STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MICHELE KASETA,

Plaintiff,

vs. Case No. 2005-1971-NO

THEODORE BINKOWSKI and
CAROL BINKOWSKI,

Defendant.
_____/

OPINION AND ORDER

Defendants have filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff requests the Court deny Defendants' motion.

On March 13, 2003, Plaintiff visited Defendants' home as a self-employed real estate broker to assist Defendants in finding a new home. As Plaintiff was exiting Defendants' premises, she allegedly slipped on ice and seriously injured her knee. Plaintiff filed her complaint against Defendants on May 18, 2005. Plaintiff alleges Defendants were negligent by failing to maintain their premises in a reasonably safe condition for invitees. On June 29, 2006, Defendants filed the instant motion.

Defendants contend that summary disposition is appropriate based upon the open and obvious doctrine. Defendants contend that they did not owe a duty to Plaintiff since Plaintiff knew snow and ice was present and the danger presented by it. Defendants also contend that an average person would have discovered the presence of the ice where Plaintiff fell, and that the danger associated with the ice and the totality

2005-001971-NO
00019731840
OPNIMGCC

of the circumstances do not establish "special aspects" to impose liability despite the open and obvious nature of the condition. Defendants further contend that they took reasonable steps in a reasonable amount of time to diminish the potential hazard.

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

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. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford,* Inc, 449 Mich 606, 614; 537 NW2d 185 (1995). A premises invitor owes no duty to protect or warn the invitee of open and obvious dangers unless he should anticipate the harm despite knowledge of it on behalf of the invitee. Lugo, at 516. The open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty. *Lugo*, at 516. 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. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

However, 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. *Lugo*, at 517. If a danger is deemed open and obvious, the critical question is whether there is evidence that creates a genuine issue of material fact whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine. *Id.*, at 519.[1] In *Kenny v Katz Funeral Home Inc,* 472 Mich 929; 697 NW2d 526 (2005), our Supreme Court held that snow and ice could constitute as an open and obvious condition.

In the case at hand, Plaintiff testified that she arrived at Defendants' premises at approximately 9:00 p.m. on March 13, 2003 in order to finalize the sale of a parcel of land. Plaintiff testified that it snowed earlier in the day. Plaintiff has presented the Court with a report from Paul Gross, a certified consulting meteorologist, who indicated that two inches of snow fell on the day of Plaintiff's fall, and that the temperature rose to a

[1] The Court gave two illustrations of "special aspects" where an obvious condition will not bar liability: one where the only entrance to a commercial building for the public is covered with standing water, making the danger effectively unavoidable; and the other where the condition imposes an "unreasonably high risk of severe harm" despite its obvious condition. *Lugo*, at 518.

high of 29 degrees. Plaintiff's expert has also indicated that it was 40 degrees the day before Plaintiff's fall, and that the meteorological conditions leading up to Plaintiff's fall strongly support the existence of black ice on untreated or insufficiently treated exposed pedestrian areas. Plaintiff testified that when she was walking down Defendants' driveway, she did not notice any ice because it was dark, and Defendants' did not have their front porch light on. Plaintiff testified that she felt the ice with her hand after she fell, and still could not see it due to the darkness. Plaintiff also testified that she did not notice any salt on the driveway despite Defendants' testimony that they shoveled and salted the driveway prior to Plaintiff's fall several times, and the driveway appeared to be just cement.

The Court is satisfied that Plaintiff has established a question of fact whether the ice that caused her fall constituted as an open and obvious condition. Plaintiff's testimony indicates that the ice was essentially unnoticeable due to the time of day and lack of lighting. Plaintiff has also submitted an affidavit that attests to the fact that Defendants failed to warn her of the potential hazard, contrary to Defendants' testimony otherwise. The facts in the case at hand are not as strong to support a finding that the danger was open and obvious upon casual observation as in *Kenney*. In *Kenney*, the Plaintiff witnessed three people having to hold on to their vehicles in order to keep their balance in the same parking lot prior to her fall, and that it appeared that the parking lot was covered with a dusting of snow. The Court took notice that the plaintiff was a lifelong resident of Michigan, and should have been aware that ice frequently forms beneath snow during snowy December nights. In the case at hand however, Plaintiff testified that although there was snow on the street and on the lawn, Defendants'

driveway was clear. Therefore, Plaintiff did not have any reason to believe that the driveway would be slippery since it was clear of snow, and also that it appeared to be cement. Defendants' reliance upon cases holding that a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery is therefore misplaced based upon the distinguishing facts of the case at hand. Taking the facts in the light most favorable to Plaintiff, the testimony and evidence presented is insufficient to demonstrate that an average person would have discovered the ice upon casual inspection. Consequently, Defendants' motion for summary disposition based upon the open and obvious doctrine should be denied.[2]

The Court is also satisfied that a question of fact exists whether Defendants took reasonable measures within a reasonable time to diminish the hazard of injury. Although Defendants have testified that they shoveled the driveway and salted prior to Plaintiff's fall, Plaintiff testified that she did not notice any salt or other ice melting products. Plaintiff's expert has indicated that all commercially available ice melters, including salt, would have effectively diminished ice prior to Plaintiff's fall. Given the evidence that the temperature was below freezing all day of Plaintiff's fall, a reasonable person could conclude that Defendants' actions were insufficient if they believe Plaintiff's testimony that salt was not present. The logical inference would be that the ice would have been there since the previous day based upon the temperatures for the area the day before. In addition, a reasonable factfinder could conclude that Defendants' actions were insufficient given the conditions outside, and the fact that they

[2] The Court is also satisfied that the evidence presented is sufficient to create a question of fact whether special aspects of the condition, darkness and the invisible nature of the ice, should impose liability despite a finding that the danger associated with the ice was open and obvious.

knew Plaintiff was coming to their house for a meeting. Consequently, Defendants' motion for summary disposition should be denied.

Based upon the reasons set forth above, Defendants' motion for summary disposition is DENIED. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: AUG 30 2006

DMD/aac

cc: Gerald H. Acker, Attorney at Law
Charles Trickey III, Attorney at Law

DIANE M. DRUZINSKI
CIRCUIT JUDGE

AUG 30 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: Deputy Court Clerk