STATE OF MICHIGAN

COURT OF APPEALS

DESHEAN WILLIAMS,

Plaintiff-Appellant,

v

HOLIDAY VENTURES APARTMENTS, INC.,

Defendant-Appellee.

UNPUBLISHED
March 1, 2011

No. 296051
Monroe Circuit Court
LC No. 08-026289-NO

Before: TALBOT, P.J., and SAWYER and M. J. KELLY, J.J.

M.J. KELLY, J. (*dissenting*).

This case arises out of an alleged fall that occurred on November 10, 2005 as Williams attempted to step from the porch onto the sidewalk at a building in Holiday Venture's apartment complex. Williams and another man, Alford, had come to the apartment building in order to help a friend, who was a tenant, move. Although Williams had been to the complex before, he had never been to this particular building. The two men parked in a lot and entered through the front door. After staying approximately one hour they decided to leave and exited through the rear door of the building because of its proximity to the parking lot. It was around 8:00 p.m. and dark outside. The area between the porch and lot, including the sidewalk, was covered heavily with leaves. Alford led the way and stepped off of the porch onto the ground without incident. As Williams stepped from the porch onto what he thought was a sidewalk abutting the bottom of the porch his foot did not land on a sidewalk, but instead an area of ground that had eroded and was approximately ten inches lower than the sidewalk. The depression could not be seen because it was covered by leaves and gave him the impression that it was, at least, level ground.[1] Williams broke his fibula when he twisted it and fell in the depression.

The trial court, likening the condition to black ice under snow and a line of cases from this court that have determined that, in certain circumstances, a plaintiff can be deemed to have

[1] A photograph submitted as documentary evidence in the summary disposition motion confirms the unorthodox design of the sidewalk and the impression that one stepping off of the porch at that location would be landing on concrete.

notice of the ice, found that the dangers posed from slipping or tripping over something concealed under the leaves presented an open and obvious condition. The majority agrees. I do not. While it cannot be seriously contested that the presence of fallen leaves on the ground in November in Michigan is an open and obvious condition, it does not follow that any hazard lurking beneath the leaves is also open and obvious. Here, Williams testified that he observed that the sidewalk and surrounding area was completely covered by leaves. But Williams did not simply slip on leaves that were in plain view or trip in an uncovered hole in the middle of a yard. Rather, he stepped from the stoop onto what he expected to be a concrete sidewalk and his foot sunk an unexpected ten inches into a depression that was unobservable due to it being covered by leaves. It would not be reasonable to expect that an average person would appreciate the danger posed by this hazard and casual inspection does not require Williams to stick an object through leaf cover to determine if his next step will be into a hole in the sidewalk.

The very quote cited by the majority from *Royce* demonstrates the lack of logic and torturing of precedent that has so plagued this doctrine: "'by its very nature, a snow-covered surface presents an open and obvious danger because of the *high probability* that it may be slippery.'" Ante at ___, quoting *Royce v Chatwell Club Apartments*, 276 Mich App 389, 393-394; 740 NW2d 547 (2007) (emphasis supplied). To be analogous to the present factual scenario, as the majority claims, we would have to conclude that, by its very nature, a sidewalk completely covered from view by leaves presents an open and obvious danger because of the *high probability* that there may be a ten inch deep hole underneath the leaves. This I am unwilling to do because it defies common sense and life experience. Indeed, the very opposite is true: there is a very low *possibility*, let alone *probability*, that there will be ten inch holes in sidewalks.

The majority's extension of the open and obvious danger doctrine to a leaf-covered hole in a sidewalk is also contrary to the rule set down in *Lugo* that, "Where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). In short, what the majority is attempting to craft is a rule whereby a premises owner may escape liability for dangerous conditions on their premises which they created or were aware of by merely showing that, if an invitee has some *general* knowledge of a potentially dangerous condition that may be present somewhere—anywhere—on the premises, he or she is charged with the *specific* knowledge of the exact condition that caused his or her injury, even if that condition is totally hidden from view.[2] As was recently noted in *Watts v Michigan Multi-King*,

---

[2] Our precedents have been bedeviled by a pernicious fallacy that equates a general knowledge about the existence of certain classes of hazards with actual knowledge of the location of specific hazards within that class. The question is properly whether a reasonable person would notice the hazard under the totality of the circumstances and, after observing the hazard, would understand the nature and extent of the danger that it poses—not whether reasonable people generally understand that such hazards exist. See *Lugo*, 464 Mich at 516 (noting that the doctrine cuts off liability where the invitee should have discovered the condition at issue *and* realized its danger).

___ Mich App ___; ___ NW2d ___ (2010), such an expansive reading of the doctrine is essentially, "a broadened version of the assumption of risk doctrine, which, even in its narrower form, was abolished in Michigan 45 years ago." And, if this is now where the open and obvious danger doctrine has been extended in the jurisprudence of Michigan, then it really must be re-named, for it does violence to any known definitions of the words "open" or "obvious." The leaf-covered hole was not open and obvious and the trial court erred when it granted summary disposition in favor of Holiday Ventures on that basis.

I would reverse.

/s/ Michael J. Kelly