STATE OF MICHIGAN

COURT OF APPEALS

LOIS LOCKHART,

Plaintiff-Appellee,

V

WAL-MART STORES, INC.,

Defendant-Third-Party Plaintiff-Appellant,

and

KEVIN SEIF, d/b/a/ SEIF LAWN CARE AND SNOW PLOWING,

Third-Party Defendant.

UNPUBLISHED
September 27, 2002

No. 229750
Kent Circuit Court
LC No. 97-009640-NO

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

In this premises liability action, defendant Wal-Mart Stores, Inc., appeals by right from the circuit court's judgment in favor of plaintiff Lois Lockhart following a bench trial. We reverse.

I. Facts and Proceedings

On March 15, 1997, plaintiff drove to defendant's store on 28th Street in Grand Rapids with her friend, Jetty Spidell, to purchase some yarn. Because of the poor weather conditions on the two days preceding their visit to the store, they waited until the 15th to go.[1] Plaintiff parked her car in a parking space at the end of a row, closest to the entry of the store. Because of Spidell's advanced age, plaintiff wanted to park as close to the entrance as possible. When she pulled into the parking space, the driver's side of her car was approximately twelve inches from an elevated island at the end of the row of spaces. As plaintiff pulled into the parking space, she noticed that the island was covered with snow. When she opened her car door, she saw that there

[1] On March 13 and 14, Grand Rapids incurred rain, snow, freezing rain, and freezing fog.

was also snow and ice on the pavement along the side of her car, covering the area between her car and the island. Because she thought she might slip and fall under her car if she walked along the side of the car toward the back of the vehicle, she decided to walk across the parking island. She stepped up onto the island and when she took her second step, her feet went out from under her and she fell, hitting her head on the cement curbing on the far side of the island and breaking her right wrist. Plaintiff did not know what caused her to fall.

Spidell did not see that plaintiff had fallen and exited the car on the passenger's side, walked around the back of the car, and proceeded into the store. Plaintiff was assisted into the store, and one of defendant's employees contacted plaintiff's son, Glenn Lockhart, who then came to the store and took plaintiff and Spidell to the hospital. Plaintiff needed six to eight stitches to close the cut on her head, completed by emergency room personnel that day, and closed reduction and pin fixation of her wrist, completed the following day.

Plaintiff filed suit against defendant on September 17, 1997, alleging that defendant had failed to maintain the premises in a safe condition and had failed to remove the snow and ice. The case was tried by the court on June 21, 2000. Defendant argued at trial that its duty to plaintiff did not include clearing the parking island of snow and ice and that, in any event, the open and obvious doctrine precluded plaintiff's claims. In support of its argument, defendant referred to the testimony of David Seif, who was responsible for snow removal at the store. He testified that his commercial customers had never requested that he remove snow and ice from parking islands.

In a written opinion, the trial court concluded that defendant's duty to maintain its premises in a reasonably safe condition extended to the parking island, particularly in light of the fact that many customers walked across the island, as defendant had invited them to do by placing it between the parking space and the store entrance. Moreover, it found that defendant had breached its duty to its invitee by failing to diminish the hazards of ice and snow within a reasonable time, both in the parking spaces and on the parking island. The court also found that the open and obvious doctrine did not prohibit plaintiff's recovery in this case because the ice on the island was covered by a layer of snow, concealing the danger from plaintiff, and that the layer of snow was "hardly an obvious hazard." Nevertheless, the court continued, even if the open and obvious doctrine was implicated in this case, its application was limited because defendant was still expected to take reasonable precautions to clear the path to its store when there was no reasonably convenient alternative route to the entrance. The court assessed plaintiff's damages at $41,603.90.[2] Defendant now appeals.

II. Standard of Review

We review the trial court's findings of fact in a bench trial for clear error and review de novo its conclusions of law. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

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[2] After deducting payments from collateral sources and adding statutory interest, taxable costs, and case evaluation sanctions, the judgment in plaintiff's favor totaled $52,642.51.

III. Analysis

Defendant argues that the risk of harm associated with the condition of the parking island was open and obvious, and that, therefore, it did not owe any duty to plaintiff. Defendant also argues that even if the risk was not open and obvious, its duty to maintain the premises did not extend to the parking island. Because we conclude that the open and obvious doctrine precludes plaintiff's claims, we do not need to address whether defendant's general duty extends to the parking island.

Defendant, as a possessor of land, generally owes its invitee a duty 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). By and large, this duty does not require the removal of open and obvious dangers. *Id.* A condition is open and obvious if "an average user of ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In the present case, the trial court concluded that because there had been freezing rain during the two days prior to plaintiff's fall, it was reasonable to infer that the snow on the island hid ice beneath it. The snow itself, the court stated, was "hardly an obvious hazard." We disagree. We find that the condition was open and obvious. The snow was readily apparent upon casual inspection, and even if ice was hidden beneath the snow on the island, it is reasonable to expect an average user of ordinary intelligence to recognize that after two days of freezing rain accompanied by snow, the surface might be slippery because of either ice or snow.

When a condition is open and obvious, the possessor will not be liable unless special aspects of the condition create an unreasonable risk of harm. *Lugo, supra* at 516-517. One special aspect that can make a condition unreasonably dangerous is unavoidability. *Id.* at 517. Here, the trial court found that regardless of whether the condition was open and obvious, defendant still owed a duty to plaintiff because there was no reasonably convenient alternate route for plaintiff to take. However, plaintiff testified that she had the option of parking in other parking spaces. She may have been inconvenienced by choosing another parking spot, but she clearly could have done so. The situation plaintiff faced was not unavoidable. See *Joyce, supra* at 242 (the plaintiff could have returned on another day to avoid the danger presented by a slippery walkway).

Special aspects of a condition that "impose an unreasonably high risk of severe harm" can also make the condition unreasonably dangerous. *Lugo, supra* at 518. For example, "an unguarded thirty foot deep pit . . . would present such 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.* The ordinary dangers of the snow and ice plaintiff encountered, however, do not rise to this level. Therefore, the condition was not unreasonably dangerous, and defendant did not owe any duty to plaintiff.

Plaintiff argues that the open and obvious doctrine does not apply to snow or ice, citing *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975), where the Court stated that an invitor has a duty to remove accumulations of snow and ice within a

reasonable time. *Id.* at 261. However, in *Corey v Davenport College (On Remand)*, 251 Mich App 1, 8; ___NW2d___(2002), this Court held that:

> [a]fter analyzing both *Lugo* and *Joyce*, we conclude that these prior analyses in *Quinlivan* and *Bertrand* on the interplay between the open and obvious danger doctrine when it involves snow and ice and the newly refined definition of open and obvious in *Lugo* can only mean that the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo*. Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious. [*Id.* at 8.]

Based on *Corey*, then, the issue remains whether the condition was unreasonably dangerous, and *Quinlivan* does not alter our analysis.

Reversed and remanded for judgment in favor of defendant. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra