

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UNPUBLISHED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. 03-321-NO

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

OWENS, J. (*concurring in part and dissenting in part*).

This appeal arises from a slip and fall at an apartment complex. Defendant owns the apartments in Ypsilanti where the injury giving rise to this claim occurred. Plaintiff slipped and fell on defendant's sidewalk around 2:30 a.m., on March 9, 2003. He was a guest of his mother, who was renting an apartment from defendant. Plaintiff alleged that improper design and/or maintenance of the sidewalk caused it to pool water that formed into the ice patch on which he fell. He also alleged inadequate lighting. He appeals by right from the court's grant of summary disposition to defendant. I would reverse in all respects and remand for trial. I respectfully dissent from the majority opinion with respect to whether ice under snow is open and obvious as a matter of law.

Depositions of two maintenance employees indicate that no shoveling or salting was done after March 7, two days before plaintiff's fall on March 9. One of the deponents stated that the sidewalk would get wet but he did not notice if the side by the grass or the side by the parking lot was wetter. He did, however, notice unusual ice build-ups closer to the grass as opposed to the parking lot but did not know if it was because the concrete was slanted in that direction.

Plaintiff described the day of his fall in his deposition. He left for work at about 8:30 p.m., when it was getting dark. He did not see any snow or ice on the sidewalk on the way to his truck. It had been warm that day, and snow was melting. He did not notice any pooled water on the sidewalk. By the time he left work after 2:00 a.m., the temperature had dropped below freezing. A light dusting of snow had fallen. Plaintiff noticed no slick spots when he walked and drove home from work. His headlights flashed across the area where he eventually fell, and he saw no ice, just a dusting of snow. He did not slip as he walked toward the sidewalk. Once on the sidewalk, he walked four to six steps, slipped, and fell. He did not see any ice until after he fell because it was covered by snow.

Plaintiff presented an engineer's report. The expert reported that small lights were spaced about every 110 feet along the north side of the sidewalk, and there was an exterior light over the front door. Plaintiff claimed that the light nearest to the location where he fell – approximately thirty feet away – was burned out the night of the incident. The engineer stated that sidewalks should be pitched toward a road or parking lot where there are catch basins for water. Use of a level indicated that the sidewalk was pitched toward the grass. Attached to the report were photographs of the site several months after the injury depicting standing water, and documents reflecting sidewalk slope requirements for the Michigan Department of Transportation and some cities in southeast Michigan. The engineer concluded:

Based on over 40 years of engineering practice in southeast Michigan, it is my professional opinion that the sidewalk where [plaintiff's] accident occurred was not constructed in accordance with engineering standards used in Michigan. Also, it is my opinion that the sidewalk has been in this condition for many years, probably since it was constructed. The lack of positive drainage on the sidewalk where [plaintiff's] accident occurred allowed ice to form, which was hidden from [his] view early in the morning of March 9, due to a "light" snow cover and apparent minimal lighting. If the sidewalk had been constructed correctly, water (which could become ice) would not accumulate on the sidewalk.

The court granted summary disposition in favor of defendant. It stated that whether plaintiff was a licensee or invitee was likely a question of fact. Giving plaintiff the benefit of doubt and assuming defendant owed him the greater duty owed an invitee, the court relied on *Corey v Davenport College of Business*, 251 Mich App 1; 649 NW2d 392 (2002), and held that "the light dusting of snow over what apparently was some ice was an open and obvious condition." According to the court:

Plaintiff possessing ordinary intelligence knew that sidewalk was concrete covered with a light dusting of snow. Further being aware of Michigan winters, [p]laintiff was also aware that there could be ice underneath the snow. Thus the snowy condition of the sidewalk was an open and obvious condition. Further, there is no evidence that [d]efendant had any notice of this apparently newly deposited snowfall.

Considering plaintiff's claim that the open and obvious doctrine should not apply because of the covenant of habitability, the court stated:

Plaintiff has failed to demonstrate to the satisfaction of the Court that [d]efendant has violated any statutory requirements or that such an investigation is pending. In addition, although [p]laintiff's expert offers criticism, he fails to cite any particular violation of any Michigan statute attributable to [d]efendant. Moreover, even if the sidewalk construction violated certain "standards," the Court finds in this particular factual situation that such a claimed violation does not result in a condition that was unreasonably dangerous.

This Court reviews de novo a trial court's grant of summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no

genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) challenges whether the complaint is factually sufficient. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court must consider all admissible evidence in the light most favorable to the nonmoving party. *Id.*

Invitees are entitled to the greatest protection under premises liability law. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). A landowner’s “reason for inviting persons onto the premises is the primary consideration when determining the visitor’s status: In order to establish invitee status, a plaintiff must show that the premises were held open for a *commercial* purpose.” *Stitt, supra* at 604 (emphasis in original). Similarly, in *Stanley v Town Square Coop*, 203 Mich App 143; 512 NW2d 51 (1994), a social guest was considered a licensee of the tenant because the tenant derived no pecuniary benefit from the visit. *Id.* at 147-148. But the opposite was true for the landlord:

the landlord does receive some pecuniary benefit. Part of the rent paid to the landlord is the consideration for giving to the tenants the right to invite others onto the property. Thus, the same duty that a landlord owes to its tenants also is owed to their guests, because both are the landlord’s invitees. See *Aisner v Lafayette Towers*, 129 Mich App 642, 341 NW2d 852 (1983). [*Stanley, supra* at 148.]

Part of the quid pro quo between defendant and its tenants like plaintiff’s mother is the right of tenants’ guests to use common areas. *Stitt, supra* at 604. The burden of inspection is appropriately placed on defendant because it put itself out as an enterprise offering rental premises that tenants pay to use and whose use includes inviting guests. *Stanley, supra* at 148. Thus, plaintiff was an invitee.

Plaintiff first contends that defendant breached its covenant of habitability, which is codified in the following statutory language:

- (1) In every lease or license of residential premises, the lessor or licensor covenants:
 - (a) That the premises and all common areas are fit for the use intended by the parties.
 - (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] willful or irresponsible conduct or lack of conduct. [MCL 554.139.]

The statute also states that its provisions “shall be liberally construed” MCL 554.139(3). The trial court dismissed plaintiff’s claim under this statute for failure to allege violations of any specific statutory safety provisions. This was a misreading of the statute. The plain language of the statute separates the duty to comply with health and safety laws from the duty to “keep the

premises in reasonable repair. . . .” MCL 554.139(1)(b). Although evidence that a specific statute was violated is dispositive of whether a lessor complied with applicable health and safety laws, it is not necessarily required with respect to whether the lessor violated a duty to keep the premises in reasonable repair. Therefore, the court should have determined whether an issue of fact existed regarding defendant’s duty to keep the sidewalk in reasonable repair.

The engineer’s report raised a colorable claim that the sidewalk was improperly pitched for drainage purposes, causing water to collect on its surface and freeze to form an unsafe surface for walking; and the engineering standards contained in the report arguably demonstrated what was considered reasonable repair.¹ The factfinder must now decide if in fact the sidewalk was not in reasonable repair for its intended use. See *Scott v Harper Recreation, Inc*, 444 Mich 441, 448; 506 NW2d 857 (1993) (unless it involves an overriding matter of public policy, the reasonableness of a premises owner’s actions is considered a question for the jury).

The open and obvious doctrine may not be used to avoid a statutory duty. *Woodbury v Brucker*, 467 Mich 922; 658 NW2d 482 (2002), citing *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002) (a municipality may not use an open and obvious defense to avoid its statutory duty to keep its sidewalks in reasonable repair). This Court applied this legal principle to a private landowner’s statutory duty under MCL 554.139(1), in *O’Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003). In *O’Donnell* the plaintiff fell inside an inn when she tried to climb down from the loft where she had been sleeping. *Id.* at 570. In reversing and remanding the trial court’s grant of summary disposition to the defendant, this Court held:

The application of the open and obvious danger doctrine may additionally be avoided in a premises liability claim involving the lease or license of residential property by the statutory imposition of a specific duty to maintain the premises in reasonable repair and in compliance with local health and safety laws. [*Id.* at 582.]

Therefore, the reasonableness of repair could not be resolved by finding that the risk the sidewalk presented was open and obvious. Nevertheless, the evidence before the trial court did not demonstrate with respect to plaintiff’s common-law claim of premises liability that the hazard was open and obvious.

Generally, a premises possessor owes invitees a duty to use reasonable care to protect them from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty does not extend to a danger that is

¹ In saying this, we acknowledge defendant’s argument that plaintiff failed to provide evidence of a standard that applied to a private property owner in the city of Ypsilanti. We express no opinion whether a private property owner must comply with engineering standards set forth by the Michigan Department of Transportation. We merely note that it was some evidence that a standard existed. Moreover, plaintiff provided evidence that several cities have adopted similar standards and imposed them on private residents.

open and obvious, unless special aspects of the open and obvious condition create an unreasonable risk of harm, from which the premises possessor must take reasonable steps to protect invitees. *Id.* at 516-517. “[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee” unless the risk of harm is unreasonable despite being obvious or known to the invitee. *Bertrand, supra* at 613-614, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). “The test to determine if a danger is open and obvious is whether ‘an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.’” *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

The open and obvious analysis, when it comes to ice and snow and the role of judge and jury, is expressed in a developed line of case law. According to *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975):

[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. [*Quinlivan, supra* at 261.]

In *Corey, supra* at 8, this Court concluded that *Quinlivan, supra* was subsumed in the special aspects rule set forth in *Lugo*. However, the Supreme Court recently by implication affirmed that accumulation of snow and ice is not open and obvious as a matter of law. In *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004), the Court stated:

[I]n 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.” [Emphasis added.]

The emphasized language indicates that not all accumulation of snow and ice is open and obvious. Indeed, in *Mann*, the Court refrained from deeming open and obvious the “icy and snow-covered parking lot” upon which the intoxicated plaintiff fell and remanded the case to the trial court. *Mann, supra*, 470 Mich at 327, 334. The Court explicitly acknowledged the role of the jury. “[I]n determining whether defendant breached its duty, the fact-finder must decide only whether a reasonably prudent person would have slipped and fallen on the ice and snow in defendant’s parking lot, or whether that reasonably prudent person should have been warned by defendant of the dangerous condition.” *Id.* at 330. The Court also ruled that liability hinges on the condition of the premises, not the particular plaintiff. *Id.* at 329. It stressed the objective standard of care of the reasonably prudent person and rejected as irrelevant the intoxication of the plaintiff and the dramshop’s knowledge of the intoxication. *Id.* at 329-330.

Therefore, the question before the trial court in the instant case was whether a reasonably prudent person in plaintiff's position would have upon casual inspection discovered the danger and the risk that defendant's sidewalk presented. The only evidence presented on this point was that the only thing visible when plaintiff slipped was a light dusting of snow. He had not observed ice on the sidewalk earlier in the day and did not encounter ice anywhere else throughout his walk and drive home. Thus, he had no reason to believe that slippery ice was underneath the snow. The trial court's pronouncements on temperature fluctuations and a general knowledge in Michigan that where there is snow there might be ice is the sort of blanket conclusion rejected in *Quinlivan* and *Mann*. Were it otherwise, then all accumulations of snow and ice would be open and obvious per se, which, until our Supreme Court rules otherwise, is not the law in Michigan.

Unlike unsuccessful plaintiffs that came before him, plaintiff did not know of the ice. This distinction is crucial because it sets apart other cases in which this Court held that accumulations of snow and ice were open and obvious. In each case, the plaintiff had advance knowledge of the slippery condition, unlike plaintiff in this case. In *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002), there “was nothing hidden about the frost or ice on the roof” off of which the plaintiff slipped and fell. In *Corey, supra* at 6-7, the plaintiff “testified that although he saw the steps and their condition . . . he nonetheless attempted to use them.” The instant trial court incorrectly relied on this case because plaintiff did not recognize the danger that the sidewalk presented. Finally, in *Joyce v Rubin*, 249 Mich App 231, 239; 642 NW2d 360 (2002), this Court applied the open and obvious doctrine where the plaintiff was aware of the slippery sidewalk, repeatedly told the defendant about it, and had slipped on it twice before falling. Moreover, unlike the plaintiff in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 120; 689 NW2d 737 (2004), rev'd ___ Mich ___ (2005) (for reasons stated in the dissenting opinion), plaintiff here did not have the benefit of observing three companions “holding on to the hood of the car to keep their balance” to alert him of the slippery condition of the sidewalk.

The trial court erred in finding that the snow and ice accumulation on defendant's sidewalk was open and obvious when no evidence demonstrated that a reasonable person would have discovered the condition on casual inspection. In light of this conclusion, it is unnecessary to consider whether the sidewalk presented an unreasonably dangerous condition, a question that is only triggered when the condition is deemed open and obvious.

I would reverse in all respects.

/s/ Donald S. Owens