

STATE OF MICHIGAN
COURT OF APPEALS

GARY BENDER and BRIDGETT BENDER,

Plaintiffs-Appellants,

v

JAY SAPH a/k/a NEWPORT SHORES
APARTMENTS, JAY SAPH TRUST, ROY G.
FRENCH & ASSOCIATES, MARK DANNEELS,
BILLY DANNEELS, HAROLD DANNEELS,
Individually and d/b/a DANNEELS
LANDSCAPING AND SNOW REMOVAL,

Defendants-Appellees,

and

BAUER BUILDERS,

Defendant.

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants'¹ motion for summary disposition under MCR 2.116(C)(10). We affirm.

I

This is a premises liability action. Plaintiffs were tenants in an apartment complex owned by defendants. In March 1997, plaintiff, Gary Bender, twice fell on the premises of the apartment complex, once in the parking lot and once near the entrance to the Benders' apartment.

¹ The case proceeded to hearing on the motions of only defendants Newport and Saph and this appeal concerns only those defendants.

Plaintiff claimed that on both occasions he slipped and fell on a thin coating of ice which was covered by a “dusting” of snow.

Defendants’ motion for summary disposition focused on whether ice and snow could have caused Gary Bender’s fall in light of weather statistics showing above normal temperatures and little or no precipitation. Defendants presented the affidavit of a forensic meteorologist in support of their claims in this regard. The trial court, however, relied on lack of notice on the part of defendants. That is, the trial court held that plaintiffs did not have any evidence that defendants knew or should have known of any unreasonably unsafe condition of the premises which would have enabled them to correct the problems; it essentially found that defendants owed plaintiffs no duty with regard to the slippery conditions on which plaintiffs based their cause of action.

We review de novo a trial court’s ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

II

Discovery was closed and mediation concluded when defendants’ motion for summary disposition was heard and decided on August 27, 2001.² Both plaintiffs had been deposed and plaintiff Gary Bender had filed his affidavit in opposition to the motion for summary disposition.

It is clear from the deposition transcripts and the affidavit that plaintiffs did not provide any notice to defendants of the specific conditions which they claim caused Gary Bender’s falls, i.e., the thin layers of ice covered by light dustings of snow on the two dates in March when Gary Bender fell. However, plaintiffs allege that their testimony and affidavit established that they had complained of slippery conditions existing in the past and that the unsafe conditions existed as a result of lack of proper drainage in the parking lot and near the entrance to their apartment. Plaintiffs claimed that defendants not only had notice of the lack of proper drainage in these areas, but that defendants created the problem by failing to have a drain in the parking lot for runoff of melting snow, and by failing to divert roof runoff into the ground near the entrance to their apartment as was done in another area of the apartment complex.

III

There is no dispute that Gary Bender’s legal status was that of an invitee. The defendants-invitors had a legal duty of reasonable care to protect their invitee from unreasonable risk of harm caused by a dangerous condition of their premises which they knew or should have known the invitee would not discover, realize or protect himself against. *Bertrand v Alan Ford*,

² The order granting the motion was entered on September 20, 2001.

Inc., 449 Mich 606, 616-618; 537 NW2d 185 (1995).³ However, if the invitee knows of the danger, the invitor owes no duty to protect or warn except in circumstances where harm can be expected in spite of the knowledge of the invitee. *Riddle v McLouth Steel Product Corp.*, 440 Mich 85, 96; 485 NW2d 676 (1992). Questions of duty are for the court to decide as matters of law. *Id* at 95.

The question of duty in premises liability cases under Michigan law has developed around two sections of the Restatement of Torts, 2d. *Riddle, supra* at 93-95; *Quinlivan v Great Atlantic & Pacific Tea Co.*, 395 Mich 244, 258-261; 235 NW2d 732 (1975).

The first of the two sections is § 343 which states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

The second is § 343A(1) which provides:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

In *Bertrand*, our Supreme Court held that where a risk of harm remains unreasonable, despite knowledge of it by the invitee, then a duty may arise on the part of the invitor to take reasonable precautions for the protection of the invitee. *Bertrand, supra* at 611-612. See also *Lugo v Ameritech Corp, Inc.*, 464 Mich 512, 516-519; 629 NW2d 384 (2001).

³ This duty does not generally include removal of open and obvious dangers. *Lugo v Ameritech Corp, Inc.*, 464 Mich 512, 516; 629 NW2d 384 (2001). While defendants' affirmative defenses included a recitation of the open-and-obvious defense, they did not pursue this line of defense in their motion for summary disposition and the trial court did not mention it in its ruling on the motion.

IV

The trial court held that defendants had no duty to act to correct the slippery surfaces on which Gary Bender fell because they had no notice of the allegedly dangerous conditions. We agree with the finding of no duty, but for different reasons than relied on by the trial court.

Plaintiffs allege that prior incidents of ice in the parking lot and near the entrance to their apartment led them to complain to defendants. They also testified that there had been other falls as a result of these conditions. Therefore, it is at least arguable that defendants were on notice of the potential for icy conditions to develop on the premises.

However, plaintiffs' admission that they had knowledge of the danger which they claim caused Gary Bender to fall, i.e., that ice sometimes formed on the parking lot and near the entrance to their apartment, affects the nature of defendants' duty. As noted, where an invitee has knowledge of dangerous conditions, an invitor has no duty to protect or warn unless it can be said that harm could be expected in spite of that knowledge. Plaintiffs do not allege and have advanced no proof that in spite of their knowledge that icy conditions sometimes developed, defendants should have expected harm to them. Moreover, plaintiffs have presented no evidence that the conditions of the parking lot and entrance area were unreasonably dangerous for purposes of premises liability.

The trial court was correct in concluding that defendants owed plaintiffs no duty on the facts of this case and in granting summary disposition under MCR 2.116(C)(10). Even though the trial court's reasoning was not based on the proper reasoning, where it reached the right result, we will not reverse. *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997).

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavangh
/s/ Janet T. Neff