STATE OF MICHIGAN

COURT OF APPEALS

SHERYL L. SPIGNER,

Plaintiff-Appellee/Cross-Appellee,

v

YARMOUTH COMMONS ASSOCIATION and KRAMER-TRIAD MANAGEMENT GROUP, LLC,

Third-Party Plaintiffs-Defendant/Appellants,

and

W & D LANDSCAPING & SNOW PLOWING, INC.,

Third-Party Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 30, 2014

No. 315616
Macomb Circuit Court
LC No. 2011-002037-NO

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

K. F. KELLY, J. (*concurring in part and dissenting in part*).

I agree with the majority that the trial court erred when it determined that Spigner raised a viable claim for damages premised on a breach of MCL 559.241. However, because the condition in this case was open and obvious and there were no special aspects rendering the condition unreasonably dangerous, I would reverse and order that the trial court enter summary disposition in favor of W & D Landscaping.

A property owner has a duty to exercise reasonable care to protect its invitees from an unreasonable risk of harm that is caused by a dangerous condition on the property. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, an owner generally does not have a duty to protect invitees from open and obvious dangers. *Id*. A condition is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002) (internal citation marks omitted). "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Royce v Chatwell Club Apartments*, 276 Mich App 389,

392; 740 NW2d 547 (2007). Where there is snow on a sidewalk or parking lot, its potential slipperiness is open and obvious as a matter of law. *Id*. at 394.

Nevertheless, even if a danger is open and obvious, an owner has a duty to take reasonable precautions to protect its invitees if special aspects of a condition render it unreasonably dangerous. *Lugo, supra* 464 Mich 517. The issue in this case is whether the condition presented special aspects that rendered it unreasonably dangerous. An unreasonably dangerous condition may exist because it is "effectively unavoidable" or "impose[s] a high risk of severe harm." *Lugo, supra* 464 Mich at 518. The *Lugo* Court explained:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.

In *Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), our Supreme Court further examined what is meant by "effectively unavoidable." In that case, the plaintiff was injured when she slipped and fell on ice as she entered a health club facility. The facility had just one entrance, and the plaintiff recognized the danger posed by the icy sidewalk leading to that entrance. She chose to walk on the ice to enter the facility and work out, and while doing so, she slipped and fell, injuring her back. *Hoffner, supra* 492 Mich at 456-457.

The Court considered the "special aspects" exception to the open and obvious danger doctrine. It explained that "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. at 468-469 (emphasis in original). It further instructed that the touchstone for permitting recovery under this exception is the unreasonableness of the hazard. *Id*. at 471.

The Court explained that

> exceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations. Thus, an "unreasonably dangerous" hazard must be just that—not just a dangerous hazard,

> but one that is *unreasonably* so. And it must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances. An "effectively unavoidable" hazard must truly be, for all practical purposes, one that a person is required to confront under the circumstances. A general interest in using, or even a contractual right to use, a business's services simply does not equate with a compulsion to confront a hazard and does not rise to the level of a "special aspect" characterized by its *unreasonable risk of harm*. [*Id*. at 472-473 (emphasis in original) footnotes omitted.]

The majority concludes that Spigner, in seeking to retrieve her mail, was required to confront the condition, rendering the hazard effectively unavoidable. I disagree. Spigner does not make a compelling argument that she was "forced to confront the risk," or " 'trapped' in the building," or "compelled by extenuating circumstances with no choice but to traverse a previously unknown risk." *Hoffner*, 492 Mich at 473. Moreover, the mailbox was obviously accessible by a motor vehicle as can clearly be seen in the photographs of the mailbox.[1]

In *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2004), the plaintiff was injured when she slipped and fell on an icy sidewalk while attempting to remove personal items from a private home where she was previously employed as a caregiver. *Id*. at 233. The Court determined that the icy conditions were not unavoidable because the plaintiff could have removed her items another day, she was not "effectively trapped inside a building" such that she had to encounter the open and obvious condition in order to get out, and she admitted that she had "walked around the regular pathway to avoid the slippery condition." *Id*. at 242.

In *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 392 (2002), the plaintiff was injured when he slipped and fell on icy steps as he was going into his college dormitory. *Id*. at 2. This Court concluded that the icy condition was not unavoidable because the plaintiff had admitted that he saw the snow and ice buildup on the steps and knew that there was an alternative entry nearby. *Id*. at 6.

And in *Kenny v Kaatz Funeral Home Inc*, 472 Mich 929, 697 NW2d 526 (2005), the Supreme Court, "in lieu of granting leave to appeal," reversed this Court's decision for the reasons stated in the dissent. In that case, plaintiff fell while traversing the defendant's snow-covered parking lot to gain access to the defendant's place of business. The dissent concluded that "[s]now and ice in a Michigan parking lot on December 27 are common, not unique, occurrence[s]" and that a snow-covered parking lot was not the type of unique situation that fell within the special aspects exception. *Kenny*, 264 Mich App 99, 121; 689 NW2d 737 (2004) (Griffin, J., dissenting).

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[1] The photographs show both older tire tracks and fresh, crisp tire tracks accessing the mailbox. However, plaintiff chose not to drive up to the mailbox to retrieve her mail, nor did she even try to do so, but rather disregarded the option and chose to access the mailbox on foot.

The wintery conditions that Spigner encountered did not give rise to a special aspect exception because she chose to confront the hazard. Moreover, there is no evidence that the condition at issue here gave rise to a uniquely high severity of harm. Our Supreme Court has cautioned:

> In considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a "special aspect" and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition a priori, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. This is because a plaintiff may suffer a more or less severe injury because of idiosyncratic reasons, such as having a particular susceptibility to injury or engaging in unforeseeable conduct, that are immaterial to whether an open and obvious danger is nevertheless unreasonably dangerous. Thus, . . . this opinion does not allow the imposition of liability merely because a particular open and obvious condition has some potential for severe harm. Obviously, the mere ability to imagine that a condition could result in severe harm under highly unlikely circumstances does not mean that such harm is reasonably foreseeable. However, we believe that it would be unreasonable for us to fail to recognize that unusual open and obvious conditions could exist that are unreasonably dangerous because they present an extremely high risk of severe harm to an invitee who fails to avoid the risk in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented. [*Lugo*, 464 Mich at 519 n 2.]

There is nothing in the record to suggest that Spigner confronted "anything other than what every Michigan citizen is compelled to confront countless times every winter." *Hoffner*, 492 Mich at 480.

I would reverse.

/s/ Kirsten Frank Kelly