

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY SMITH,

Plaintiff-Appellant,

v

WINGATE MANAGEMENT CORPORATION,

Defendant-Appellee.

UNPUBLISHED

August 2, 2005

No. 255151

Washtenaw Circuit Court

LC No. 03-000321-NO

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

While we concur with the treatment by Judge Owens of the covenant of habitability issue – i.e., we agree that the trial court’s order must be reversed to permit the finder of fact to decide if the sidewalk was not in reasonable repair for its intended use – we do not agree with Judge Owens with regard to whether the snow and ice accumulation on defendant’s sidewalk was open and obvious. We conclude that the condition leading to plaintiff’s fall was indeed open and obvious and that it did not pose an unreasonable risk of harm.

The availability of the open and obvious defense in an ice and snow accumulation case was recently reinforced by our Supreme Court in *Kenny v Kaatz Funeral Home, Inc (Kenny II)*, 472 Mich 929, 929; 697 NW2d 526 (2005), in which the Court reversed the earlier decision by the Court of Appeals “for the reasons stated in the dissenting opinion.” In *Kenny v Kaatz Funeral Home, Inc (Kenny I)*, 264 Mich App 99, 101-102; 689 NW2d 737 (2004), reversed by *Kenny II, supra*, the plaintiff observed a dusting of snow but did not see the ice, covered by snow, that apparently caused her to fall in a parking lot. The dissenting judge in *Kenny I* found the danger posed by the ice to be open and obvious and found that no special aspects of the parking lot existed that would countermand the application of the open and obvious doctrine. *Id.* at 118-119, 121-122.

As noted by Judge Owens, the *Kenny I* dissent emphasized that the plaintiff in that case had earlier observed three people holding onto a vehicle for balance in the parking lot. *Id.* at 120. The *Kenny I* dissent concluded that this observation provided the plaintiff with notice about the slippery conditions. *Id.* Here, plaintiff made no such observation. We conclude, however, that the absence of a similar observation here does not serve to negate the application of the open and obvious doctrine.

The instant plaintiff testified that, on the day of his fall, it had been warm. He further indicated that, when he left for work about 8:30 p.m., the ground was “gishy looking,” meaning that the soil was “wet [and] saturated . . . from the winter” Plaintiff testified that, when he departed work at 2:00 a.m., the temperature had plunged below freezing and a light dusting of snow had fallen. While plaintiff stated that he noticed no ice or slick spots on his way home or on the sidewalk where he fell, it is clear that he observed a light covering of snow on the ground.

In *Kenny I*, *supra* at 119, the dissent favorably cited the following passage written by the trial court in that case: “[The plaintiff] also conceded that it had been snowing outside. As a lifelong resident of Michigan, she should have been aware that ice frequently forms beneath snow during snowy December nights.” Plaintiff here was also a long-term Michigan resident and should have been aware that ice frequently forms beneath snow in conditions such as those that existed on the day of his fall. That he did not first observe others struggling to keep their balance on the sidewalk is of no moment, because a reasonable, long-term Michigan resident understands that when the temperature drops below freezing and it begins snowing on a previously warm and wet day, ice is likely to be present on the ground. Plaintiff should have been aware of the risk upon casual inspection of the ground and the prevailing conditions. See *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Accordingly, the dangerous condition in this case was open and obvious as a matter of law. *Id.* Moreover, the condition had no “special aspects that “[gave] rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided.” See *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). As noted by the dissent in *Kenny I*, “[s]now and ice in a Michigan parking lot [in the winter] are a common, not unique, occurrence.”

Accordingly, we affirm the trial court’s ruling concerning the applicability of the open and obvious doctrine. We join Judge Owens in reversing the trial court with respect to the covenant of habitability issue.¹

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter

¹ Judge Owens concludes that plaintiff was an invitee. We decline to address whether plaintiff was an invitee or a licensee, because our conclusions would remain the same under either scenario.