

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT JACKSON, JR,

Plaintiff-Appellant,

v

LONE STAR STEAKHOUSE & SALOON OF
MI, INC.,

Defendant-Appellee.

UNPUBLISHED
December 8, 2005

No. 256332
Saginaw Circuit Court
LC No. 02-046078-NO

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

SCHUETTE, J. (*dissenting*).

I respectfully dissent from the majority opinion and would affirm the trial court's grant of summary disposition for defendant.

I conclude that the trial court correctly found that the condition on defendant's premises was open and obvious and that there were no special aspects that turned it into an unreasonably dangerous condition. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The change in elevation between the parking lot and the land behind the curb was visible in photographs supplied to the lower court by plaintiff. Additionally, the snow covering the curb area put plaintiff on notice that he could not see the surface beneath. Thus, after identifying the presence of a curb partially obscured by snow, an average user would be put on notice of the potential danger of stumbling on an unseen uneven surface beneath the snow and behind the curb. *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The danger presented was also avoidable as plaintiff admitted that had he approached the car door from the rear of his vehicle, he would not have had to step back into the snow to enter the car. The danger presented was avoidable and because it did not give rise to an unreasonably high risk of severe harm, there were no special aspects to the condition and it was open and obvious. *Lugo, supra* at 517. I would therefore affirm the trial court's grant of summary disposition to defendant.

/s/ Bill Schuette