STATE OF MICHIGAN

COURT OF APPEALS

HELEN PALMER and ALMONT PALMER,

Plaintiffs-Appellants,

V

CENDANT CORP, d/b/a KNIGHTS INN, DHARMESH B PATEL, d/b/a KNIGHTS INN, JAYANTI PATEL, and PARESL PATEL,

Defendants-Appellees.

UNPUBLISHED
September 20, 2002

No. 234006
Wayne Circuit Court
LC No. 00-002589-NO

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's grant of summary disposition to defendants in this premises liability action.[1] We affirm.

I. Facts and Proceedings

On January 30, 1999, plaintiffs began their annual winter trip to Florida, leaving their home in Redford, Michigan that morning and driving as far as Chattanooga, Tennessee. Plaintiffs had not made any hotel reservations for that night, but decided to stop in Chattanooga and look for a Ramada Inn. As they exited I-75, however, they saw a sign for the new Knights Inn and decided to stay there. It had been raining hard when plaintiffs decided to stop.

Plaintiff Almont Palmer parked the car in front of the main entrance to the hotel, and he and his wife went inside to check in. After getting their room key, plaintiffs drove their car down to the entrance toward the end of the hotel, parked, and went inside. At approximately 6:30 or 6:45 p.m., they left the hotel to go eat dinner. When they exited the hotel, they saw the restaurant across the street, and decided to eat there. Because the restaurant was so close, plaintiffs decided to walk, rather than drive, to the restaurant. It was already dark outside, and it was still raining. To reach the restaurant, plaintiffs walked across the area of the parking lot where their car was parked, crossed a grassy area, and then crossed the street, ending up at the restaurant.

[1] Plaintiff Almont Palmer's claim was for loss of consortium.

Plaintiffs left the restaurant around 8:00 p.m. Rather than walking the same route back to the hotel, however, they walked on a sidewalk from the exit of the restaurant to the street, crossed the street, walked "down a little ways," and then started to walk up the driveway of the hotel because there was no walkway. The ground was wet when plaintiffs left the restaurant, and it was still drizzling rain. When plaintiffs got about three quarters of the way up the driveway, they moved over for an exiting vehicle, and plaintiff Helen Palmer fell. She stated that because of the slope in the driveway (she was going uphill when she fell), her feet went out from under her and she fell on the wet asphalt, landing on her back. Helen stated that the area was dimly lit, that she did not trip on the curbing adjacent to the area where she fell, and that there was no ice on the pavement where she fell. Almont Palmer and the driver of the exiting vehicle helped Helen stand, and then plaintiffs walked inside the hotel where Almont told the person working at the front desk that his wife had fallen.

When plaintiffs arrived in Fort Lauderdale on February 1, 1999, Helen sought medical help and was diagnosed with a broken humerus. Plaintiffs returned to Michigan on February 3, 1999, and Helen later had surgery to repair her injury.

Plaintiffs originally filed suit against Knights Inn, Dharmesh B. Patel (the franchise owner of the Chattanooga hotel and joint owner of the premises), and Jayanti and Paresl Patel (the other joint owners of the premises). They alleged that Helen fell "due to the slanted nature of the driveway, which was slippery because of the rain, and was poorly lit," and that defendants had breached their duty to construct the parking lot/driveway without "a dangerous slant where pedestrians would be required to walk" and to construct it using a non-slip material. Plaintiffs also claimed that defendants breached their duties to provide a safe walkway away from traffic, to properly light the area, to obviate the dangers of the driveway, and to warn plaintiff of the dangers presented.[2]

In their first amended complaint, plaintiffs added Cendant Corporation (the owner of the national Knight's Inn chain) as a defendant, alleging that because Cendant owned the rights to the Knights Inn trademark, nationally marketed the Knights Inn trademark, and had entered into a franchise agreement with defendant Dharmesh Patel for the Knights Inn in Chattanooga, Cendant was liable to plaintiffs for the same breaches of duty alleged against the other defendants.[3]

Defendants moved jointly for summary disposition and argued that the condition of the wet pavement was open and obvious and did not constitute a defective condition. Defendants

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[2] These defendants moved for dismissal of plaintiffs' suit based on lack of personal jurisdiction, and the trial court denied the motion. Whether the trial court properly concluded that there was personal jurisdiction over the defendants is not before us in this appeal.

[3] Cendant was not a party to the suit at the time the first motion to dismiss for lack of personal jurisdiction was filed, and filed a separate motion to dismiss on its behalf. The trial court did not rule on this motion before granting summary disposition in favor of all defendants. Thus, whether personal jurisdiction properly rested against Cendant is also not before us in this appeal

also argued that plaintiffs failed to state a cognizable claim against Cendant because it did not have possession or control of the premises. In response, plaintiffs argued that the open and obvious doctrine does not apply to a hazard caused by a natural accumulation of precipitation; that despite the obviousness of the hazard, the risk of harm remained unreasonable; and that the open and obvious doctrine does not apply to plaintiffs' claims that defendants created and maintained an unreasonably hazardous premises that did not have reasonable means of ingress and egress for pedestrians.

The trial court granted defendants' motion, stating that the slope of the driveway and its slippery nature because of the rain were open and obvious and that cars being driven on a driveway do not present any unique circumstances. Additionally, the trial court rejected plaintiffs' natural accumulation argument because it was not supported by law, and because there was no showing as to how water removal could reasonably be accomplished. The trial court also found that the open and obvious doctrine applies to design defect claims. Plaintiffs now raise these three arguments on appeal.

II. Standard of Review

This court reviews decisions on motions for summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). The trial court did not state on what grounds it based its ruling, but because it looked beyond the pleadings to the evidence presented, its ruling was based on MCR 2.116(C)(10). *Steward v Panek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 222847, decided 6/4/02), slip op at 5. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claim. *Id.* at 5-6. The moving party has the initial burden of showing that no genuine issues of material fact exist. *Veenstra, supra* at 163. In order to avoid summary disposition, the opposing party must produce evidence demonstrating that factual issues remain. *Id.* "Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Id.* The court must view all of the evidence in a light most favorable to the non-moving party. *Id.* at 164. Summary disposition is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Steward, supra* at 6.

III. Analysis

A. The Open and Obvious Doctrine Applies to Design Defect Claims

The trial court correctly decided that the open and obvious doctrine applies to plaintiffs' design defect theory. Although plaintiffs claim that the doctrine generally applies to unintended surface defects or other obstructions, this Court's decisions in *Milliken v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490; 595 NW2d 152 (1999), and *Joyce v Rubin*, 249 Mich App 231, 235-237; 642 NW2d 360 (2002), demonstrate that it applies to design defect claims as well. In *Milliken*, this Court addressed whether the open and obvious doctrine applies only to claims based on a failure to warn theory. *Id.* at 491. The plaintiff in that case specifically claimed that the doctrine did not apply to her allegation that the "defendant had failed to maintain the premises in a reasonably safe condition by placing the support wire [that she tripped over] where

it did." *Id.* In its analysis, this Court cited language in *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-96; 485 NW2d 676 (1992), that recognized the open and obvious doctrine as an attack on the duty element of a "'prima facie negligence case,' not just a failure to warn case." *Id.* at 495-496. Additionally, the Court noted that the *Bertrand* Court stated that the doctrine applies to "harms 'caused by a dangerous condition of the land' or 'any activity or condition on the land.'" *Id.* at 496. The *Milliken* Court concluded that "the doctrine protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, regardless of the alleged theories of liability." *Id.* at 497. The Court in *Joyce* reaffirmed the holding of *Milliken. Joyce, supra* at 235-237. Because plaintiffs' design defect claim concerned a condition on the land, the open and obvious doctrine applies.

B. The Risk of Harm Was Not Unreasonable

Generally speaking, a possessor of land owes an invitee a duty 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*, 464 Mich 512, 516; 629 NW2d 384 (2001). An "integral part of the definition of that duty" is the open and obvious doctrine. *Id.* To determine if a condition is open and obvious, the court looks at whether "an average user of ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Joyce, supra* at 238, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Here, there is no dispute that Helen Palmer was aware of the slope of the driveway and that it was wet. Plaintiffs do not claim that the condition was not open and obvious. Instead, they argue that the wet pavement, the incline or the driveway, the foreseeable pedestrian traffic, the fact that restaurants were locked across the street, and the lack of safe, alternative means of ingress and egress created an unreasonable risk of harm, raising a question of fact for the jury as to whether defendants breached their duty of care.

We disagree. In *Lugo, supra*, the Michigan Supreme Court clarified the extent of a possessor's duty regarding an open and obvious condition. When a condition is open and obvious, the Court stated, the possessor will not be liable unless the condition presents an unreasonable risk to the invitee. *Id.* at 516. Specifically,

> if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. [*Id.* at 516-517, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).]

The Court further stated that "special aspects" of an open and obvious condition can make it unreasonably dangerous. *Id*. at 517. As the Court concluded,

> the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517-518.]

Potential special aspects of a condition include its unavoidability. *Id.* Here, plaintiffs claim that they were forced to walk along the wet, sloped driveway. However, they admittedly *chose* to walk, rather than drive, to the restaurant. Additionally, Helen Palmer testified that they did not consider simply retracing the path they took to the restaurant, but instead took the closest route. Although plaintiffs dispute that walking across the wet lawn was a viable option, they were able to walk across the lawn without slipping on their way to the restaurant. Accordingly, plaintiffs have not presented evidence that the condition was unavoidable.

Other potential special aspects of a condition include those that "give rise to a uniquely high likelihood of harm or severity of harm." *Id.* at 519. The condition presented here—a wet, sloped driveway—does not present such a tremendous risk. There is nothing in the record to suggest that water was rushing down the incline or that plaintiffs were wading through the parking lot. Rather, it had merely been drizzling at the time of Helen's fall. The pavement was simply wet. Furthermore, the fact that there were cars driving in the parking lot does not make this condition unreasonably dangerous. In *Lugo*, the Court stated that although the plaintiff in that case claimed she was distracted by moving cars in the parking lot, "[t]here is certainly nothing 'unusual' about vehicles being driven in a parking lot, and, accordingly, this is not a factor that removes this case from the open and obvious danger doctrine." *Id.* at 522. Based on the foregoing, plaintiffs have not demonstrated that the condition presented an unreasonable risk of harm. Accordingly, the open and obvious doctrine precludes liability. *Lugo*, *supra* at 517-518.

C. The "Natural Accumulation" Doctrine Does Not Apply

The trial court correctly concluded that the "natural accumulation" theory does not apply in this case.

In *Corey v Davenport College (On Remand)*, 251 Mich App 1, 8; ___NW2d___(2002), this Court recently held that:

> [a]fter analyzing both *Lugo* and *Joyce*, we conclude that these prior analyses in *Quinlivan* and *Bertrand* on the interplay between the open and obvious danger doctrine when it involves snow and ice and the newly refined definition of open and obvious in *Lugo* can only mean that the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo*. Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious. [*Id.* at 8.]

Based on *Corey*, then, the issue becomes whether the rain on the pavement made the condition unreasonably dangerous. Consistent with the analysis above, we find that ordinary rainwater does not "give rise to a uniquely high likelihood of harm or severity of harm." *Lugo*, *supra* at 519.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder