

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN D'AGOSTINI,

Plaintiff-Appellant,

v

CLINTON GROVE CONDOMINIUM
ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED

March 1, 2005

No. 250896

Macomb Circuit Court

LC No. 02-001704-NO

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Plaintiff Steven D'Agostini appeals as of right an order granting defendant Clinton Grove Condominium Association's motion for summary disposition pursuant to MCR 2.116(C)(10) in this premises liability action. This case is being decided without oral argument pursuant to MCR 7.214(E). As there exists a question of fact regarding the open and obvious nature of ice concealed by a layer of snow, we reverse and remand for a trial on the merits.

I. Factual Background

Midday on January 25, 2000, plaintiff accompanied his sister, Christine D'Agostini, to her condominium. It had snowed on and off that day and the ground in the condo development was covered by one to one-and-a-half inches of snow. Ms. D'Agostini parked in the driveway and the two entered her condo through the garage. Plaintiff returned to the vehicle a few minutes later to retrieve some paperwork. He sat inside the vehicle while he searched. When he exited the vehicle the second time, his foot slipped on ice underneath the snow cover, causing his current injuries. Plaintiff asserted in his deposition that he knew he had slipped on ice after he fell as his hand continued to slip when he attempted to stand. Ms. D'Agostini stated in her deposition that the ice was revealed only after plaintiff's fall as his body displaced the snow cover.

II. Summary Disposition

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.¹ A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.² "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."³ 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.⁴

III. Open and Obvious Doctrine

"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 land."⁵ 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.²³ Michigan's open and obvious doctrine was initially based on the Restatement of Torts.²⁴ 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."²⁵ A possessor must still warn or protect an invitee against open and obvious dangerous conditions when the possessor should anticipate the harm.²⁶

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.²⁷

¹ *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

² *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

³ *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

⁴ *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

⁵ *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).

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.”²⁸ 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.²⁹

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.”³³ Whether a dangerous condition is open and obvious is “not dependent on the characteristics of a particular plaintiff. . . .”³⁴

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).

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.^[6]

⁶ *Bragan v Symanzik*, 263 Mich App 324, 331-332; 687 NW2d 881 (2004) (some alterations in original).

The open and obvious danger doctrine is equally applicable in those cases involving the accumulation of ice and snow on a winter day.⁷ 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*,⁸ 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.^[9]

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 snow and ice to diminish the hazard of injury to [plaintiff]” only if there is some “special aspect” that makes such accumulation “unreasonably dangerous.”^[10]

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.¹¹ A landowner has a duty to inspect the premises and “make any necessary repairs or warn [invitees] of any discovered hazards.”¹² 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 where the accumulation is not open and obvious or where special aspects exist.¹³

⁷ *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 106-107; 689 NW2d 737 (2004).

⁸ *Quinlivan v The Great Atlantic & Pacific Tea Co*, 395 Mich 244; 235 NW2d 732 (1975).

⁹ *Id.* at 261.

¹⁰ *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 107, quoting *Mann, supra* at 333 n 13.

¹¹ *Kenny, supra* at 107. 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*).

¹² *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”).

¹³ *Kenny, supra* at 107. See also *Riddle, supra* at 93 (finding that *Quinlivan*’s holding that
(continued...)

The trial court determined that the slippery conditions in defendant's parking lot and the driveway were open and obvious as a matter of law. 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.¹⁴ In the recent opinion of *Kenny v Kaatz Funeral Home, Inc*, this Court found that whether ice under snow is an open and obvious dangerous condition is a question of fact for the jury.¹⁵ The ice in *Kenny* was "black ice," i.e. the same color as the pavement it covered.

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.¹⁶ Likewise, the current plaintiff became aware of the presence of ice only upon his fall. Although plaintiff has not claimed that the ice was "black ice," he and his sister testified that the ice was only noticeable following his fall, when the snow in the immediate area was displaced. Furthermore, as in *Kenny*, defendant failed to present any evidence of a recent thaw or rain that would place a reasonable person on notice of the presence of ice.¹⁷ As plaintiff presented sufficient evidence to establish that the ice was not noticeable due to the snow cover, the trial court improperly determined that the ice was open and obvious as a matter of law.¹⁸ This determination is a factual question that should have been reserved for the trier of fact. Accordingly, plaintiff is entitled to a trial on the merits.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Jessica R. Cooper

(...continued)

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).

¹⁴ 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").

¹⁵ *Kenny, supra* at 108.

¹⁶ *Id.* at 102-103.

¹⁷ *Id.* at 108.

¹⁸ Furthermore, the fact that the ice was not visible because it was hidden underneath a layer of snow is a special aspect rendering the condition unreasonably dangerous.