To conclude otherwise impermissibly shifts the focus from an examination of the premises to an examination of the personal circumstances of plaintiff. Plaintiff admitted he was aware of the icy conditions and chose to traverse the area. Under these circumstances, the icy condition of the parking lot was not "effectively unavoidable."

Because plaintiff did not establish a special aspect of the icy lot sufficient to remove it from the application of the open and obvious doctrine, I would reverse.

/s/ Kirsten Frank Kelly