# STATE OF MICHIGAN

# COURT OF APPEALS

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| DENNIS R. HERRON and LORI A. HERRON,<br><br>Plaintiffs-Appellants/Cross-Appellees, | UNPUBLISHED<br>July 14, 2005 |
| v | No. 252854<br>Wexford Circuit Court |
| RANDALL R. TULICK and CATHLEEN TULICK,<br><br>Defendants-Appellees/Cross-Appellants. | LC No. 03-017413-NO |

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right and defendants cross-appeal from a trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Although the trial court erred in assigning the status of licensee rather than invitee to plaintiff, because the condition on the premises was open and obvious, we affirm.

Dennis Herron[1] operated a roofing business at the time of the incident. Defendants contacted him and requested that he examine their roof and give them a repair estimate. Herron was injured when he slipped on a patch of ice located on a sidewalk on defendants' property. The trial court dismissed the action on the basis that Herron was a licensee and that defendants had not breached any duty owed. For purposes of appellate review the trial court also determined that the ice on the sidewalk was not an open and obvious danger.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470

[1] Lori Herron sought damages for loss of consortium. Given the derivative nature of this claim, reference throughout opinion to "Herron" will be to Dennis Herron only.

Mich 274, 278; 681 NW2d 342 (2004). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiffs first argue on appeal that the trial court erred by finding that Herron was an licensee rather than an invitee. Michigan recognizes three categories of persons who enter on the premises of another: trespasser, licensee, and invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "Each of these categories corresponds to a different standard of care that is owed to those injured on the owner's premises. Thus, a landowner's duty to a visitor depends on that visitor's status." *Id.* "Whether someone is an invitee or a licensee on another's property may be a question of fact where persons of average intelligence can disagree over whether the guest is on the property for a social purpose or to render a service beneficial to the owner of the property." *White v Badalamenti*, 200 Mich App 434, 436; 505 NW2d 8 (1993).

In *Stitt*, our Supreme Court explained "that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status . . . ." *Stitt, supra* at 604. "A 'licensee'" *Stitt* observed, "is a person who is privileged to enter the land of another by virtue of the possessor's consent. . . . Typically, social guests are licensees who assume the ordinary risks associated with their visit." *Id*. at 596. Regarding invitees, the Court stated that "[i]n order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose." *Id*. at 604.

Citing *Stitt*, defendants argue that invitee status is determined only by whether the property is held open to the public by the premises owner for commercial purposes. Defendants' reliance on *Stitt* for this proposition is misplaced. *Stitt* observes that "[t]he 'commercial purpose' distinction is sufficiently recognized in Michigan case law that there are even secondary authorities that include Michigan among those jurisdictions conferring invitee status only on business visitors." *Stitt, supra* at 598-599. A "business visitor" is "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." 2 Restatement Torts, 2d, § 332, p 176. The "business visitor" category consists of two subcategories. "The first class includes persons who are invited to come upon the land for a purpose connected with the business for which the land is held open to the public . . . ." 2 Restatement Torts, 2d, § 332, comment e, p 179. "The second class includes those who come upon land not open to the public, . . . for a purpose connected with their own business which is connected with any purpose, business or otherwise, for which the possessor uses the land." *Id.* at pp 179-180.

While *Stitt* speaks in terms of the premises "owner's commercial business interests," and notes that "a plaintiff must show that the premises were held open for a commercial purpose," *Stitt, supra* at 603, 604 (emphasis removed), these comments cannot be removed from the factual context of that case, i.e., a situation involving land held open to the public. In other words, *Stitt* involved the first of the two subcategories of business visitor identified above. Accordingly, *Stitt* stands for the proposition that where a person is injured on land held open to the public, consideration of the person's status focuses on whether the land is being held open for a commercial purpose. See *Kendzorek v Guardian Angel Catholic Parish*, 178 Mich App 562; 444

NW2d 213 1989), overruled on other grounds sub nom *Orel v Uni-Rak Sales Co*, 454 Mich 564; 563 NW2d 241 (1997) (cited in *Stitt*, *supra* at 601).

Our Supreme Court has long recognized that where a person is on a premises for the purpose of performing commercial services beneficial to the premises owner, the visitor has the status of an invitee rather than a mere licensee. For example, in *Kroll v Katz*, 374 Mich 364; 132 NW2d 27 (1965), our Supreme Court concluded that the jury was properly instructed on the standard of care that an invitor owes to an invitee in a situation involving a plaintiff, hired by the premises owner to perform plumbing repairs, who was injured while walking down the stairs into the basement in order to shut off the water supply. *Id.* at 366, 373-374.[2]

This case at bar is directly on point with *Kroll*. Accordingly, the court erred when it determined as a matter of law that Herron was a licensee. Herron was a business visitor because his visit to defendants' premises was "founded on a commercial purpose." *Stitt*, *supra* at 607. Because we conclude that Herron was an invitee we do not reach plaintiffs' argument that the trial court improperly applied the licensee standard of care.

Defendant argues on cross-appeal that the trial court erred when it determined that the patch of ice on which Herron fell was not an open and obvious danger. A landowner owes a duty to an invitee to exercise reasonable care to protect an invitee from 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 encompass open and obvious dangers unless special aspects of the condition make the risk unreasonably dangerous. *Id.* The determination of whether an alleged dangerous condition is open and obvious focuses on the characteristics of a reasonably prudent person. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). The test is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented on casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). Finally, a premise owner can be liable for an open and obvious condition if special aspects of that condition create an unreasonably high risk of severe harm. *Lugo*, *supra* at 517.

We conclude that the patch of ice was an open and obvious danger. Herron testified that after he got up from his fall and returned to a standing position, he looked around and did see the patch of ice because it shone in the sunlight over the concrete sidewalk. He stated that it was two feet in length and three feet across and that it looked like water. His explanation for not seeing the patch of ice prior to his fall was that he "just turned around" and "started walking" and was "glancing around and stuff." In addition, the record evidence establishes that while there was snow on the ground, neither the sidewalk nor the patch of ice was covered with snow. Further, the sidewalk was dry with the exception of the icy patch. Moreover, the fact that the entire sidewalk was not covered in ice indicates that the patch of ice was distinguishable from the

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[2] We do not believe that our Supreme Court impliedly overruled *Kroll* in *Stitt*. "The Supreme Court does not favor abandonment of its prior decisions by implication." *Jaschuk v Manistee Co Rd Comm*, 205 Mich App 322, 325; 517 NW2d 318 (1994), citing *People v Stoeckl*, 347 Mich 1, 16; 78 NW2d 640 (1956).

surrounding concrete. This is unlike black ice, which covers an entire dark surface with a thin film of ice that is almost impossible to discern. Under these conditions, we believe that the danger presented by the patch of ice was open and obvious to an average user with ordinary intelligence.[3]

Finally, there are no special aspects of the ice that make the risk of harm unreasonably high. *Lugo* noted that an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. *Lugo, supra* at 517. If such special aspects exist, a premises owner can be liable despite the open and obvious nature of the condition. *Id*. at 519. We do not believe, however, that the condition here either presented an unusual risk of death or serious bodily harm, or was effectively unavoidable. See *Lugo, supra* at 520 (observing that typical open and obvious dangers . . . do not give rise to these special aspects.") Therefore, although we find the reasoning of the trial court flawed, we affirm its grant of summary disposition. "Where a trial court reaches the correct result for the wrong reason, its decision need not be reversed on appeal." *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

Affirmed.

**/s/** William B. Murphy
**/s/** David H. Sawyer
**/s/** Pat M. Donofrio

[3] Although we properly hold plaintiff only to the standard of an average user with ordinary intelligence, we note that he testified in his deposition that he was aware that snow runs off roofs and turns to ice stating: "[u]sually the sun melts the snow on the roof because the roof heats up, the shingles heat up and melts the snow, it runs down, hits the ground and turns to ice."