STATE OF MICHIGAN

COURT OF APPEALS

JOHN DELAY and VICKI DELAY,

Plaintiffs-Appellants,

v

McLAREN REGIONAL MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
December 13, 2002

No. 239768
Genesee Circuit Court
LC No. 01-069408-NI

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order granting summary disposition to defendant in this negligence case. We affirm.

On January 12, 2001, plaintiffs filed a complaint alleging that plaintiff John Delay (hereinafter "Delay") sustained a broken leg and other injuries on February 18, 2000, when he slipped while walking in a Flint parking lot owned by defendant. The complaint asserted that Delay, at the time of the accident, was employed by Burns Security, was assigned to the McLaren Regional Medical Center, and slipped on ice in the parking lot while "in the process of getting a car for a person who was at the hospital." Plaintiffs alleged that defendant negligently failed to maintain the parking lot in a safe condition, negligently failed to inspect the parking lot, and negligently failed to remove snow and ice from the parking lot. Delay's wife, Vicki, claimed loss of consortium as a result of Delay's injuries.

On December 14, 2001, defendant moved for summary disposition under MCR 2.116(C)(10), claiming that (1) the "natural accumulation of snow and/or ice" on which Delay allegedly slipped was an open and obvious condition with respect to which no duty existed; (2) defendant was not negligent because it "complied with its obligation to take reasonable measures within a reasonable period of time after the accumulation [of] snow and ice to diminish the hazard . . .;" and (3) Delay, as an employee of Burns Security, which contracted with defendant, was a co-employee of defendant and thus was obligated to use workers' compensation as his exclusive remedy.

Defendant attached to its motion the deposition of Delay. Delay testified, in part, as follows: The accident occurred around 8:30 p.m. – after dark – on the day in question. The temperature was "approximately 28 degrees," and there "was a wet snow, on and off," that had been occurring all day and that was sticking to the ground. He was assigned to a security cruiser

by Burns Security. In the evenings, it was his job to retrieve vehicles from the hospital's valet parking lot. He drove to the lit valet lot to retrieve a vehicle and noted that "there [were] no tracks in any of the snow, and the snow was approximately four inches deep, five inches deep." It appeared to him that the lot had not been cleared that day, despite the wet and heavy snow. As he was clearing the windows of the vehicle he had set out to retrieve, he slipped on some ice hidden underneath the snow and broke his leg. He had to have a plate and screws installed in his leg.

Delay admitted that "there was a lot of snow" and that "they attempted to keep [the lots] clear the best they could . . . ." He further admitted that he did not complain to anyone that the lots had not been sufficiently cleared on the day in question.

Among other documents, defendant also attached to its motion the deposition of Rande Lake, a maintenance supervisor with defendant. Lake testified that no formal records were kept regarding when each lot was plowed on the day in question but noted that "[w]e followed our policy and our practices." He testified that overtime employees were brought in to clear snow that day and that the valet lot was likely cleared of snow approximately every hour. He also noted that a process was in place by which security employees could contact the engineering department through the operator if they believed that a particular area needed plowing. He stated:

> It can be done one of several ways. A phone call to our office should be general operating hours [sic] and we'll relay the message to the folks that are outside. The operator takes calls and relays by means of radio, a handy talky [sic] that the truck drivers carry with them or snowplow drivers carry with them. And the crew themselves are in communication with each other as they're out in the lots taking care of business.

Lake asserted that security people in the past had "[a]bsolutely" contacted the engineering department to clear snow "when they [saw] the need in a particular area . . . ."

On December 26, 2001, plaintiffs filed an answer to defendant's motion for summary disposition, arguing that (1) the open and obvious defense was unavailable in this case because Delay was required to enter the parking lot, despite the danger, as part of his job; (2) there were questions of fact regarding whether defendant's snow-clearing efforts on the day in question were adequate; and (3) Delay was not required to seek solely workers' compensation benefits because defendant did not meet its burden of establishing that it and Burns Security were co-employers.

Among other documents, plaintiffs attached to their answer a report filed by another Burns Security employee who was working on the evening in question. The report noted that the snow in the lot was approximately four to five inches deep and that the "lots had not been plowed or salted yet."

The trial court ruled for defendant, relying on *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001).[1] The court stated that the snow was "four or five inches" high and was "open and obvious to the plaintiff on this particular occasion." The court further stated:

> In this particular situation it's open and obviously, as indicated, the snow, and ice accompanies snow, it has been snowy wet all day and the Court believes that the Court has no choice but to grant the motion under *Lugo* and *Denoyer*.

The trial court rendered no decision on the workers' compensation issue, finding that it had too little information to do so. The court later denied plaintiffs' motion for reconsideration, stating that "there is nothing unusual about finding snow and ice in a parking lot in Michigan during a winter storm" and that "[t]he risk did not remain unreasonable despite its obviousness, and despite knowledge of it by the invitee."

Plaintiff now asks us to reverse the trial court's grant of summary disposition to defendant. We decline to do so.

We review a trial court's grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a motion granted under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to determine if any genuine issue of material fact exists. *Wilcoxon, supra* at 357-358. We resolve all legitimate inferences in favor of the nonmoving party. *Id*. at 358.

Plaintiffs contend that the trial court should not have granted summary disposition to defendant because the parking lot was unreasonably dangerous. Plaintiffs concede for purposes of appeal that the danger was open and obvious[2] but contend that because Delay was *required* to walk across the parking lot as part of his job, and because the parking lot was dangerous, the open and obvious defense was inapplicable. Plaintiffs cite *Lugo, supra* at 517-518, in support of this proposition. In *Lugo, supra* at 517, the Court stated:

> In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

The *Lugo* Court went on to note that an "effectively unavoidable" open and obvious condition could be considered unreasonably dangerous. *Id.* at 518. As an example, the Court mentioned "a commercial building with only one exit for the general public where the floor is covered with standing water." *Id.* at 518.

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[1] The trial court also relied on the unpublished case of *Denoyer v Freedman*, unpublished opinion per curiam of the Court of Appeals, issued August 15, 2000 (Docket No. 218963), in which the Court held that a mail carrier had no cause of action for negligence after she slipped and fell on an obviously snowy and icy porch.

[2] Despite plaintiffs' concession, we nonetheless explicitly find that the trial court did not err in concluding that the condition was open and obvious.

Plaintiffs contend that the ice and snow at issue in this case are comparable to this example taken from *Lugo*. Plaintiffs argue that because Delay *had* to traverse the ice and snow or else suffer consequences with regard to his job, the condition was unreasonably dangerous. While this argument has some appeal in light of the example set forth in *Lugo*, we note that the *Lugo* example is obiter dictum because it was not necessary to the disposition of the case. See, generally, *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 730 n 5; 609 NW2d 859 (2000). Accordingly, because the example is obiter dictum, it is not binding upon this Court. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 216; 625 NW2d 93 (2000).

A more instructive, and, in our view, dispositive, case is *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002). In *Joyce*, the plaintiff, who had been working as a live-in caregiver for one of the defendants, contended that the icy steps on which she fell while moving her belongings were unreasonably dangerous because she was essentially forced to use the steps. *Id.* at 233, 241. The plaintiff contended that her employer demanded she move from the house in question on a snowy day and "refused to provide safety measures or an alternative route" for moving her belongings. *Id*. This Court stated:

> Though Joyce says that she had no choice but to traverse the slippery walkway to the front door, she presents no evidence that the condition and surrounding circumstances would "give rise to a uniquely high likelihood of harm" or that it was an unavoidable risk. First, Joyce could have simply removed her personal items another day or advised Debra Rubin that, if Rubin did not allow her to use the garage door, she would have to move another day. Further, unlike the example in *Lugo*, Joyce was not effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out. [*Id.* at 242 (emphasis in original).]

In the instant case, Lake specifically testified that a process was in place by which security personnel could contact the engineering department to deal with unplowed lots, and Delay admitted that he did not contact anyone about the valet lot being dangerous. Delay could have notified the person whose vehicle he was attempting to retrieve from the valet lot that he had to wait for the snow and ice to be cleared before the vehicle could be retrieved. Delay proffered no evidence that he would have suffered adverse job consequences for doing this. Moreover, Delay was not "effectively trapped inside a building so that [he had to] encounter the open and obvious condition in order to get out." *Id.* Accordingly, we hold that "no reasonable juror could conclude that the aspects of the condition were so unavoidable that [Delay] was effectively forced to encounter the condition."[3] *Id.* at 242-243.

In light of *Joyce*, we hold that the trial court did not err in granting summary disposition to defendant.

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[3] Moreover, although plaintiffs do not explicitly argue to the contrary, we note for the sake of completeness that the open and obvious condition itself (i.e., without regard to its avoidable or unavoidable nature) was not "so unreasonably dangerous that it would create a risk of death or severe injury." *Joyce, supra* 243.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter