STATE OF MICHIGAN

COURT OF APPEALS

RICHARD D. LaRUE and CATHY LaRUE,

Plaintiffs-Appellants,

v

RICHARD E. JACOBS GROUP, d/b/a FASHION SQUARE MALL,

Defendant-Appellee,

and

DOC HEINZ CONTRACTING, INC.,

Defendant.

UNPUBLISHED
October 29, 1999

No. 211741
Saginaw Circuit Court
LC No. 96-013353 NO

Before: O'Connell, P.J. and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Richard E. Jacobs Group, doing business as Fashion Square Mall, in this premises liability action. We affirm.

We review the trial court's decision whether to grant the motion for summary disposition de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we view the documentary evidence in a light favoring the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Plaintiffs argue that the pile of snow over which plaintiff Richard LaRue[1] walked to get to defendant's shopping mall, and on which he slipped and fell, presented an unreasonable risk of harm despite its open and obvious nature. The trial court disagreed, and granted defendant's motion for summary disposition.[2]

The parties do not dispute that plaintiff was an invitee on defendant's premises.[3] An invitor owes a duty "'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the [invitor] knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). See also 2 Restatement Torts 2d, § 343, pp 215-216. However, an invitor generally has no duty to warn or protect an invitee of open and obvious dangers. *Bertrand*, *supra* at 610-611; *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96 485 NW2d 676 (1992); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495-497; 595 NW2d 152 (1999). The parties also do not dispute that the danger presented by the snow bank was open and obvious.[4]

The open-and-obvious-danger doctrine generally relieves the invitor of the duty to warn or protect the invitee of open and obvious dangers; however, the invitor still owes a duty to protect the invitee from conditions that pose an unreasonable risk of harm despite their open and obvious nature. *Bertrand*, *supra* at 610-611; *Riddle*, *supra* at 96; *Millikin*, *supra* at 498; *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). Michigan courts have approvingly cited the following rule from the Second Restatement of Torts:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. [2 Restatement Torts 2d, § 343A(1), p 218.]

This rule has sometimes been stated in terms of whether the risk remains unreasonable despite its open and obvious nature. *Bertrand*, *supra* at 611 ("[I]f the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions."); *Millikin*, *supra* at 498 (holding that summary disposition for the defendant was appropriate where the plaintiff failed to present facts that the dangerous condition posed an unreasonable risk despite its open and obvious nature). Other times, the rule has been stated in terms of whether the harm was foreseeable despite the open and obvious nature of the condition. *Bertrand*, *supra* at 610-611 ("While there may be no obligation to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions."); *Riddle*, *supra* at 96 ("However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."); *Hughes*, *supra* at 10 ("[E]ven if a danger is open and obvious, a possessor of land may still have a duty to protect invitees against foreseeably dangerous conditions."). We conclude that under the facts and circumstances of this case, both characterizations of the rule are accurate—a risk that remains unreasonable despite its open and obvious nature is one where harm will foreseeably occur despite that open and obvious nature.[5]

In this case, the trial court correctly concluded that plaintiffs did not present any factual basis for concluding that the snow bank presented an unreasonable risk despite its open and obvious nature. The

nature of the snow bank, even with the presence of the path created by other patrons and employees of the mall, is commonplace during winter months in Michigan. Plaintiff had observed similar snow banks at the mall on many previous occasions. On the date of his injury, plaintiff chose to walk over the snow bank rather than around it. Plaintiff could have avoided the danger but did not. Merely because other persons also chose not to avoid the danger, thus creating a makeshift "path" over the snow bank, does not render it foreseeable that injury will occur despite the open and obvious nature of the condition—especially where it was abundantly simple for plaintiff to avoid the danger altogether by walking around the snow bank. Accordingly, the trial court did not err in granting summary disposition in favor of defendant.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] Because plaintiff Richard LaRue was the person who slipped and fell, and because his wife Cathy LaRue was added as a plaintiff to claim loss of consortium, any further references in this opinion to "plaintiff" refer solely to plaintiff Richard LaRue.

[2] The trial court also denied plaintiff's motion for reconsideration pursuant to MCR 2.119(F).

[3] An invitee is a person who is invited to enter or remain on the premises either for a purpose for which the premises are held open to the public or for a purpose connected with the business of the possessor of the premises. *Stitt v Holland Abundant Life Fellowship*, 229 Mich App 504, 506-508; 582 NW2d 849 (1998), citing 2 Restatement Torts, 2d, § 332, p 176.

[4] A danger is open and obvious where "it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

[5] We note that our Supreme Court recently split evenly on the proper characterization of this rule. In *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997), Justices Weaver, Boyle, and Riley held that the question is not the foreseeability of the harm, but rather, whether the risk of harm remains unreasonable despite its open and obvious nature. *Id*. at 142-143. However, Justices Mallett, Brickley, and Cavanagh maintained that the invitor "may still be liable to invitees if he should anticipate that the hazard will cause injury." *Id*. at 146. Justice Kelly did not participate in the decision.