STATE OF MICHIGAN

COURT OF APPEALS

ROBERT RICHARDSON and JEAN RICHARDSON,

Plaintiffs-Appellees,

v

ROCKWOOD CENTER, L.L.C.,

Defendant-Appellant,

and

EMILIA A. BARBU and DIANA E. BARBU,

Defendants.

FOR PUBLICATION
April 12, 2007
9:05 a.m.

No. 274135
Wayne Circuit Court
LC No. 05-502369-NI

Official Reported Version

Before: Wilder, P.J., and Sawyer and Davis, JJ.

DAVIS, J. (*dissenting*).

I respectfully dissent.

The facts in this case center around what is commonly known as a "strip mall," a kind of shopping center with a central parking lot bordered by a row of stores, all of which front on a shared, unenclosed sidewalk. A double lane for vehicular traffic runs parallel to the sidewalk, between the stores and the actual parking area. Thus, shoppers are required to traverse the vehicular traffic lanes on foot when walking from their cars to the stores. Defendant Rockwood Center, L.L.C., is the owner of the shopping center at issue here. As the majority explains, plaintiff Robert Richardson was leaving one of the stores in defendant's shopping center and crossing the second, outgoing traffic lane, when he was struck by an automobile driven by Diana Barbu. Barbu reported that she was unable to see plaintiff because of the sun in her eyes, but she braked to slow down before striking plaintiff. Pertinent to this appeal is plaintiff's premises liability action against defendant Rockwood Center.

I would first note that this case comes before us on a summary dismissal pursuant to MCR 2.116(C)(10). At issue, therefore, is only whether there exists a genuine factual question to be resolved at a trial. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). A "mere promise" to establish a factual question or the "mere possibility" that one might arise is

insufficient. *Id*. at 121. However, all the submitted evidence "and all legitimate inferences" must be viewed in the light most favorable to the party opposing the motion. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). The party opposing the motion is further entitled to the benefit of any reasonable doubt. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

It is worth additionally noting that there is also no dispute that plaintiff was a commercial business invitee of defendant, and was therefore owed by defendant "the highest level of protection under premises liability law" to make the premises reasonably safe. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597, 604; 614 NW2d 88 (2000). There is no dispute that the traffic lanes were in fact unmarked and lacking in any sort of control device, sign, or other marking to designate a safe—or even merely specified—place for pedestrians to cross those lanes. The premises did, however, feature a designated area for returning shopping carts, and it was while plaintiff was attempting to return a cart to this location that he was struck. There is also no dispute that any would-be shopper on defendant's premises would need to cross those traffic lanes in order to conduct any shopping.

The majority correctly explains, as the parties also agreed below, that

> [t]he focus is on the condition of the premises. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004). If the risk of harm remains unreasonable despite the obviousness or despite knowledge of it by the invitee, then the special aspects of the circumstances may be such that the invitor is required to undertake reasonable precautions within a reasonable time to diminish the hazard. *Id*. at 332; *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (applying 2 Restatement Torts, 2d, §§ 343 & 343A). Special aspects that serve to remove a condition from the open and obvious danger doctrine are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." *Lugo, supra* at 519. [*Ante* at ___.]

There is no dispute in this case that any hazards inherent in defendant's premises were open and obvious.

There is no need to determine "whether the hazards associated with a pedestrian moving through a parking lot and across traffic lanes to a store are open and obvious." Again, an affirmative answer with respect to these premises was agreed on at the outset. The only real dispute here is whether there exists a genuine factual question whether the hazards on defendant's premises present a uniquely high likelihood of harm or severity of harm if the risk is not avoided, such that defendant may be liable for them despite their openness and obviousness. As the majority observed, "defendant would have no liability in the absence of 'special aspects' that 'make a risk of harm unreasonable nonetheless,' irrespective of the specific kind of negligence alleged." *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). "'Special aspects' exist if the condition 'is effectively unavoidable' or constitutes 'an unreasonably high risk of severe harm.'" *Id*. at 593, quoting *Lugo*, *supra* at 518. Thus, the determination of "special aspects" only requires one *or* the other of these conditions to be met. The case relied on by the majority, *Kirejczyk v Hall*, unpublished opinion per curiam of the Court of Appeals,

issued November 5, 2002 (Docket No. 233708), is not, in my opinion, dispositive because it is unpublished and therefore not binding, MCR 7.215(J)(1), but more importantly, it involved a plaintiff who was injured as a *motor vehicle passenger* in an accident *between motor vehicles* in a parking lot.

The parties finally agreed below, correctly, that the focus was not on Barbu's driving. However, the majority focuses in part on how a driver should respond to a pedestrian. I certainly do not disagree with the responsibilities the majority ascribes to drivers as a general matter. However, I do not see how that could possibly absolve the owner of a commercial property laid out as this one is from taking steps to minimize the very apparent hazard. As a practical matter, a parking lot and vehicular ingress and egress lanes that put drivers in immediate proximity to pedestrians as they enter or exit the stores is likely to result in injury—particularly if either the driver or the pedestrian or both are negligent, which is certainly within the average realm of contemplation. Therefore, I believe the majority's focus on the driver's responsibility is not relevant to the issue of the landowner's responsibility.

The majority relies on Judge Griffin's observation that "[n]either a common condition nor an avoidable condition is uniquely dangerous." *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 117; 689 NW2d 737 (2004) (Griffin, J., dissenting), adopted 472 Mich 929; 697 NW2d 526 (2005). In *Kirejczyk*, this Court observed that the parking lots of many businesses lack traffic control devices or signage. However, Judge Griffin and the case on which he relied for that statement, *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 8-9; 649 NW2d 392 (2002), were discussing snow and ice accumulation. In *Corey*, the plaintiff was aware of the icy condition of some steps and an alternate route, but attempted to use the steps nevertheless; this Court found that the condition was open and obvious and avoidable, and falling down three steps was not the kind of unreasonably dangerous condition implied by the *Lugo* example of falling down a thirty-foot pit. *Corey*, *supra* at 6-9. In *Kenny*, the plaintiff observed others keeping themselves from slipping by holding onto cars before she herself walked around her car and slipped on ice; Judge Griffin concluded that the absence of other parking spaces did not automatically make the ice unavoidable, and ice and snow in Michigan did not present a *uniquely high* risk of likely or severe harm to a lifelong Michigan resident. *Kenny*, *supra* at 119, 121. The fact that many businesses have parking lots without traffic control devices or signage is not a "common condition" in the same sense as natural ice and snow accumulation. There are many potential variables just in design or traffic flow alone that may heighten or reduce the hazard.

A fair reading of the pertinent portion of *Lugo* is that our Supreme Court intended effective unavoidability and unreasonably high risk of severe harm to be two *illustrative examples* of situations featuring "special aspects," rather than an exclusive list. See *Lugo*, *supra* at 516-520. The common thread is that, despite a danger being open and obvious, some characteristic of the hazard nevertheless impedes a person's ability to effectively evade the danger to which he or she might be exposed.

The hazard here is not static, like a pool of water or a thirty-foot pit. In fact, as suggested above, the hazard actually involves at least one person other than the plaintiff. A plaintiff can control his or her own actions, but not those of someone else. As agreed, there is no way for any invitee on defendant's premises to avoid crossing traffic lanes. Similar to a fall into a large and

equally dangerous open pit in a parking lot, a person on foot being struck by a moving automobile, even one traveling at the relatively low speeds of a parking lot, presents a clear and substantial risk of death or severe injury. It may be impossible to make interaction between vehicles and pedestrians *totally* safe. However, where the commercial design requires the patron to cross two lanes of vehicular traffic from the designated parking area to the sales floor and then back again on exiting, it sets up an abnormally dangerous dynamic. Under *Lugo*, "special aspects" would be present if the danger was unavoidable *or* if it would pose an unreasonably high risk of severe harm if not avoided. Here, the evidence tends to show that the premises actually satisfy both of the options set forth in *Lugo*. Reasonable minds surely can differ regarding whether under such circumstances the landowner, having allowed the hazard for the purpose of conducting commerce, has an obligation to his or her business invitees to manage and minimize this hazard in some reasonable way.

The trial court was correct in denying summary disposition to defendant Rockwood Center.

/s/ Alton T. Davis