STATE OF MICHIGAN

COURT OF APPEALS

BETTE BALL,

Plaintiff-Appellant,

v

FLORIN MICU and ANTONETA MICU,

Defendants-Appellees.

UNPUBLISHED
January 15, 2009

No. 280762
Oakland Circuit Court
LC No. 2006-078824-NO

Before: Murphy, P.J., and K.F. Kelly and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition in this premise liability action involving a slip and fall. Because the icy condition of the porch was open and obvious and no special aspects existed making the porch unreasonably dangerous, we affirm.

On February 23, 2005, plaintiff, Bette Ball, a long-time Michigan resident, slipped and fell while visiting the home of defendants Florin and Antoneta Micu. On the morning of the incident, it was very cold and there was snow on the ground. Plaintiff entered the home through the front entrance that had a raised threshold from the porch level to the inside of the house. The porch had not been salted and was constructed with white ceramic tile. Plaintiff noticed that the tile was "very shiny" and as a result, she was careful when she crossed the porch to enter the home through the front door. As plaintiff exited the home, she stepped down from the threshold onto the porch and slipped landing on the porch. According to plaintiff, she did not see the ice on the porch because it was "invisible." When lying on the porch, plaintiff could see a small patch of ice. As a result of her slip and fall, plaintiff seriously injured her left knee.

"This Court reviews a trial court's summary disposition decision de novo." *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 509; 739 NW2d 402 (2007). "This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). Under MCR 2.116(C)(10), a motion for summary disposition should be granted if the "proffered evidence fails to establish a genuine issue regarding any material fact." *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002), quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "In deciding a motion brought under subrule C(10), a court considers all the evidence, affidavits, pleadings, and admissions in the

light most favorable to the nonmoving party." *Royce v Chatwell Club Apts*, 276 Mich App 389, 391; 740 NW2d 547 (2007).

The general rule is the owner of the premises owes a duty to the invitee "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 Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not extend to dangers that are "open and obvious." *Mann v Shusteric Enterprise*, 470 Mich 320, 328; 683 NW2d 573 (2004). "The test to determine if a danger is open and obvious is whether 'an average user with ordinary intelligence (would) have been able to discover the danger and the risk presented upon causal inspection.'" *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002), citing *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). "Because the test is objective, this Court 'look(s) not to whether plaintiff should have known that the (condition) was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Corey*, *supra* at 5 (internal quotations and citations omitted).

In *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005) (*Kenny II*), the Michigan Supreme Court reversed this Court's decision in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004) (*Kenny I*) for the reasons stated in the dissent. The case centered on whether the ice on which the plaintiff slipped and fell in a parking lot was open and obvious. *Kenny I*, *supra* at 101. In his dissent, Judge Griffin concluded the ice was open and obvious because the plaintiff's companions held onto the vehicle for balance, it was snowing outside, and, the plaintiff was a lifelong Michigan resident who should have been aware "that ice frequently forms beneath snow during snowy December nights." *Id.* at 119-120 (Griffin, J., dissenting). Judge Griffin came to this conclusion even though the black ice was not easily visible and was camouflaged by snow. *Id.* at 118 (Griffin, J., dissenting). Additionally, our Supreme Court has held that frost and ice present on a roof is open and obvious. *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002) ("There was nothing hidden about the frost or ice on the roof, and anyone encountering it would become aware of the slippery conditions.").

This Court has recently held that a question of fact existed regarding whether an average person of ordinary intelligence upon casual inspection would have been able to discover the danger and risk presented by black ice without the presence of any other indicia of a potentially hazardous condition. *Slaughter v Blarney Castle Oil Co*, ___ Mich App ___, ___; ___ NW2d ___ (2008), lv pending. In *Slaughter*, the plaintiff was an invitee at a gas station some time between midnight and 1:00 a.m. When the plaintiff exited her truck, she stepped out and placed her left foot on black asphalt paved ground and immediately lost her footing on black ice. The plaintiff fell and slid under her truck. Though the ground was slippery, plaintiff was not able to observe ice or snow before she fell and could not readily see it after she fell. There was no snow on the ground and it had not snowed that day nor any time during the prior week. Under those circumstances, this Court concluded a question of fact existed regarding whether black ice without the presence of snow is an open and obvious danger. *Id.*

The facts presented in the instant case are similar to *Kenny I*, *supra*, in that the white ceramic tile on the porch arguably camouflaged the ice, but dissimilar to *Slaughter*, *supra*. The ice was open and obvious because plaintiff was a long-time Michigan resident who was familiar with Michigan winters, was aware it had snowed recently, the adjacent ground surrounding the

porch was clearly snow-covered, and it was very cold the morning of the accident. Most importantly, unlike the plaintiff in *Slaughter*, plaintiff here was aware of the snowy conditions and even recognized the possible presence of ice on the porch on her way into the house. Plaintiff admitted that the porch looked "shiny" when she entered the house, and thus she crossed the porch carefully the first time. All of these factors combined would alert a reasonable person of the foreseeable danger of slipping on ice while walking across a shiny white ceramic tile porch during a Michigan winter.

Because the ice was appropriately considered open and obvious, this Court must determine whether "there existed a special aspect of the slippery condition of the [porch] that made the risk unreasonably dangerous and gave rise to a duty on behalf of defendant to take reasonable measures to protect invitees from the risk." *Royce, supra* at 394-395. "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 that risk from typical open and obvious risks . . . ." *Lugo, supra* at 517. Therefore, "only 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 doctrine." *Id*. at 519. To illustrate conditions that would remove a condition from the open and obvious danger doctrine, the Court provided two examples: 1) "a commercial building with only one exit for the general public where the floor is covered with standing water" making it "effectively unavoidable," and; 2) "an unguarded thirty foot deep pit in the middle of a parking lot" that presents "a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition." *Id*. at 518.

In *Joyce, supra* at 233, 238, the plaintiff slipped and fell on the snowy sidewalk and was injured while retrieving her belongings from a home. The plaintiff argued that the snowy and icy sidewalk was unavoidable because she asked for an alternative route and the homeowner denied a mat and the requests. *Id* at 241. However, this Court ruled the condition was not unavoidable because the plaintiff "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).

Here, there is no evidence to support plaintiff's contention that the icy condition of the porch was unavoidable. Plaintiff entered the building without a problem, never complained or voiced concern about the condition of the porch, and did not ask for an alternative route. Under these circumstances, no reasonable juror could conclude, "that the aspects of the condition were so unavoidable that [plaintiff] was effectively forced to encounter the condition." *Joyce, supra* at 242-243.

Additionally, the condition of the porch was not unreasonably dangerous. In *Lugo, supra* at 519, the Court used the example of an "unguarded thirty foot deep pit in the middle of a parking lot" to demonstrate what condition would qualify as "unreasonably dangerous." This Court has also held "[t]he risk of slipping and falling on ice is not sufficiently similar to those special aspects discussed in *Lugo* to constitute a *uniquely high* likelihood or severity of harm and remove the condition from the open and obvious danger doctrine." *Royce, supra* at 395-396 (emphasis in original). And in *Perkoviq, supra* at 19-20, our Supreme Court held that the "mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition." In this case, there also was not a high likelihood of severe harm from slipping and falling on an icy porch. The porch and conditions as they existed did not create an

unreasonably dangerous condition such that it should be considered a special aspect removing it from the doctrine of open and obvious dangers.

Affirmed. Defendants having fully prevailed on appeal, are awarded costs under MCR 7.219.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio