

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

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DEANNA GOLEMBIEWSKI and MARK  
GOLEMBIEWSKI,

UNPUBLISHED  
March 11, 2003

Plaintiffs-Appellants,

v

THOMAS JARZEMBOWSKI FUNERAL HOME,  
INC., d/b/a JARZEMBOWSKI FUNERAL  
HOME, and WOODY'S LANDSCAPING  
COMPANY,

No. 238083  
Wayne Circuit Court  
LC No. 00-015020-NO

Defendants-Appellees.

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Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's orders granting defendants' motions for summary disposition and denying their motion for reconsideration. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On January 13, 1998, plaintiffs drove to defendant Jarzembowski Funeral Home to attend a funeral. Prior to parking in a designated space in the funeral home parking lot Mark Golembiewski stopped in the lot to allow Deanna Golembiewski to exit the vehicle. Deanna Golembiewski opened the vehicle door and stepped down onto the vehicle's running board. She testified at deposition that she did not notice any ice or look down before she stepped off the running board. She slipped on ice and fell to the ground, sustaining injuries.

Plaintiffs filed suit alleging that Deanna Golembiewski was on the premises as a business invitee, and that the funeral home failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. Plaintiffs alleged that defendant Woody's Landscaping Company breached its oral contract with the funeral home by failing to take reasonable steps to remove snow and ice from the parking lot. Mark Golembiewski alleged loss of consortium.

Defendants filed separate motions for summary disposition pursuant to MCR 2.116(C)(10), arguing that the undisputed evidence showed that the funeral home parking lot had been plowed, that the condition of the parking lot was open and obvious, and that no special aspects of the condition made it unreasonably dangerous in spite of its open and obvious condition. The trial court granted defendants' motions, finding that no genuine issue of fact

existed as to whether the condition of the parking lot was open and obvious, and that no genuine issue of fact existed as to whether any special aspects made the condition unreasonably dangerous in spite of its open and obvious condition. The trial court denied plaintiffs' motion for reconsideration.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

We review a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-611; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.*, 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect invitees from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Plaintiffs argue the circuit court abused its discretion by denying their motion for reconsideration, and erred by granting defendants' motions for summary disposition. We disagree and affirm the trial court's grant of summary disposition.<sup>1</sup> Plaintiffs' motion for

<sup>1</sup> The trial court granted summary disposition in favor of Woody's on the ground that the condition of which plaintiffs complained was open and obvious. Woody's did not own or control the property on which the injury occurred; therefore, application of the open and obvious danger doctrine, an aspect of premises liability, to the issue of whether a genuine issue of fact existed as to whether Woody's performed negligently under its contract was erroneous. A defendant who does not own or control premises on which an injury occurs cannot be held liable under a premises liability theory. See *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702; 644 NW2d 779 (2002). As a general rule, those persons or parties foreseeably injured by the negligent performance of a contractual duty are owed a duty of care. *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002). Plaintiffs failed to establish the existence of a

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reconsideration merely presented the same issues previously argued to the trial court; thus, the trial court did not abuse its discretion by denying the motion. MCR 2.119(F)(3). Plaintiffs' reliance on *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975), for the proposition that the open and obvious danger doctrine does not apply in cases involving an accumulation of snow and ice, is misplaced. *Quinlivan* held that a premises owner owes a business invitee the duty to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to the invitee, and rejected the proposition that ice and snow are obvious hazards in all circumstances and cannot give rise to liability. *Id.* Subsequently, this Court has clarified that

the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo* [*supra*]. Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious. [*Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8; 649 NW2d 392 (2002).]

The funeral home parking lot had been plowed but not salted the day before the accident occurred. In her deposition, Deanna Golembiewski testified that had she been watching where she stepped, she would have noticed the ice and would have attempted to avoid it. The fact that Deanna Golembiewski claimed that she did not see the ice is irrelevant. *Novotney, supra*, 475. It is reasonable to conclude that Deanna Golembiewski would not have been injured had she been watching the area she was about to set foot on. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). The affidavit from plaintiffs' liability expert did not create an issue of fact in light of Deanna Golembiewski's testimony that had she been watching her step, she would have seen the ice in the parking lot. Plaintiffs did not come forward with sufficient evidence to create an issue of fact as to whether an average person with ordinary intelligence could not have discovered the condition upon casual inspection. The circuit court did not err in concluding that the condition of the parking lot constituted an open and obvious danger.

Furthermore, plaintiffs' argument that the condition of the parking lot was unreasonably dangerous under the circumstances is without merit. The attire worn by funeral home patrons and the state of mind of those patrons were not special aspects of the condition of the parking lot itself. Plaintiffs failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. *Lugo, supra*; see also *Joyce v Rubin*, 249 Mich App 231, 240-243; 642 NW2d 360 (2002). Summary disposition was proper.

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genuine issue of fact as to whether Woody's performed negligently under its verbal contract with the funeral home, or whether Deanna Golembiewski was injured as a result of any negligent act by Woody's. We conclude that the trial court correctly granted Woody's motion for summary disposition, albeit for the wrong reason. *Portice v Otsego Co Sheriff's Dep't*, 169 Mich App 563, 566; 426 NW2d 706 (1988).

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Joel P. Hoekstra