

STATE OF MICHIGAN
COURT OF APPEALS

CAROL BUCKENMEYER and
LARRY BUCKENMEYER,

UNPUBLISHED
October 21, 2003

Plaintiffs-Appellants,

v

No. 242953
LC No. 00-048040-NO

OFFICE MAX, INC.,

Defendant/Cross-Plaintiff-Appellee,

and

TWENTY-EIGHTH STREET KENTWOOD
ASSOCIATES,

Defendant/Cross-Plaintiff/Cross-
Defendant-Appellee,

and

DENNIS GERSHENSON, DAVID ROSE,
SYDNEY ROSE, FREDERICK RUEBIN, and
GENERAL LANDSCAPING & LAWN CARE,

Defendants/Cross-Defendants-
Appellees.

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

In this premises liability action, plaintiffs Carol and Larry Buckenmeyer appeal as of right from an order granting defendants Office Max, Inc., 28th Street Kentwood Associates, and General Landscaping & Lawn Care's motions for summary disposition. We affirm.

The instant case stems from a slip and fall accident that occurred on the morning of January 17, 1999. Plaintiff Larry Buckenmeyer dropped off his wife, plaintiff Carol Buckenmeyer, at the curb in front of the Office Max store located at 4160 28th Street in

Kentwood. As she crossed the front walkway, she slipped on a patch of ice and fractured her left leg and ankle.

Plaintiffs brought suit. Defendants moved for summary disposition relying on the open and obvious doctrine. The trial court granted the motion on that basis.

We review de novo decisions to grant or deny summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Under MCR 2.116(C)(10), summary disposition is proper when there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In making this determination, we consider the pleadings, affidavits, depositions, and other documentary evidence available to us. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995), citing *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993). A party opposing such a motion “may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial.” *Id.*

Plaintiffs first contend that a genuine issue of material fact exists regarding whether the patch of ice that caused Carol's fall constituted an open and obvious danger. We disagree. Parties in possession of land generally have a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). The open and obvious doctrine defines the extent of this general duty. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Under most circumstances, a possessor of land "is not required to protect an invitee from open and obvious dangers." *Id.* at 517. But if "special aspects of a condition make even an open and obvious risk unreasonably dangerous," the possessor must take reasonable steps to protect invitees from harm. *Id.*

When deciding a case based on premises liability we apply a two-step analysis to determine if the hazard complained of was open and obvious. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). An open and obvious danger exists where the invitee has actual knowledge of the condition. *Id.* If the invitee is unaware of the risk, then the question becomes whether the dangers were “so obvious that the invitee might reasonably be expected to discover them.” *Id.* In applying the objective prong of the test, we determine whether an average person of ordinary intelligence would have discerned the risk “upon casual inspection.” *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

We hold that plaintiffs did not produce sufficient evidence so as to create a genuine issue of material fact regarding whether the hazards complained of in the instant case were open and obvious. Carol testified that she had previously slipped and fallen due to conditions similar to those she encountered on the day of the accident. At the time of this incident, she noticed that the walkway was “slipperier” than she first thought and attempted to walk carefully. She was aware of the icy conditions and the potential danger of slipping before she fell. As this Court stated in *Joyce, supra* at 239, “the average person with ordinary intelligence would not only have seen the . . . condition of the sidewalk, but would have discovered the risk of slipping on it.” Therefore, no reasonable juror could have concluded that these icy conditions did not constitute an open and obvious hazard.

Next, plaintiffs argue that even if the danger was open and obvious, a jury could have found special aspects giving rise to a uniquely high likelihood of harm under the circumstances. In *Lugo*, the Michigan Supreme Court stated that only “special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided” lead to liability for open and obvious hazards. *Lugo, supra* at 519. The first special aspect occurs when the dangerous condition is effectively unavoidable. *Id.* at 518. The Court provided the example of a business in which standing water covers the only exit and traps a customer inside. *Id.* The second kind when the open and obvious condition imposes “an unreasonably high risk of severe harm.” *Id.*

In the present case, there was no evidence that an unreasonably high risk of severe harm existed. The danger presented was that of slipping and falling due to wintry conditions. This Court has held that a layer of snow on a sidewalk did not constitute a unique danger creating a “risk of death or severe injury.” *Joyce, supra* at 243. Even falling several feet down ice-coated stairs does not give rise to the sort of severe harm contemplated in *Lugo*. *Corey v Davenport College of Business*, 251 Mich App 1,6-7; 649 NW2d 392 (2002). Therefore, if the grant of summary disposition is to be reversed, there must be a question of material fact regarding whether the danger was avoidable.

Plaintiffs contend that defendants failed to provide invitees any safe route of access to the store. They attempt to draw an analogy between the instant case and the example provided by the Supreme Court in *Lugo*, i.e., customers are unable to leave a building because a dangerous condition blocks the only exit. Plaintiffs urge that no distinction should be made based on whether the injured party was entering or leaving the business. We disagree.

This Court addressed a similar situation in *Joyce, supra* at 242. There, the plaintiff slipped on the sidewalk while entering the home of her former employer to remove some of her personal belongings. *Id.* at 234. Although plaintiff Joyce argued that she had no choice but to cross the snowy walkway, this Court found that “Joyce could have simply removed her personal items another day.” *Id.* at 242-243. “Unlike the example in *Lugo*, Joyce was not effectively trapped inside a building so that she *must* encounter the open and obvious condition in order to get out.” *Id.* at 242, emphasis in original.

The holding in *Joyce* is instructive for the instant case. Despite the open invitation to do business with Office Max, plaintiff was not forced to encounter the open and obvious hazards in front of the store. Even if no safe path to the entrance existed, she could have shopped on a different day or with a retailer at a safer location. As in *Joyce*, “no reasonable juror could conclude that the aspects of the condition were so unavoidable that [she] was effectively forced to encounter the condition.” *Id.* at 242-243.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Christopher M. Murray