STATE OF MICHIGAN

COURT OF APPEALS

JULIE MCFARLIN,

Plaintiff-Appellant,

v

ROSS PROPERTIES,

Defendant-Appellee,

and

EMERALD LAWN & LANDSCAPING, INC.,

Defendant.

UNPUBLISHED
December 2, 2003

No. 242416
Genesee Circuit Court
LC No. 01-070326-NO

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant Emerald Lawn & Landscaping, Inc.'s motion for summary disposition under MCR 2.116(C)(10). However, plaintiff's issues on appeal involve an earlier order granting summary disposition to defendant Ross Properties. We affirm.

Plaintiff's first issue on appeal is that the trial court erred in granting defendant's motion for summary disposition under MCR 2.116(C)(10) because a genuine issue of material fact exists regarding whether the patch of ice upon which plaintiff fell was an open and obvious condition. We disagree. We review motions for summary disposition granted under MCR 2.116(C)(10) de novo, considering the facts in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

> A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. The adverse party may not rest on mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. All this supporting and opposing material must be considered by the court. [*Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000) (citations omitted).]

Generally, a premises possessor owes invitees a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 [1995]). This duty does not extend to dangers that are open and obvious, unless there exist special aspects of an open and obvious condition that create an unreasonable risk of harm, in which case the premises possessor has a duty to take reasonable steps to protect invitees from the risk. *Lugo*, *supra* at 516-517. "'[W]here 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 the risk of harm is unreasonable despite being obvious or known to the invitee. *Bertrand*, *supra* at 609-611 (citing and quoting *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 [1992] [emphasis added]). "The test to determine if a danger is open and obvious is whether 'an average user with 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]). The open and obvious analysis is somewhat different, however, when it comes to ice and snow. Plaintiff cites *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732(1975), as authority on this point. In *Quinlivan*, our Supreme Court stated:

> [W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. [*Quinlivan*, *supra* at 261.]

However, this Court has noted that the rule in *Quinlivan* has evolved in light of later cases. In *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 392 (2002), this Court considered *Quinlivan* in light of later cases, *Corey (On Remand)*, *supra* at 7-8, and held:

> After 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. [*Corey (On Remand)*, *supra* at 8.]

Plaintiff testified at her deposition that she parked that morning at defendant's premises, went into a nearby store, made a purchase and returned to her car. At this point, plaintiff testified that she was aware of the slippery character of the parking lot, and that she had seen ice, both snow-covered and not, elsewhere in the parking lot. After putting her purchase in her car, plaintiff decided to pay a social visit upon her mother, who was working at a travel agency located on defendant's premises. After visiting for some time with her mother, plaintiff left, walked about five feet toward her car, and slipped and fell on a patch of snow-covered ice in the parking lot, injuring herself.

This Court has previously held that a similar knowledge of snow, ice, or snow-covered ice reasonably supported a finding that the hazard was open and obvious. In *Joyce*, *supra*, this Court held the danger presented by the snow-covered ice to be open and obvious where the plaintiff "admittedly knew, and under the circumstances, 'an average user with ordinary intelligence [would] have been able to discover' the condition of the sidewalk and the risk it presented," *Joyce*, *supra* at 239 (quoting *Novotney*, *supra* at 475), and that she was "undoubtedly aware of the condition and the specific, potential danger of slipping . . . ." *Joyce*, *supra* at 239. This Court has also held snow and ice on steps to be an open and obvious condition where the plaintiff was "a reasonable person who recognized the snowy and icy condition of the steps and the danger the condition presented." *Corey (On Remand)*, *supra* at 5.

Applying *Joyce* and *Corey (On Remand)* to the instant case, we conclude that, even viewing the facts in a light most favorable to plaintiff, plaintiff's admitted knowledge of the hazardous condition of the parking lot and the risks it presented supports the conclusion that the trial court properly concluded that the patch of ice was an open and obvious condition.

Plaintiff's other issue on appeal is that, even if the condition is open and obvious, it has special aspects rendering it unreasonably dangerous which, under *Lugo*, would lead to a duty of defendant to protect invitees from the dangerous condition. We disagree.

As examples of special aspects rendering open and obvious conditions unreasonably dangerous, our Supreme Court, in *Lugo*, *supra*, cited a hypothetical commercial building with only one exit and the floor in front of it covered in standing water, and a hypothetical unguarded, thirty-foot-deep pit in the middle of a parking lot. *Lugo*, *supra* at 518. In the former example, the Court reasoned that though the hazard would be open and obvious, it would also be effectively unavoidable by invitees; in the latter, the Court reasoned that such a pit might well be open, obvious, and easily avoided, but nevertheless posed such a high risk of severe harm and injury as to be an unreasonable danger. *Id*. The Court intended to limit liability to cases where "*unusual* open and obvious conditions could exist that are unreasonably dangerous because they present an *extremely high risk of severe harm* to an invitee." *Lugo*, *supra* at 518-519 n 2 (emphasis added).

Plaintiff first argues that the snow covering the ice was a special aspect of the ice patch rendering it unreasonably dangerous. We disagree. The difference between a snow-covered patch of ice and an unguarded, thirty-foot-deep pit are vast indeed. Furthermore, there is no evidence that a snow-covered patch of ice is especially unusual for Michigan in winter or that it poses an *extremely* high risk of severe harm. We therefore conclude that the patch of ice did not possess any special aspects rendering it unreasonably dangerous.

Plaintiff next argues that the condition was effectively unavoidable because plaintiff had no choice but to encounter it on the way from her mother's office to her car. We disagree. In *Joyce*, *supra*, the plaintiff, a live-in caregiver who had terminated her employment to accept a new job, argued that since she was ordered by the defendant to move out that day, and he would not allow her to use the garage entrance of his home, the icy, snowy, dangerous sidewalk leading to the front door was an unavoidable, albeit open and obvious, hazard. *Joyce*, *supra* at 233, 239-241. This Court rejected that argument, stating that Joyce could very easily have either moved a different day, told her former employer that she would move another day unless he gave her access to the garage, or walked on a different path altogether. *Joyce*, *supra* at 242-243. In light

of this Court's decision in *Joyce*, we find that the hazard in the instant case was far more avoidable. Here, plaintiff was operating under the direction of no one but herself. Plaintiff made a decision to make a social visit to her mother after discovering the slippery and potentially dangerous character of the parking lot, a social visit that could easily have been postponed, avoiding the injury altogether. We conclude, therefore, even after viewing the facts in a light most favorable to plaintiff, that the patch of ice had no special aspects making it unavoidable to plaintiff.

Plaintiff argues, finally, that the fact that she was forced by traffic in the parking lot to watch for traffic instead of ice was a special aspect of the open and obvious condition. First, we conclude that plaintiff's *conduct* is likely not reasonably considered an aspect (special or otherwise) of a patch of ice on a parking lot. Second, by the same token, traffic in a parking lot can hardly be considered an aspect of a patch of ice. Plaintiff cites *Lugo* in support of this argument; however, the *Lugo* Court specifically rejected an almost identical argument, and concluded exactly the opposite, reasoning that there is nothing at all unusual about traffic moving about in a parking lot. *Lugo*, *supra* at 517. We do the same.

As a result of the foregoing, even viewing the facts in a light most favorable to plaintiff, we conclude that there were no special aspects of the open and obvious condition rendering it unreasonably dangerous. Accordingly, we conclude that the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski