STATE OF MICHIGAN

COURT OF APPEALS

THERESA ROYCE and CARL ROYCE, Plaintiffs-Appellees/Cross-Appellants,	FOR PUBLICATION August 7, 2007 9:00 a.m.
v	No. 266682 Genesee Circuit Court
CHATWELL CLUB APARTMENTS, a/k/a TOBIN GROUP, Defendant-Appellant/Cross-Appellee.	LC No. 04-080383-NO Official Reported Version

Before: Servitto, P.J., and Jansen and Schuette, JJ.

SERVITTO, P.J.

Defendant appeals by leave granted the circuit court's order denying in part its motion for summary disposition in this premises liability action involving a slip and fall. Plaintiffs cross-appeal as of right the same order granting in part defendant's motion for summary disposition under MCR 2.116(C)(10). Because the slippery condition of the parking lot where the fall occurred was open and obvious and no special aspect making the condition unreasonably dangerous existed, and because defendant could not rely on the open and obvious danger doctrine to avoid its statutory duty under MCL 554.139, we reverse and remand for further proceedings.

This case arises out of a slip and fall that occurred in defendant's parking lot on February 5, 2003, while plaintiffs resided at defendant's apartment complex. Plaintiff Theresa Royce[1] left her apartment at approximately 7:00 that evening intending to get into her vehicle, which was parked in front of her apartment. It was dark outside and snow covered the ground. As she stepped off the sidewalk into the parking lot, she slipped on snow-covered black ice and slid

[1] Because Carl Royce's claim is derivative in nature, we employ the singular term "plaintiff" to refer to Theresa Royce only.

underneath her car. She did not see the ice before she fell and discovered it only after she tried to get up. She was seriously injured and ultimately underwent surgery on her left knee.

Defendant moved for summary disposition, arguing that the black ice in the parking lot was an open and obvious condition and that a lessor's duty under MCL 554.139 does not extend to snow and ice removal. The trial court denied defendant's motion for summary disposition as it pertained to plaintiff 's common-law premises liability claim, but granted summary disposition to defendant on plaintiff 's statutory duty claim. This appeal followed.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). 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. *Id*. at 30-31.

Defendant argues that the trial court erred by denying its motion for summary disposition regarding plaintiff 's common-law claim because the dangerous condition of its premises was open and obvious and there existed no special aspects making the condition unreasonably dangerous. "In general, a premises possessor owes a duty to an invitee[2] 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, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not extend to open and obvious dangers, however, unless a special aspect of the condition makes even an open and obvious risk unreasonably dangerous. *Id.* at 517. In such cases, the premises possessor has a duty to take reasonable measures to protect invitees from that risk. *Id.*

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection." *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard. *Id.* at 428.

In *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 114; 689 NW2d 737 (2004) (*Kenny I*), rev'd 472 Mich 929 (2005), this Court reversed the trial court's order granting the defendant funeral home summary disposition based on the open and obvious danger doctrine when the plaintiff slipped and fell on snow-covered black ice in the defendant's parking lot. In *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005) *(Kenny II)*, however, our Supreme Court reversed this Court's decision for the reasons stated in Judge GRIFFIN's

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[2] A tenant is an invitee of a landlord. *Benton v Dart Properties Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006).

dissent in *Kenny I*. In that case, the plaintiff argued that the open and obvious danger doctrine did not apply because the black ice took on the color of the pavement beneath the ice and was not easily visible, the ice was virtually undetectable in the darkness, and the ice was covered with snow. *Kenny I, supra* at 118 (GRIFFIN, J., dissenting). In his dissenting opinion, Judge GRIFFIN adopted the trial court's reasoning, which noted that the plaintiff was 79 years old, had lived in Michigan her entire life, and had witnessed many snowfalls. Therefore, the trial court concluded that she should have been aware that ice frequently forms underneath snow. The trial court also noted that the plaintiff observed other persons traveling with her grab onto the car to keep their balance after getting out of the car. For these reasons, Judge GRIFFIN opined that the hazardous condition of the parking lot was open and obvious and that no special aspect existed that created a uniquely high likelihood or severity of harm. *Id.* at 118-122.

In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61; 718 NW2d 382 (2006), this Court addressed whether the potential danger of a snow-covered surface is open and obvious in and of itself even absent some other factor indicating that the surface is slippery, such as the fact that persons held onto a car for balance in *Kenny I*. Regarding the trial court's opinion in *Kenny I*, later adopted by Judge GRIFFIN and our Supreme Court, this Court stated:

> Thus, the trial court's reasoning suggested two possible rules. First, a snow-covered surface might always, by its very nature, present an open and obvious danger because it is likely to be slippery as a result of underlying ice or for some other reason. Alternatively, a snow-covered surface would not present an open and obvious danger unless there is some other reason, in the facts of a particular case, that would lead a plaintiff to reasonably conclude that it is slippery. [*Ververis, supra* at 65.]

The *Ververis* Court noted that the plaintiff in that case slipped and fell on a snow-covered surface while entering a bowling alley and that no other independent factor alerted him to the fact that the surface was slippery. *Id.* at 63, 66. This Court considered orders of our Supreme Court based on *Kenny II* and concluded as a matter of law that "by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Id.* at 67. Thus, this Court held that the defendant bowling alley was entitled to a directed verdict even though no independent factor alerted the plaintiff to the danger. *Id.*

Applying the foregoing rule in the instant case, the potential danger posed by the snow-covered parking lot was open and obvious even absent some other factor suggesting that the surface was slippery. Plaintiff testified that snow covered the pavement and that her foot began to slide immediately when it touched the ground. She further testified:

> *A.* I then fell on the right side of my right leg catching myself with my hand, I was just sliding all over the place. Before I knew it I was under the car. I couldn't stop sliding. It was just like I hit a sheet of ice.
>
> * * *

Q. And I think you indicated for me earlier that you had no idea what caused you to fall until you were down on the ground?

A. Absolutely.

Q. And what did you determine had caused you to fall?

A. I was trying to gather myself out from under the car and it was just nothing but ice. When I started moving the snow it was just ice, just like a sheet of ice like this. Just ice everywhere under me.

Under *Ververis, supra* at 63, the potential slipperiness of the snow-covered parking lot was an open and obvious danger as a matter of law.

The question becomes, then, whether there existed a special aspect of the slippery condition of the parking lot 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. *Lugo, supra* at 517. Defendant contends that the fact that plaintiff's vehicle was parked next to a parking space for the handicapped did not constitute a special aspect making the condition unreasonably dangerous.

In *Lugo, supra* at 517-518, our Supreme Court stated:

> [W]ith regard to open and obvious dangers, 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.

The *Lugo* Court stated that a special aspect creating an unreasonable risk of harm may exist where, for example, the floor of the sole exit of a commercial building is covered with standing water, requiring persons to enter and exit through the water and creating an unavoidable risk. *Id.* at 518. The Court also recognized that an unguarded 30-foot-deep pit in the middle of a parking lot would pose an unreasonably dangerous risk. *Id.* The Court stated that "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 danger doctrine." *Id.* at 519.

The fact that the ice patch on which plaintiff fell was located near a handicapped parking space did not give rise to a uniquely high likelihood of harm or severity of harm. The 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. See *Kenny I, supra* at 121 (GRIFFIN, J., dissenting); see also *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002) (ice-covered steps did not create a uniquely high likelihood of harm or severity of harm).

Moreover, whether the condition was unavoidable does not affect our determination because plaintiff was unaware of the condition in any event. According to plaintiff's testimony, she did not see the ice before she fell, and realized that she had fallen on black ice only after she tried to get up. Thus, whether an alternate route to her car existed, by which she could have avoided the patch of ice, is immaterial. Because the condition of the parking lot was open and obvious and no special aspect existed making the condition unreasonably dangerous, the trial court erred by denying defendant's motion for summary disposition regarding plaintiff's common-law premises liability claim.

On cross-appeal, plaintiff argues that the trial court erred by granting summary disposition for defendant on her statutory claim. MCL 554.139 provides, in pertinent part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful or irresponsible conduct or lack of conduct.

Plaintiff contends that defendant cannot rely on the open and obvious danger doctrine to avoid its statutory obligation under this provision. We agree.

This Court recently addressed this issue in *Allison v AEW Capital Mgt, LLP (On Reconsideration)*, 274 Mich App 663; 736 NW2d 307 (2007), which involved identical facts. There, the plaintiff slipped and fell on ice and snow in the parking lot of his apartment complex. *Id.* at 665. This Court determined that its previous decision in *Benton v Dart Properties, Inc*, 270 Mich App 437; 715 NW2d 335 (2006), regarding a slip and fall on an apartment complex sidewalk, was controlling and that a parking lot is a "common area" under MCL 554.139(1)(a). *Id.* at 670. This Court thus concluded that "a parking lot, like a sidewalk, constitutes a common area under MCL 554.139(1)(a) and that defendant had a duty to keep the parking lot free from ice." *Id.* at 671. Accordingly, this Court determined that the open and obvious danger doctrine did not shield the defendant from liability under the statute. *Id.* This Court's holding in *Allison* compels the same result in this case.

As pointed out in the dissent, there is a prior opinion that, if followed, would direct us to hold otherwise. In *Teufel v Watkins, supra* at 429 n 1, the Court stated in a footnote:

> The plain meaning of "reasonable repair" as used in MCL 554.139(1)(b) requires repair of a defect in the premises. Accumulation of snow and ice is not a defect in the premises. Thus, a lessor's duty under MCL 554.139(1)(a) and (b) to

keep its premises in reasonable repair and fit for its intended use does not extend to snow and ice removal.

We find *Teufel* inapplicable for two reasons. First, *Teufel* ignored the binding precedent set forth in *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003). While *O'Donnell* addressed a fall from an open stairway inside a leased premises rather than a fall on ice or snow in an apartment complex parking lot, the rule of law announced in that case remains applicable here:

> The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b). [*Id.* at 581.]

Second, the more recent cases addressing this issue (see *Allison, supra*; *Benton, supra*; *Taylor-Floyd v Consolidated Mgt, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 [Docket No. 274061]; *Marbly v McKinley Assoc Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 [Docket No. 268580]; *Gotautas v Marion Apartments of St. Clair*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 [Docket No. 270785]) reiterate and follow the *O'Donnell* holding, reflecting a return from *Teufel*'s deviation from binding precedent. Again, then, this Court's holding in *Allison* compels a finding that defendant could not rely on the open and obvious danger doctrine to avoid its statutory duty under MCL 554.139, and the trial court therefore erred by granting summary disposition for defendant on plaintiff 's statutory claim.

Defendant argues that it nevertheless cannot be held liable for a statutory violation because it had no actual or constructive notice of the black ice in its parking lot. This issue is not preserved for appeal because it was not raised in and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Although this Court may address an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented, *Sutton v City of Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002), we decline to address this issue because the necessary facts have not been presented. In particular, the record fails to disclose whether defendant had notice of the condition of the parking lot.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

JANSEN, J., concurred.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen