STATE OF MICHIGAN

COURT OF APPEALS

MYRA WALKER, Plaintiff-Appellant,	UNPUBLISHED March 1, 2011
v	No. 293626 Macomb Circuit Court
MARY A. KILPATRICK, Defendant-Appellee.	LC No. 2008-002722-NO

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent as the icy area on which plaintiff fell was "an open and obvious condition that [was] effectively unavoidable" and, under *Lugo v Ameritech*, 464 Mich 512, 517-518; 629 NW2d 384 (2001), presents a "special aspect . . . so as to create an unreasonable risk of harm."[1]

The photographs offered in evidence show that there were two strips of the driveway shoveled, but unsalted, presumably for the homeowner's car to access the driveway. As they approach the house, these two strips are joined at a right angle by a walkway that leads to the porch where the mailbox was located. The photographs also show that there was a large area of ice covering the "intersection" where the driveway strips and the walkway to the porch meet. There was no way to traverse the walkway to and from the porch other than to traverse this icy area. The area of visible ice was plainly too large for someone to safely step over without risking a loss of balance, or even having to jump. The only alternative to walking over this large icy area was to walk through the adjacent grassy area that was completely snow-covered with uneven levels of snow that would interfere with one's footing and with no way to tell whether there was ice under the snow.

[1] I note that for purposes of the motion for summary disposition, defendant agreed to assume that plaintiff was an invitee rather than a licensee. Given the trial court's ruling, the issue of plaintiff's status was not determined and is not before us at this time.

This Court has held "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006). Thus, plaintiff had to either walk on the icy, unsalted walkway, or traverse snow-covered areas which, as a matter of law, themselves "present[ed] an open and obvious danger." *Id.* I fail to see how a path that, as a matter of law "present[s] an open and obvious danger," can be said to constitute a reasonable alternative to walking on an icy walkway. Indeed, had plaintiff attempted to walk on the snow-covered areas and slipped and fallen there, defendant could, under our rule of law, argue that the snow presented an open and obvious hazard which plaintiff could have avoided by walking on the shoveled walkway. Thus, while the uneven snow-covered grassy area represented an alternative path, it did not represent one that afforded a reliable degree of safety. It seems a curious rule of law that providing a second hazardous path vitiates the duty to take reasonable measures to render one path safe.

A trier of fact could certainly conclude, after hearing the evidence, that the fact that defendant elected not to salt the walkway did not constitute negligence. However, in the absence of a demonstrated safe alternative to the path taken by plaintiff through defendant's property, I would conclude that the hazard was "effectively unavoidable" and, therefore, the risk of harm remained unreasonable, even if the ice in question was open and obvious. Accordingly, I would conclude that the trial court erred in granting summary disposition on this basis.

/s/ Douglas B. Shapiro