STATE OF MICHIGAN

COURT OF APPEALS

MARY BUHALIS,

Plaintiff-Appellee/Cross-Appellant,

v

TRINITY CONTINUING CARE SERVICES, a/k/a SANCTUARY AT THE ABBEY, f/k/a ABBEY MERCY LIVING CENTER,

Defendant-Appellant/Cross-Appellee.

FOR PUBLICATION
May 29, 2012

No. 296535; 300163
Macomb Circuit Court
LC No. 2009-000633-NO

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

M. J. KELLY, P.J. (*dissenting*).

Although I do not join its analysis, I concur with the majority's conclusions with regard to plaintiff Mary Buhalis' ordinary negligence claim as well as her statutory and regulatory claims. I must dissent, however, from the majority's decision to disregard settled premises liability law governing the duties owed by a premises possessor to his or her invitees. In a departure from Michigan's common law, the majority holds that—as a matter of law—a premises possessor owes no duty to diminish the hazard of ice and snow from its property beyond clearing a single path to and from its main entrance. For the first time in Michigan's jurisprudence, a premises possessor will have no duty to protect an invitee from a particular class of hazards; hazards that the premises possessor knows about, but that the invitee might not know or have reason to know about—that is, for the first time an invitee will be relegated to the legal status of a trespasser while in an area of a defendant's premises where he or she has not trespassed and where he or she is still, for all other purposes, an invitee. To this novel proposition, I cannot subscribe.

I conclude that Buhalis presented evidence that established a question of fact as to whether defendant Trinity Continuing Care Services impliedly invited her to use the patio to park her tricycle. Accordingly, she established a question of fact as to whether Trinity had a duty to clear the patio for her, as its invitee, and breached that duty. She also presented evidence from which a reasonable jury could have concluded that the ice at issue was not open and obvious. Because a jury had to resolve these factual questions, the trial court erred when it dismissed Buhalis' premises liability claim. I would reverse and remand for trial on the merits.

I. PREMISES LIABILITY

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to dismiss a claim under MCR 2.116(C)(10). *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. THE DUTY TO PROTECT INVITEES USING THE PATIO

On appeal, Trinity argues that it owed no duty to keep ice and snow from the patio because the patio was closed for the winter. The duty that a premises possessor owes to persons visiting his or her property is inextricably intertwined with the visitor's legal status while visiting the premises. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A premises possessor owes the highest duty to those persons that visit his or her property as invitees:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Id.* at 597, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 258; 235 NW2d 732 (1975), citing 2 Restatement Torts, 2d, § 343, pp 215-216.]

Typically, whether a premises possessor had a duty cognizable at law is a question of law to be decided by the courts. See *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). However, "if there is evidence from which invitee status might be inferred, it is a question for the jury." *Stitt*, 462 Mich at 595; see also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

In this case, Buhalis, who was 86, testified that she liked to visit friends at Sanctuary at the Abbey, which is a nursing home that Trinity owns and operates. She said that she rode her three-wheeled cycle to the Abbey on the day at issue to deliver a bag of clothing for patients or friends. Therefore, there was evidence from which a reasonable jury could conclude that Buhalis was an invitee to those parts of the premises that visitor's typically use. See *Stanley v Town Square Coop*, 203 Mich App 143, 147-148; 512 NW2d 51 (1993) (holding that a tenant's guests are invitees of the landlord because the landlord derives a pecuniary benefit from the consideration paid by the tenants in exchange for the right to invite guests); see also Restatement, 2d, Torts § 332, comment g, p 180 (noting that those who "go to a hotel to pay social calls upon the guests or to a railway station to meet passengers or bid them farewell, are business visitors, since it is part of the business of the hotelkeeper and railway to afford the guest and passengers such conveniences."). But, as our Supreme Court has recognized, a visitor can lose his or her invitee status if he or she moves from an area open to invitees into an area that is not open to invitees. See, e.g., *Muth v W.P. Lahey's, Inc*, 338 Mich 513, 517-518; 61 NW2d 619 (1953)

(holding that, although the plaintiff in that case proceeded to go into the store's backroom to look for shoes, it was undisputed that the store's clerk instructed her to do so, as such the plaintiff was still an invitee, not a mere licensee). Thus, if the patio were closed for the winter, Buhalis might not have been an invitee when she used the patio. Nevertheless, as our Supreme Court explained approximately 80 years ago in *Nezworski v Mazanec*, 301 Mich 43; 2 NW2d 912 (1942), a visitor's status is a matter for the jury if there is evidence from which it could find that the visitor reasonably understood that he or she had the right to use the area at issue.

In *Nezworski*, the plaintiff had gone to the defendant's restaurant for a Christmas party. *Id.* at 51. The restaurant had two rooms, a larger room in front and a small room in the rear. *Id.* at 48-49. There was a door in the rear room that led out to a narrow cement platform, which had been enclosed. On the east end of the platform there was another door that led out to an alley and on the west end there was a flight of stairs that led to the basement. *Id.* The plaintiff was using the rear room when she decided to get some fresh air and left through the rear door leading to the cement platform. As she stepped through the door she lost her balance, and fell down the stairs. *Id.* at 51-52.

On appeal, the defendant argued that it owed the plaintiff no duty to warn or protect her because, when the plaintiff went "through the doorway in the rear room and upon the cement platform leading to the alley," she became a trespasser. *Id.* at 58. In analyzing the issue, our Supreme Court explained that a premises possessor's duty can arise from an implied invitation to use the area at issue:

> "An implied invitation is one which is held to be extended by reason of the owner or occupant doing something or permitting something to be done which fairly indicates to the person entering that his entry and use of the property is consistent with the intentions and purposes of the owner or occupant, and leads him to believe that the use is in accordance with the design for which the place is adapted and allowed to be used in mutuality of interest." [*Id.* at 59, quoting 45 CJ, negligence, § 220, pp 809-810.]

The Court noted that there was evidence that "other members of the party were using the rear room" and that the "door leading from such room onto the platform and to the alley was not locked and was open at least a part of the time during the evening." *Id.* There was also evidence that, despite the defendant's denials, he must have been aware that his guests were using the doorway and platform as an exit to the alley. *Id.* The Court explained that the "circumstances were such that [the] plaintiff could reasonably presume that she had the same right as others to use the door, platform, and alley." *Id.* Accordingly, there was "testimony from which the jury could reasonably find that [the] plaintiff, when using the doorway and platform leading to the alley, was an invitee, and not a trespasser." *Id.* at 60. Because the plaintiff was an invitee when she entered onto the platform, the defendant had the requisite duty to warn or otherwise protect her from the hidden danger posed by the platform's condition. *Id.* at 60-61.

In this case, Buhalis testified that she had ridden her tricycle to the Abbey before and parked it on the patio near the entrance. There was also evidence that the Abbey's employees had seen her do so in the past. Indeed, she parked her tricycle in front of the Abbey's office window. There was also no evidence that the patio was actually or constructively closed for the winter; there was no sign or barrier to suggest that the patio was closed and there was no evidence that anyone from the Abbey had told her she could not use the patio. In addition, when asked whether he salted the patio area, the Abbey's maintenance man, Joshua Shock, answered: "No, we never did that, unless—if we have extra time or we weren't really busy that day, then maybe, but never." This evidence permits an inference that Buhalis had used the patio with the knowledge and implied consent of the Abbey's staff. Shock's testimony further established that the Abbey's maintenance staff would, if they had time, clear the patio—presumably for use by the Abbey's residents and visitors. Accordingly, there was evidence from which a jury could find that Buhalis' use of the patio area—even during winter—was "consistent with the intentions and purposes of the owner or occupant," such that Buhalis reasonably believed that her "use [was] in accordance with the design for which the place is adapted and allowed to be used in mutuality of interest." *Id.* at 59 (quotation marks and citation omitted). For that reason, there was a question of fact as to whether Trinity had a duty to warn or protect Buhalis from the hazards posed by snow and ice on the patio. *Stitt*, 462 Mich at 595; *Bertrand*, 449 Mich at 617.

The majority concludes that Trinity had no duty to clear the patio of snow and ice because the patio was closed for the winter. That is, it essentially *finds* that Buhalis was a *trespasser* to the extent that she strayed from the path that Trinity cleared to its main entrance. To make this finding, the majority must have rejected the evidence that would permit a jury to find that Buhalis reasonably believed that she had the right to use the patio to park her tricycle and did so with Trinity's implied consent. But this Court—like the trial court below—is not permitted to weigh the evidence or assess credibility on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, it must review all the evidence in the light most favorable to the nonmoving party. *Id.* And, given the evidence actually presented by the parties, there is a question of fact as to whether Buhalis was an invitee at the time and place of her fall. If she were an invitee, then Trinity had a duty to warn or protect her from the hazards that were on the patio.

In addition to improperly weighing the evidence, the majority also uses the facts of this case to fundamentally alter the duty that premises possessors owe to warn or protect their invitees from snow and ice. Under the majority's new rule, a rule previously unknown to Michigan law, a premises possessor no longer has any duty to clear snow and ice except to provide a path to the "main entrance." Apparently, a premises possessor's invitees now "assume the risk" for harms from the hazards posed by snow and ice on the paths leading to every entrance other than the main entrance and for any other outdoor area that the premises possessor has invited the general public to use during the winter, but chooses not to clear of snow and ice. Moreover, I cannot agree with the majority's apparent conclusion that Trinity necessarily satisfied its duty by posting a sign warning that the main path might be slippery. It is well-settled that, although the existence of a duty will often be a question of law, it is for the jury to decide "whether [the defendant's] conduct in the particular case is below the general standard of care" unless reasonable minds could not differ. *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977) (opinion by Levin, J.). Here, a reasonable jury could conclude that, given the

danger posed by black ice and the likelihood that its invitees would not discover the ice, Trinity should have taken additional steps to remit the hazard beyond posting a sign.

I also cannot agree with the majority's conclusion that ice is open and obvious as a matter of law because there is evidence that an average person of ordinary intelligence would not notice the ice on casual inspection.

C. OPEN AND OBVIOUS DANGERS

Even though there is a question of fact as to whether Trinity owed a duty to Buhalis as an invitee on the patio, Trinity would not owe Buhalis any duty if the ice at issue was open and obvious. See *Lugo v Ameritech Corp*, 464 Mich 512, 516-519; 629 NW2d 384 (2001). The open and obvious danger doctrine is not an exception to the duty owed by a possessor of land, but a part of its definition. *Id.* at 516. A premises possessor need not protect an entrant onto the land from an obvious danger, because an obvious danger is no danger to a reasonably careful person. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008). Whether a hazard was open and obvious is determined by an objective standard. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A dangerous condition is open and obvious when the hazard is such that an average person of ordinary intelligence would have discovered it upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

Buhalis testified at her deposition that, before she fell, she "look[ed] to see if there was any ice," but "didn't see any." It was only after she fell that she saw the ice that caused her fall. Further, although Buhalis acknowledged that she saw the ice after her fall and could have seen the ice had she looked down at it, taken in context, it is evident that the ice was only visible through close inspection near the ground—not through casual inspection while walking. Further, there was no evidence that there were other conditions that, when considered in context, would have placed a reasonable person on notice that there was ice at that *specific* location. See *Slaughter*, 281 Mich App at 482-484. Given this evidence, I also conclude that the trial court erred to the extent that it determined that the ice was open and obvious as a matter of law. Whether the ice constituted an open and obvious hazard is a question for a jury, not the court.

In concluding that the ice involved in this case was open and obvious, the majority—in part—perpetuates the fallacy that a person's general knowledge about the potential for snow and ice is the same as having specific knowledge about the existence of a particular patch of snow and ice.[1] But the open and obvious doctrine is premised on the concept that a reasonably prudent

[1] This fallacy, of course, can be misapplied to eliminate the duty to warn or remediate every hazard known to man: people know that manhole covers sometimes collapse under the weight of a pedestrian, so the hazard posed by collapsing manholes is open and obvious, even when there is no visible evidence that a manhole is in danger of collapsing; similarly, everyone knows that elevators sometimes crash to the earth, so the hazard posed by a falling elevators is open and

person in the invitee's circumstances would have *actual* knowledge of a *specific* hazard—not that a reasonably prudent person would understand the mere possibility that a hazard might, in theory, exist somewhere. Courts rightly assume that a person will easily avoid a hazard that he or she can readily observe. *Slaughter*, 281 Mich App at 478. But it is fundamentally wrong to require invitees to avoid hazards that an average person of ordinary intelligence would not notice on casual inspection just because such a person generally understands that such hazards exist. By validating this fallacy, courts essentially abrogate a premises possessor's duty to clear snow and ice, because all snow and ice—whatever the surrounding circumstances and without regard to whether it is in fact obvious—is open and obvious as a matter of law. But, whatever the merits of that position as a matter of public policy, it remains the law in this state that premises possessors must take reasonable steps to safeguard their invitees from the hazards posed by accumulated snow and ice. See *Quinlivan*, 395 Mich 244.[2]

I would reverse the trial court's decision to dismiss Buhalis' premises liability claim and remand for a trial on the merits.

/s/ Michael J. Kelly

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obvious to every elevator passenger, even in the absence of visible evidence that the elevator is in disrepair.

[2] Although it might sometimes appear to the contrary, our Supreme Court has never overruled *Quinlivan*. Instead, our Supreme Court clarified that the duty stated in *Quinlivan* "must be understood in light of this Court's subsequent decisions in *Bertrand*[, 449 Mich 606 (1995),] and *Lugo*[, 464 Mich 512 (2001)]." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 333 n 13; 683 NW2d 573 (2004). Thus, premises possessors—at least in theory—continue to have a duty to take reasonable measures to diminish the hazards of snow and ice from those portions of the premises possessor's land to which they have expressly or impliedly invited their guests.