

STATE OF MICHIGAN
COURT OF APPEALS

BEVERLY GARGES,

Plaintiff-Appellee,

v

PATRICIA TODD, d/b/a LAST CHANCE
PARTY STORE,

Defendant-Appellant.

UNPUBLISHED

September 12, 2006

No. 260084

Jackson Circuit Court

LC No. 03-001448-NO

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

NEFF, P.J. (*dissenting*).

I respectfully dissent. The jury in this case rendered a verdict in favor of plaintiff, finding that the ice patch was not open and obvious. The jury's decision was based on then-existing law, which defined an open and obvious danger as one "where the danger is known to the invitee, or if the invitee might reasonably be expected to discover it, and the invitor owes no duty to protect or warn the invitee of an open and obvious condition unless the invitor should anticipate the harm, despite knowledge of it, on behalf of the invitee."¹ This Court has since decided "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery."² *Ververis v Hartfield (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006).

The majority now applies the new law from *Ververis* to hold that the danger in this case was open and obvious as a matter of law contrary to the jury's express finding. Moreover, the majority decides further that the icy patch has no "special aspects" to justify imposing a duty on defendant, despite the jury's clear determination that plaintiff could not reasonably have been expected to discover the dangerous condition on defendant's property. In my view, these

¹ The quoted instruction to the jury was not challenged.

² This holding was chosen from one of "two possible [alternative] rules" suggested in Judge GRIFFIN'S dissent in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105; 689 NW2d 737 (2004), which was adopted by the Supreme Court, *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005). *Ververis v Hartfield (On Remand)*, 271 Mich App 61, 65-67; 718 NW2d 382 (2006)

disparate conclusions cannot in good faith be reconciled and do not support disregarding the jury verdict to reverse the trial court's denial of defendant's motions for summary disposition and directed verdict.

If this Court applies the new law, as decided under *Ververis*, then the "special aspects" question is rightfully decided by the trier of fact in this case given the evidence. Judge GRIFFIN'S dissenting opinion in *Kenny* observes that in light of changes in the law regarding the open and obvious danger doctrine when it involves snow and ice, the analysis is now not a question of whether ice and snowy conditions may constitute an "exception" to the open and obvious danger doctrine, but more properly "whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious." *Kenny, supra*, 264 Mich App 99, 117-118 (GRIFFIN, J., dissenting) (citation omitted).³ The trial court properly concluded that this question should be decided by the jury.

In denying defendant's motion for summary disposition, the trial court found that the evidence indicated that water would accumulate in the area where plaintiff fell as a result of a downspout from defendant's building that discharged water to that area, which would freeze and make the walkway icy. Further, defendant was responsible for maintaining the building roof and gutter and downspouts for runoff and took no steps to eliminate the icy condition. At trial, plaintiff presented further evidence that the parking lot and runoff from the building drained to an area where water would accumulate and freeze. Plaintiff's safety consultant testified that the improper drainage violated the building code. The jury could conclude that the frozen water causing plaintiff's fall was not a natural accumulation of ice and was a special aspect of an open and obvious danger that created "a uniquely high likelihood of harm or severity of harm" *Kenny, supra*, 264 Mich App 99, 121 (GRIFFIN, J., dissenting), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001).⁴ Given the evidence in this case, reasonable minds could differ on the issue whether special aspects existed that differentiate the ice condition from the usual snow and ice encountered by pedestrians in Michigan. Defendant therefore was not entitled to summary disposition or to a directed verdict.

/s/ Janet T. Neff

³ It must be noted that the Supreme Court's order adopting the reasoning in Judge GRIFFIN'S dissent was issued after the jury verdict in this case.

⁴ Whether the condition was effectively unavoidable is, in my view, not a necessary or relevant analysis under the circumstances of this case.