

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PERRY M. KANTNER, d/b/a KANTNER &  
ASSOCIATES,

Plaintiff-Appellant,

v

ANN ARBOR TOWER PLAZA  
CONDOMINIUM ASSOCIATION, KRAMER  
TRIAD MANAGEMENT GROUP, and TRIAD  
MANAGEMENT CORPORATION,

Defendant-Appellees.

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UNPUBLISHED  
November 16, 2004

No. 250202  
Washtenaw Circuit Court  
LC No. 01-000032-NI

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff Perry M. Kantner appeals as of right from a trial court order granting defendants Ann Arbor Tower Plaza Condominium Association, Kramer Triad Management Group and Triad Management Corporation's motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action. As there exists a question of fact regarding the open and obvious nature of the "black ice" causing plaintiff's injury, we reverse and remand for a trial on the merits.

I. Facts and Procedural History

On January 12, 1998, plaintiff went to work in his office located at the Tower Plaza, a building owned and managed by defendants. Although plaintiff did not notice any ice or snow on the ground that morning, he was aware that it rained or sleeted during the remainder of the day while he worked. When plaintiff left the Tower Plaza at 7:15 p.m., he believed the concrete outside was dry. He walked along the sidewalk to return to his car. Along the way, plaintiff slipped on black ice that had accumulated on the paving bricks between the curb and the

sidewalk.<sup>1</sup> Plaintiff asserted that the ice was nearly invisible and was only noticeable when he closely inspected the site of his fall.

Although defendants denied knowledge of the icy conditions outside of its building that day, Celeste Rodriguez, plaintiff's employee, stated in an affidavit that the Tower Plaza security guard and doorman, Dennis Kimberly, warned her at 5:30 p.m. that the front sidewalk was slippery. Mr. Kimberly was actually employed by Burns Security, but was the only building representative available after hours. Following plaintiff's fall, Mr. Kimberly inspected the fall site and prepared an incident report. Plaintiff testified in his deposition that Mr. Kimberly told him that he had previously asked someone to salt, but that no salt was available.

Upon the completion of discovery, defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the ice was an open and obvious condition that defendants were not required to warn against or remedy. In the alternative, defendants asserted that they did not have sufficient notice of the unsafe condition. The trial court found that the ice was an open and obvious condition as a matter of law and granted defendants' motion.

## II. Summary Disposition

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.<sup>2</sup> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.<sup>3</sup> "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."<sup>4</sup> Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.<sup>5</sup>

## II. Open and Obvious

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the

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<sup>1</sup> Pictures of the sidewalk included in the lower court record indicate that the paving bricks are flush with the sidewalk and the curb. The bricks appear to form an ornamental portion of the sidewalk. As the brick pavers appear to be part of the sidewalk, we reject defendant's contention that plaintiff invited injury by improperly walking across them.

<sup>2</sup> *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

<sup>3</sup> *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

<sup>4</sup> *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

<sup>5</sup> *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

land.”<sup>6</sup> The open and obvious doctrine presents a major exception to the general rule. This Court recently described the open and obvious doctrine in Michigan as follows:

An invitor is protected from liability, however, if the danger is open and obvious.<sup>23</sup> Michigan’s open and obvious doctrine was initially based on the Restatement of Torts.<sup>24</sup> Under the Restatement approach, a premises possessor is not liable for harm caused by known or obvious dangers “unless the possessor should anticipate the harm despite such knowledge or obviousness.”<sup>25</sup> A possessor must still warn or protect an invitee against open and obvious dangerous conditions when the possessor should anticipate the harm.<sup>26</sup>

However, in *Lugo v Ameritech Corp*, our Supreme Court replaced the Restatement approach with a special aspects analysis as follows:

[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.<sup>27</sup>

A special aspect exists when the danger, although open and obvious, is unavoidable or imposes a “uniquely high likelihood of harm or severity of harm.”<sup>28</sup> Pursuant to *Lugo*, a court must “focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff” or other idiosyncratic factors related to the particular plaintiff.<sup>29</sup>

The Supreme Court recently solidified this . . . legal premise in *Mann v Shusteric Enterprises, Inc.* . . . The Supreme Court held that courts must examine whether a danger is open and obvious, and whether special aspects render an open and obvious condition unreasonably dangerous, from the perspective of “a reasonably prudent person.”<sup>33</sup> Whether a dangerous condition is open and obvious is “not dependent on the characteristics of a particular plaintiff. . . .”<sup>34</sup>

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n23 [*Lugo, supra* at 516], citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

n24 *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 336-337; 683 NW2d 573 (2004) (Cavanagh, J., concurring in part and dissenting in part), citing *Lugo, supra* at 528 (Cavanagh, J., concurring), *Bertrand, supra* at 609, *Perkoviq v Delcor Home[-]Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002).

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<sup>6</sup> *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

n25 2 Restatement Torts, 2d, § 343A, p 218. See also *Mann, supra* at 337 (Cavanagh, J., concurring in part and dissenting in part).

n26 2 Restatement Torts, 2d, § 343A, comment f, p 220.

n27 *Lugo, supra* at 517.

n28 *Id.* at 518-519.

n29 *Id.* at 523-524.

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n33 [*Mann, supra*] at 328-329.

n34 *Id.* at 329 n 10.<sup>[7]</sup>

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The open and obvious danger doctrine is equally applicable in those cases involving the accumulation of ice and snow on a winter day.<sup>8</sup> As early as 1975, the Michigan Supreme Court found that a landowner could be liable for injuries caused by the natural accumulation of ice and snow. In *Quinlivan v The Great Atlantic & Pacific Tea Co.*,<sup>9</sup> the Supreme Court held:

[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. . . . As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee.<sup>[10]</sup>

More recently, the Supreme Court found in *Mann v Shusteric Enterprises, Inc.*,

Thus, in the context of an accumulation of snow and ice, *Lugo* means that, when such an accumulation is “open and obvious,” a premises possessor must “take reasonable measures within a reasonable period of time after the accumulation of

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<sup>7</sup> *Bragan v Symanzik*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 247287, issued August 19, 2004), slip op at 5-6 (some alterations in original).

<sup>8</sup> *Kenny v Kaatz Funeral Home, Inc.*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 248720, issued October 12, 2004), slip op at 5.

<sup>9</sup> *Quinlivan v The Great Atlantic & Pacific Tea Co.*, 395 Mich 244; 235 NW2d 732 (1975).

<sup>10</sup> *Id.* at 261.

snow and ice to diminish the hazard of injury to [plaintiff]” only if there is some “special aspect” that makes such accumulation “unreasonably dangerous.”<sup>11</sup>

Pursuant to *Mann*, this Court must apply the open and obvious danger doctrine and principles regarding special aspects to all premises liability actions, including those involving the accumulation of black ice.<sup>12</sup> A landowner has a duty to inspect the premises and “make any necessary repairs or warn [invitees] of any discovered hazards.”<sup>13</sup> Furthermore, the duty of a landowner to take reasonable measures within a reasonable time following the accumulation of ice and snow to reduce the risk of injury remains intact regardless of the creation of the open and obvious doctrine.<sup>14</sup>

As noted previously, the trial court determined that the ice in front of defendants’ building was open and obvious as a matter of law and, therefore, defendants were entitled to summary disposition. Michigan courts have often determined that icy conditions on a winter day are open and obvious. However, the ice in those cases was always noticeable.<sup>15</sup> In the recent opinion of *Kenny v Kaatz Funeral Home, Inc*, this Court found that whether black ice under snow is an open and obvious dangerous condition is a question of fact for the jury.<sup>16</sup> By its very nature, black ice is not noticeable *even without* a covering of snow.<sup>17</sup>

In *Kenny*, the plaintiff failed to notice that the parking lot was covered with black ice. When she fell, however, she was able to see the ice that led to her injury.<sup>18</sup> Likewise, the current plaintiff became aware of the presence of black ice only upon further inspection following his

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<sup>11</sup> *Mann, supra* at 332 (alteration in original). *Mann* clarified the *Quinlivan* Court’s position that not all hazardous ice and snow conditions are obvious to all. See *Kenny, supra* at 5, quoting *Mann, supra* at 333 n 13.

<sup>12</sup> *Kenny, supra* at 5. See also *Corey v Davenport Coll of Business (On Remand)*, 251 Mich App 1, 7-8; 649 NW2d 392 (2002) (finding that the *Quinlivan* analysis had been subsumed by the open and obvious rule created in *Lugo*).

<sup>13</sup> *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). See also *O’Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003) (a landowner must use reasonable care “prepare the premises and to make them safe” for invitees”).

<sup>14</sup> *Kenny, supra* at 6. See also *Riddle, supra* at 93 (finding that *Quinlivan*’s holding that reasonable measures be taken to eliminate accumulations of ice and snow is part of the correct definition of the law regarding a landowner’s duty of care to invitees).

<sup>15</sup> See, e.g., *Perkoviq, supra* at 16 (“There was nothing hidden about the frost or ice on the roof, and anyone encountering it would become aware of the slippery conditions.”); *Corey, supra* at 6-7 (plaintiff testified that he saw the icy condition of the steps before using them); *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002) (plaintiff “saw and recognized that the snow posed a safety hazard to her”).

<sup>16</sup> *Kenny, supra* at 6.

<sup>17</sup> *Id.* at 7-8.

<sup>18</sup> *Id.* at 3.

fall. As in *Kenny*, the black ice was not immediately noticeable. Accordingly, the trial court improperly determined that the black ice on the brick pavers was open and obvious as a matter of law. This determination is a factual question that should have been reserved for the trier of fact.

However, defendants also claimed that they lacked notice of the icy condition and, therefore, had no duty to warn against or remove the dangerous condition. Plaintiff presented evidence that Mr. Kimberly, defendants' only representative in the building after hours, warned Ms. Rodriguez two hours before plaintiff fell that the front sidewalk was slippery.<sup>19</sup> Furthermore, Mr. Kimberly also told plaintiff that he had previously asked someone to salt the sidewalk. Accordingly, plaintiff created a question of fact regarding defendants' knowledge of the icy condition. Furthermore, whether defendants failed to take action in a reasonable amount of time when they potentially knew of the icy conditions for two or more hours is a question for the trier of fact. Therefore, summary disposition would also be inappropriate on this ground.

Reversed and remanded for trial. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ E. Thomas Fitzgerald

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<sup>19</sup> Along with his motion for reconsideration of the grant of summary disposition, plaintiff filed a supplemental affidavit prepared by Ms. Rodriguez. In the affidavit, Ms. Rodriguez asserts that Mr. Kimberly monitored the parking lot and driveway for illegal parking and, therefore, should have discovered the ice. We need not consider whether this evidence was timely presented below as plaintiff presented sufficient evidence to create a question of fact regarding defendants' knowledge of the icy conditions. Furthermore, plaintiff has not relied on this affidavit on appeal.