STATE OF MICHIGAN

COURT OF APPEALS

HARVEY J COWAN and SUE COWAN, Plaintiffs-Appellees, v LAKEVIEW VILLAGE CONDOMINIUM ASSOCIATION, METROPOLITAN PROPERTY MANAGEMENT INC, and T & J LANDSCAPING AND SNOW REMOVAL INC, Defendants-Appellees.	UNPUBLISHED February 1, 2005 No. 250251 and 251645 Macomb Circuit Court LC No. 02-001182-NO

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

PER CURIAM.

Plaintiff[1] appeals by right the trial court's grant of summary disposition to all defendants in a series of three opinions and orders issued on June 12, 2003, July 18, 2003, and on October 2, 2003. This case arises out of the 72-year-old plaintiff's slip and fall on "black ice" while walking across the parking lot of the condominium where he resided to take trash to a dumpster around 5:45 P.M. on January 17, 2002. Plaintiff sustained a broken hip and a broken arm. He alleges defendants are responsible for damages under theories of premises liability and breach of contract. We affirm.

I. Summary of Facts and Proceedings

Plaintiff is a member of the Lakeview Village Condominium Association (Lakeview). He bases his contract claim against Lakeview on the master deed of condominium and its by-laws. He alleges Lakeview breached its contractual obligation to maintain and repair the common elements of the property. Plaintiff also alleges, as an association member, he is a third-

[1] The singular term "plaintiff" is used to refer to Harvey Cowan because Sue Cowan's claims are solely derivative of her husband's claims. For ease of reference, defendants Lakeview Village Condominium Association, Metropolitan Property Management Inc., and T&J Landscaping and Snow Removal Inc., will be referred to respectively as Lakeview, Metro, and T&J.

party beneficiary of Lakeview's contract with Metropolitan Property Management Inc. (Metro), to manage Lakeview's business affairs, including oversight of maintenance of the condominium's common areas. Further, plaintiff alleges he is a third-party beneficiary of Lakeview's contract with T&J Landscaping and Snow Removal Inc. (T&J), for snow and ice removal. Finally, plaintiff alleges all defendants were negligent by breaching their duty of care to him as an invitee of Lakeview or Metro by failing to warn him of the dangerous icy condition or by failing to diminish the ice hazard where he fell, asserting defendants knew or should have known of the condition.

Defendants Lakeview and T&J moved for summary disposition. In its first opinion and order, the trial court dismissed plaintiff's premises liability claim against each defendant but permitted the breach of contract claims to continue. After T&J moved for reconsideration, the trial court also dismissed plaintiff's contract claim against it in its second opinion and order. In its third opinion and order, the trial court granted summary disposition to Metro on plaintiff's premises liability and contract claims, and dismissed plaintiff's contract claim against Lakeview.

In its first opinion, the trial court addressed plaintiff's premises liability claim by viewing the evidence in the light most favorable to plaintiff and determined that the "black ice" was not open and obvious because "an average person with ordinary intelligence would not have been able to discover the icy condition of the common area upon casual inspection and the risk it presented." Nevertheless, the trial court ruled that premises liability would not attach because "there is no evidence to suggest that the possessor of the land in this case should have realized that the icy condition existed, or that it presented an unreasonable risk of harm." The court relied on *Prebenda v Tartaglia,* 245 Mich App 168, 169; 627 NW2d 610 (2001), stating one element of premises liability requires that "the possessor . . . 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." The court analogized "black ice" to ice hidden under snow, citing *Altairi v Alhaj,* 235 Mich App 626, 638; 599 NW2d 537 (1999), where the "plaintiff . . . failed to show that there is a genuine issue of material fact concerning whether defendant knew, or had reason to know, that there was ice under the snow." The trial court also ruled, apparently in the alternative, that if the "black ice" condition was "open and obvious," premises liability would not attach because there was no evidence of "any special aspects giving rise to a uniquely high likelihood of harm." The trial court sympathized with plaintiff's injuries, but noted that the mere occurrence of an accident is not, by itself, evidence of negligence. Accordingly, the trial court ruled that a reasonable juror could not find Lakeview liable under a premises liability theory.

The trial court dismissed plaintiff's premises liability claim against T&J because it was only the snowplowing contractor hired by Lakeview and did not possess or control the premises. With respect to plaintiff's third-party beneficiary claim under the Lakeview-T&J contract, the trial court focused that part of the contract that required:

> Truck salting of roads and public parking areas and removal of ice from sidewalks, convenient walkways and porches will be performed when required. Salting of entranceways and intersections within the complex should be done as needed with each push. Additional salting must be

called in and logged with the management company or compensation cannot be guaranteed.

The trial court also noted that the contract provided that snow would be plowed in such a manner as to avoid blocking parking spaces in the carports, public parking or walking areas, that fire hydrants were to be kept clear of snow for easy access for emergency equipment, and that mailboxes were to be kept clear to provide automobile access. The court reasoned that these provisions provided objective evidence that plaintiff was a third-party beneficiary of the contract. So, the court concluded that plaintiff was more than incidentally benefited because plaintiff, as a co-owner, could be deemed a "landlord," and the contract was for the benefit of the landlord. Finally, the trial court reasoned that T&J could not avail itself of the tort defense that the hazard was open and obvious, or that it did not have notice of the condition, because these defenses applied to premises liability, not contractual liability.

In its second opinion and order, issued after hearing T&J's motion for reconsideration, the trial court reversed its ruling with respect to plaintiff's contract claim against T&J. Although the trial court believed it had not erred when it found that plaintiff was an intended third-party beneficiary of the snowplowing contract, the court ruled the distinction between misfeasance and nonfeasance in the performance of a contract, discussed in *Courtright v Design Irrigation*, *Inc,* 210 Mich App 528, 530; 534 NW2d 181 (1995), required granting summary disposition to T&J. Noting that misfeasance is negligence during performance of a contract, while nonfeasance is a failure to perform a contract altogether, and only a breach of contract, the court reasoned that it regarded "T&J's alleged failure to complete the contract not to be an abandonment of the contract, rather, as an unnecessary delay in undertaking to properly administer agreed-upon services in a timely manner." Then the court stated, "The allegations lodged against defendant T&J sound in tort, or a claim of negligence, rather than in breach of contract." The court noted it had already found that T&J did not have a legal duty "because plaintiff failed to demonstrate the necessary elements in order to prevail under an open and obvious theory," and without a legal duty to plaintiff, "plaintiffs negligence claim against defendant T&J is untenable."

In its third opinion and order, the trial court addressed Metro's motion for summary disposition and Lakeview's motion to have plaintiff's contract claim against it dismissed under the same rationale as applied to plaintiff's contract claim against T&J. The trial court agreed. The court found "that plaintiff has not offered any evidence that [Metro] was aware of the alleged icy condition on the parking lot, nor is there evidence indicating [Metro] should have known of the presence of the alleged ice. Moreover, there is no evidence suggesting that management was informed of the alleged ice." The court further ruled that "there is no evidence upon which a rational factfinder could conclude that the alleged icy condition presented an unreasonable risk of harm."

The trial court also dismissed plaintiff's contract claim against Lakeview for the same reason it did so as to T&J. The court noted that the open and obvious doctrine applies generally to claims of failure to maintain a premises, regardless to the legal theory advanced, citing *Millikin v Walton Manor,* 234 Mich App 490, 497; 595 NW2d 152 (1999).

The three separate rulings by the trial court generated three appeals to this Court. After the trial court's initial ruling, Lakeview applied for leave to appeal the order denying in part its

motion for summary disposition. This Court denied the application for failure to persuade the Court of the need for immediate appellate review. *Cowan v Lakeview Village Condominium Ass'n*, unpublished order of the Court of Appeals, issued October 31, 2003 (Docket No. 249514).

After the trial court's second ruling, plaintiff applied for leave to appeal the court's order granting a summary disposition and dismissing claims against defendant T&J. This Court granted plaintiff's application. *Cowan v Lakeview Village Condominium Ass'n*, unpublished order of the Court of Appeals, issued December 8, 2003 (Docket No. 250251).

After the trial court dismissed plaintiff's remaining claims, he filed a claim of appeal in this Court on October 20, 2003 (Docket No. 251645). On January 22, 2004, this Court ordered that the appeals in Docket No. 250251 and Docket No. 251645 be consolidated.

On appeal, plaintiff briefs five questions, Lakeview and Metro respond with four sections of arguments in a joint brief, and T&J responds in three. We organize the arguments of the parties into two main questions: (1) did the trial court err by granting defendants summary disposition, dismissing plaintiffs' premises liability claims and (2) did the trial court err by granting defendants summary disposition, dismissing plaintiffs' contract claims? The latter question is further subdivided as a direct claim against Lakeview and third-party beneficiary claims against Metro and T&J.

II. Preservation and Standards of Review

Plaintiff preserved all issues by raising them below and obtaining a ruling from the trial court. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 533; 672 NW2d 181 (2003).

This Court reviews de novo a trial court's grant or denial of summary disposition. *Brunsell v Zeeland*, 467 Mich 293, 295; 651 NW2d 388 (2002).

A motion under MCR 2.116(C)(8) may not be supported with documentary evidence and tests the legal sufficiency of the pleadings standing alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion must be granted if no factual development could justify plaintiff's claim for relief. *Id*.

A party's motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party must identify the undisputed factual issues, MCR 2.116(G)(4), and the trial court must consider the submitted documentary evidence in the light most favorable to the nonmoving party. *Maiden, supra* at 120; MCR 2.116(G)(5). If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists. MCR 2.116(G)(4); *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 547; 619 NW2d 66 (2000). If no dispute exists regarding a fact material to a dispositive legal claim, *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990), the moving party is entitled to judgment as a matter of law and summary disposition is properly granted. MCR 2.116(I)(1); *Maiden, supra* at 120-121.

In the instant case, all defendants moved for summary disposition citing MCR 2.116(C)(8) or (C)(10), but the trial court did not specify under which rule it granted the motions. Where the court relied on evidentiary materials outside the pleadings, review under MCR 2.116(C)(10) is appropriate. MCR 2.116(G); *Krass v Tri-County Security, Inc*, 233 Mich App 661, 665; 593 NW2d 578 (1999).

We review questions of law de novo. Whether one party has a duty of care giving rise to a tort action for negligence upon its breach presents a question of law this Court reviews de novo. *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001). Also, this Court reviews de novo the interpretation and application of a statute. *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29, 32; 658 NW2d 132 (2003). The interpretation of a contract is also a question of law reviewed de novo. *Schmalfeldt v North Pointe Insurance Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

III. Analysis

A. The Premises Liability Claims

We conclude that the trial court correctly granted summary disposition to Lakeview and Metro pursuant to MCR 2.116(C)(10) because plaintiff failed to produce sufficient evidence to create a material issue of fact whether defendants knew, or should have known in the exercise of reasonable care, that the icy condition on which plaintiff fell existed, and that it presented an unreasonable risk of harm to invitees, a necessary element to establish premises liability. MCR 2.116(I)(1); *Maiden, supra* at 120-121; *Prebenda, supra* at 169. Further, the trial court correctly granted summary disposition to defendant T&J because plaintiff failed to allege that T&J possessed and controlled the property, a necessary element to establish premises liability. *Derbabian v S & C Snowplowing,* 249 Mich App 695, 702-706; 644 NW2d 729 (2002). Also, because T&J owed no duty to plaintiff separate and distinct from its contractual obligations to Lakeview, plaintiff failed to state a tort claim for negligent performance of the contract. *Fultz v Union-Commerce Assoc,* 470 Mich 460, 467-468; 683 NW2d 587 (2004).

An injured person may maintain a negligence action only if a legal duty exists requiring the defendant to conform its conduct to a particular standard in order to protect others against unreasonable risks of harm. *Riddle v McLouth Steel Products,* 440 Mich 85, 96; 485 NW2d 676 (1992). A duty of care may arise from a statute, a contractual relationship, or by operation of the common law, which imposes an obligation to use due care or to act so as not to unreasonably endanger other persons or their property. *Id.* at 95; *Clark v Dalman,* 379 Mich 251, 261; 150 NW2d 755 (1967). With respect to premises liability, a party must both possess and control the property at issue before a duty of care arises in favor of persons coming onto the premises. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). "Premises liability is conditioned upon the presence of both possession and control over the land." *Id*., quoting *Merritt v Nickelson,* 407 Mich 544, 552; 287 NW2d 178 (1980).

The present case is factually indistinguishable from *Derbabian, supra.* There, the plaintiff slipped and fell on ice in a shopping center parking lot and brought a premises liability claim against the defendant snow plowing contractor that had agreed to remove snow and apply salt at the defendant contractor's discretion. *Id*. at 698. Because the defendant did not have

possession and control of the parking lot when the plaintiff fell, this Court held the trial court correctly granted summary disposition to the defendant. *Id*. at 702. The Court, consulting Black's Law Dictionary (7th ed), opined that "'possession,' in this context, [is defined] as 'the right under which one may exercise control over something to the *exclusion of all others.*'" *Derbabian, supra* at 703 (emphasis in *Derbabian*). The Court also referred to *Random House Webster's College Dictionary* (1995), p 297, which defined "control" as "exercising restraint or direction over; dominate, regulate, or command," and Black's Law Dictionary definition of "control" as "the power to . . . manage, direct, or oversee." *Derbabian, supra* at 703. Here, nothing in T&J's contract permits it to control the parking lot to the exclusion of all others, nor is there anything to indicate T&J ever exercised direction over, dominated, regulated, or issued commands with respect to the area where plaintiff fell. Rather, as in *Derbabian,* T&J's contract merely provided access to the common areas of the condominium to permit it to remove snow after accumulations of more that one and a half inches occurred, and for "salting of roads and public parking areas . . . when required," as well as salting of entranceways and intersections within the complex "as needed." Because T&J lacked both possession and control of the property, plaintiff's premises liability claim fails.

As to plaintiff's premises liability claims against Lakeview and Metro, a property possessor's duty of care depends on the status of the person on the premises: (1) a trespasser is owed a duty by the possessor only to refrain from inflicting willful or wanton injury, (2) a licensee must be warned only of any hidden dangers the possessor knows or has reason to know of, if the licensee does not know or have reason to know of the dangers, or (3) an invitee, to whom the possessor owes highest duty of care. *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 596; 614 NW2d 88 (2000). An "invitee" is a person who enters the land of another on the invitation of the possessor for the pecuniary benefit or commercial purposes of the invitor, which carries with it an implication that reasonable care has been used to prepare the premises and make them safe. *Id.* at 596-597, 604. Here, it is not disputed that a landlord-tenant relationship existed between plaintiff and defendants Lakeview and Metro, giving rise to a duty of care as to the common areas of the condominium to plaintiff as an invitee. *Stanley v Town Square Cooperative,* 203 Mich App 143, 149; 512 NW2d 51 (1993).

In ruling on defendants' motions for summary disposition, the trial court properly relied on the elements of premises liability stated by this Court in *Prebenda, supra* at 169:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, and only if, all of the following are true: the possessor (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, (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.

Although *Prebenda* was not a slip and fall case, it accurately sets forth the duty of a premises possessor. See *Stitt, supra at* 597, and *Riddle, supra* at 93, both citing 2 Restatement Torts, 2d, § 343, and *Quinlivan v Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 258-259, 261; 235 NW2d 732 (1975). "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" and must take "reasonable measures . . . within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee." *Id*. at 261.

In general, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land, but this duty does not extend to require a warning or protecting invitees from hazards that are open and obvious. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). "[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 he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle, supra* at 96. A duty to take reasonable precautions to protect invitees from an open and obvious danger will arise only "if special aspects of a condition make even an open and obvious risk unreasonably dangerous." *Lugo, supra* at 517. "Special aspects" impose liability for an open and obvious condition when the hazard is "effectively unavoidable," so that there exists a "uniquely high likelihood of harm," or when the condition "impose[s] an unreasonably high risk of severe harm." *Id*. at 518-519.

Plaintiff relies heavily on *Kenny v Kaatz Funeral Home Inc*, 264 Mich App 99; 689 NW2d 737 (2004), this Court's latest opinion addressing the interplay between a premises possessor's liability for snowy or icy conditions and the open and obvious doctrine. The facts in *Kenny* are analogous to instant case. The elderly plaintiff arrived at the defendant funeral home after dark on a snowy December evening, slipped and fell on so-called "black ice" hidden beneath the snow on the parking lot, fracturing her hip. *Id*. at 101-103. As in the instant case, the defendant moved for summary disposition arguing in the alternative that it lacked actual or constructive notice of the condition, or the condition was open and obvious and not unreasonably dangerous, which the trial court granted. *Id*. at 103-104. The *Kenny* Court stated the test to determine whether a condition is open and obvious is whether "it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection." *Id*. at 105. Because this test is objective, the issue is not whether a particular plaintiff should have known that the condition was hazardous, but whether a reasonable person in the plaintiff's position would foresee the danger. *Id*. at 106, citing *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

The *Kenny* Court examined closely the language in *Mann v Shusteric Enterprises, Inc*, 470 Mich 320; 683 NW2d 573 (2004), our Supreme Court's latest opinion touching upon the open and obvious doctrine. In *Mann,* the Court primarily held that the exclusive remedy provision of the dramshop act, MCL 436.1801(10), did not prohibit an intoxicated person from bringing a premises liability action after slipping and falling in the serving establishment's snow and ice covered parking lot. *Mann, supra* at 327. But the Court also held that because the open and obvious doctrine in premises liability cases involves application of an objective, reasonably prudent person standard, neither the plaintiff's state of intoxication nor the liquor establishment's knowledge of the plaintiff's state of sobriety were relevant to a determination of premises liability. *Id*. at 329. "[T]he fact-finder must consider the 'condition of the premises,' not the condition of the plaintiff." *Id*., citing *Lugo, supra* at 518 n 2.

In holding that not all snow and ice accumulations are "open and obvious," the *Kenny* Court focused on the statement in *Mann* that, "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 [a plaintiff].' only if there is some 'special aspect' that makes such accumulation 'unreasonably dangerous.'" *Kenny, supra* at 106, quoting *Mann, supra* at 332 (emphasis in *Kenny*). The Court also noted *Mann* taught that the duty stated in *Quinlivan* must be understood in light of the Court's subsequent cases addressing the open and obvious doctrine. *Kenny, supra* at 107, citing *Mann, supra* at 333 n 13. Thus, in light of *Mann*, and *Quinlivan,* the *Kenny* Court held that "if a snow or ice hazard is not open and obvious, or, if the hazard is open and obvious but special aspects exist, the premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee from the snow or ice hazard. In such cases, *Quinlivan's* standard 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' remains applicable." *Kenny, supra* at 107, quoting *Quinlivan, supra* at 261.

In applying these principles to the case before it, the *Kenny* Court concluded the trial court had erred by granting the defendant summary disposition because "reasonable minds could differ regarding the open and obvious nature of black ice under snow." *Kenny, supra* at 108. Specifically, the Court concluded it could not be determined as a matter of law, when viewing the evidence in the light most favorable to the plaintiff, that "a reasonably prudent person with ordinary intelligence would have been able to perceive and foresee the dangerous condition, i.e., black ice under a coating of snow, upon casual inspection." *Id*. The Court found pertinent that the black ice condition under the snow was not visible and there was no evidence of previous rain or extensive thawing "that might put one on notice of the presence of ice under snow that subsequently fell." *Id*. The Court distinguished *Joyce, Corey v Davenport College of Business (On Remand),* 251 Mich App 1; 649 NW2d 392 (2002), and *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd,* 466 Mich 11; 643 NW2d 212 (2002), because in those cases the hazardous condition was apparent, and the plaintiffs, in fact, were aware of the danger. *Kenny, supra* at 110-111.

Finally, the *Kenney* Court concluded material fact issues existed whether special aspects were present, and whether the condition was unreasonably dangerous. *Id*. at 112. The Court found evidence of the former because only one parking space remained when the vehicle in which the plaintiff was a passenger arrived at the funeral home and found that evidence of unreasonable danger because others also fell in the parking lot. *Id*. at 113. The Court also found evidence created a material fact question whether the defendant knew or should have known about the icy condition. *Id*. Specifically, the defendant's owner testified that he had arrived at the funeral home about one hour before the plaintiff, and had shoveled snow in the parking lot, shoveled a path to the handicap parking area, and also had salted the entrances, the handicapped parking area, and other areas of the parking lot. *Id*. at 113-114.

In the case at bar, the trial court concluded in its first opinion and order, similar to this Court's holding in *Kenny*, that viewing the evidence in a light most favorable to plaintiff a question of fact existed as to whether the "black ice" condition was open and obvious. Indeed,

because the trial court recited the test to determine an open and obvious condition from *Corey,*[2] no other conclusion is possible. The trial court determined that "viewing the evidence in a light most favorable to plaintiff, the Court is convinced that an average person with ordinary intelligence would not have been able to discover the icy condition of the common area upon casual inspection and the risk it presented." But the trial court then granted summary disposition to Lakeview on plaintiff's premises liability claim because plaintiff did not produce sufficient evidence to create a question of fact as to whether defendants knew or should have known the condition existed or that it presented an unreasonable risk of harm. *Id*. Likewise, the trial court in its third and final opinion and order, granted summary disposition to Metro on plaintiff's premises liability claim for the same reason: plaintiff produced no evidence that Metro had actual or constructive knowledge of the condition or that it involved an unreasonable risk of harm. In doing so, the trial court relied on *Prebenda*, and *Clark v Kmart*, 465 Mich 416, 419; 634 NW2d 347 (2001) (a premises possessor has a duty to warn of or diminish unsafe conditions only where the unsafe condition is known to the possessor or the condition is of such a character or has existed a sufficient length of time that the possessor should have known about it).

Plaintiff argues the trial court rendered inconsistent rulings as to whether the "black ice" condition was open and obvious, and this inconsistency requires this Court to reverse. It is true that the trial court wrote, "Assuming the Court was satisfied that the condition was open and obvious, it could not find any special aspects giving rise to a uniquely high likelihood of harm." But the trial court's apparent alternative reasoning is not an inconsistent conclusion meriting reversal. Further, the trial court's discussion of the open and obvious doctrine when addressing plaintiff's contract claims also does not merit reversal. The court's ruling regarding plaintiff's contract claims does not affect the court's decision to grant summary disposition to defendants on plaintiff's premises liability claims. Moreover, this Court will uphold a trial court when it reaches the correct result, albeit for the wrong reason. See *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Here, the trial court correctly ruled that defendants could not be held accountable under a premises liability theory because they lacked actual or constructive knowledge of the alleged unreasonably dangerous condition. *Clark, supra,* 465 Mich at 419. No evidence indicated any of the defendants had actual knowledge of the ice before plaintiff fell. Further, it was undisputed that the area of the parking lot where plaintiff fell had never been salted before, yet no one had ever complained of slippery conditions before plaintiff's fall. Also, it was not disputed that it had snowed the night before plaintiff fell, and that T&J had cleared away the snow as well as they could in the morning. Plaintiff offered a report of a meteorologist who opined the icy patch may have formed in the 48-hour period before the accident on the basis of the meteorological history during that period of light rain, periodic drizzle, light snow, with temperatures above freezing during the day but falling below freezing as evening approached. Plaintiff argues that defendants should have discovered the condition and appreciated its danger because although the

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[2] "[W]hether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Corey, supra* at 5, quoting *Novotney v Burger King (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993).

"black ice" was imperceptible in darkness, had defendants inspected the area during the daylight hours before plaintiff's fall, the ice would have been discovered.

There are several problems with plaintiff's theory. First, it is pure speculation when the patch of ice on which plaintiff fell formed. When faced with a motion for summary disposition, the nonmoving party must "set forth specific facts showing that a genuine issue of material fact exists and cannot simply rest on mere conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact." *Altairi, supra* at 629. A theory is speculative even when reasonable and supported by the evidence when there are other equally plausible explanations for the same event. *Skinner v Square D Co,* 445 Mich 153, 164-165; 516 NW2d 475 (1994). Here, Lakeview offered National Weather Service data showing that daily temperatures[3] ranged between 29 and 38 degrees, 24 and 36 degrees, and 22 and 39 degrees for January 15, 16, & 17, 2002, respectively. Based on this data, it is just as likely that the ice on which plaintiff fell formed in the late afternoon of the 17th: As the temperatures fell, melted snow from the warmer temperatures earlier in the day froze. Second, no evidence supported a claim that a representative of Lakeview or Metro was ever in a position to observe a patch of ice. Moreover, even if one had been, no evidence supported a conclusion that someone from Lakeview or Metro should have realized the condition was unreasonably dangerous. This distinguishes the instant case from *Clark, supra*, 465 Mich 416, because, in *Clark,* evidence existed from which it was fair to infer that the grape on which the plaintiff slipped had been present for at least an hour before the accident, and one of the defendant's employees should have observed the grape when closing the check-out lane. *Id.* at 420. Indeed, the Court noted this critical evidence distinguished other cases where directed verdicts had been granted to the defendants "because of the lack of evidence about when the dangerous condition arose." *Id*. at 421. Likewise, the instant case is distinguished from *Kenny, supra* at 113-114, because, in *Kenny,* one to two hours before the plaintiff arrived, the defendant "was salting areas of the parking lot and the entrances suggests that he was aware of slippery conditions on defendant's property and should have been aware of slippery conditions where plaintiff fell." So, in this case, the meteorological data and opinions based on the data simply afford no evidence that defendants knew or should have known about the specific icy patch on which plaintiff fell. As in *Altairi, supra* at 640, this evidence says nothing about whether defendants knew or should have known of the slippery conditions absent evidence that the defendants or their representatives were in the area at the time the condition existed.

Although an employee of defendant T&J apparently had been in the area earlier in the day clearing snow, because T&J did not possess or control the property, it owed plaintiff no duty to inspect and make the premises safe. Further, no evidence other then speculation based on the meteorological data suggested that the ice on which plaintiff fell existed at the time T&J's employee was clearing snow. So, even if T&J possessed and controlled the property and had a duty to inspect, plaintiff's premises liability claim against T&J fails for the same reason it fails against Lakeview and Metro. See *Derbabian, supra* at 706-707, citing *Hampton v Waste Management of Michigan*, *Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999) (the requirement

[3] Temperatures are stated using the Fahrenheit scale; water freezes at 32 degrees.

of actual or constructive knowledge of a dangerous condition before premises liability attaches is inherent in the principle that a possessor of land is not an insurer of the safety of an invitee).

In sum, whether the icy condition on which plaintiff fell was open and obvious is not dispositive of plaintiff's premises liability claims but lack of evidence of defendant's actual or constructive knowledge of the alleged dangerous condition is. *State Farm, supra* at 267. Thus, the trial court correctly granted defendants Lakeview and Metro summary disposition. MCR 2.116(C)(10), (I)(1). Further, because T&J did not possess or control the property and did not owe a duty to plaintiff independent of its snow removal contract, *Fultz supra* at 463, 468, the trial court also properly granted T&J summary disposition as to plaintiff's premises liability claim for failing to state a claim. MCR 2.116(I)(1); *Derbabian, supra* at 709.

B. The Contract Claims

Contrary to the trial court's conclusion, we hold that plaintiff was not a third-party beneficiary of either Lakeview's contract with Metro or Lakeview's contract with T&J within the meaning of MCL 600.1405. Plaintiff lacked standing to enforce an alleged breach of either contract. We will affirm the trial court when it reaches the correct result, albeit for the wrong reason. *Gleason, supra* at 3. We agree with the trial court, however, that plaintiff's direct contract claim against Lakeview is in reality a tort claim and fails for the same reason as plaintiff's premises liability claim.

The ability of a person to enforce a contract to which that person is not a party is controlled by statute. *Koenig v South Haven,* 460 Mich 667, 676; 597 NW2d 99 (1999); *Oja v Kin*, 229 Mich App 184, 192-193; 581 NW2d 739 (1998). MCL 600.1405 provides, in part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
>
> * * *
>
> (2) (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.

MCL 600.1405 is in derogation of the common-law rule prohibiting a third party from suing on a contract and must be strictly construed so as to make the least change in the common law. *Koenig, supra* at 678 n 3. The statute permits a person to enforce a contract to which he is not a party only when the contract contains a promise to "undertake[] an obligation 'directly' to or for the person." *Id*. at 677. The language of the statute evinces the Legislature's intent "to assure that contracting parties are clearly aware that the scope of their contractual undertakings

encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Id*. Further, although subsection (2)(b) permits contracting parties to create a class of third-party beneficiaries, the class must be sufficiently described or designated. *Id*. at 680, citing *Guardian Depositors Corp v Brown*, 290 Mich 433, 438; 287 NW 798 (1939). But the class, "must be something less than the entire universe, e.g., 'the public.'" *Koenig, supra* at 680. Thus, only specifically intended third-party beneficiaries may enforce a contract, not persons who may incidentally benefit from the performance of the contract but who are not directly referred to, or who are not members of a sufficiently described class. *Id*. at 677-680.

To satisfy the statute, "an objective standard is to be used to determine from the contract itself whether the promisor undertook 'to give or to do or to refrain from doing something *directly* to or for' the putative third-party beneficiary." *Id.* at 680, quoting MCL 600.1405(1) (emphasis in *Koenig*). Our Supreme Court has also counseled that in applying the objective standard, "a court should look no further than the 'form and meaning' of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of § 1405." *Schmalfeldt, supra* at 428, quoting *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 189; 504 NW2d 635 (1993), in turn quoting *Guardian Depositors, supra* at 437.

With respect to plaintiff's contract claim against Metro, he does not allege any language from Lakeview's management contract with Metro that forms the basis of his asserted third-party beneficiary status. So, plaintiff offers nothing on which to apply the objective standard. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003)(citations omitted). By failing to properly address the merits of his assertion of error, plaintiff has abandoned this issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

With respect to plaintiff's third-party claim under Lakeview's contract with T&J, an objective examination of the "form and meaning" of the contract reveals only one promise by T&J "to do or to refrain from doing something directly to or for" the class of which plaintiff is a member, condominium unit owners. Specifically, the contract prohibited T&J from accessing "individual units . . . without the prior written consent of the owner of such unit." But plaintiff does not assert this promise was breached. The same paragraph of the contract granted T&J permission to access the common elements of the condominium to perform the work under the agreement. The remainder of the contract addresses the terms, conditions, and specifications of the snow removal work to be performed, the length of the contract, terms of payment, and ancillary matters such as insurance and indemnification. The promise to remove snow and ice from the common elements of the condominium is to Lakeview, which clearly benefits by fulfilling its maintenance responsibilities to unit owners. Thus, although condominium unit owners also benefit by T&J's performance of its snow removal promises, those promises are not made *directly* to or for condominium unit owners. *Koenig, supra* at 677. Accordingly, as an incidental beneficiary of the contract, plaintiff has no standing to assert a claim for its alleged breach by T&J. *Id*. at 679-680.

Plaintiff argues that because he was a member of the Lakeview condominium association, Lakeview was acting as his agent in entering into the contract with T&J, and that he paid for the contract benefits through his association dues. In essence, plaintiff argues it is

obvious the contract was intended to benefit condominium unit owners, so, as a constructive or actual party to the contract, he could maintain an action for its breach. Plaintiff cites *Cenovski, Inc v Michigan Mutual Ins Co*, 200 Mich App 725; 504 NW2d 722 (1993), in support of his argument.

The trial court agreed that plaintiff was a third-party beneficiary of Lakeview's contract with T&J and entitled to enforce it because "co-owners themselves constituted the make-up of the association." Further, the court reasoned that the contract required snow plowing so as to "avoid blocking parking spaces in the carports [co-owners' individual parking spots], or public parking or walking areas." In addition, the contract's specifications required snow removal to permit access to mailboxes. The court then reasoned that having demanded such provisions, "it cannot be said that plaintiff 'incidentally' benefited from defendant T&J's performance of the contract, or that the contract was for the benefit of the 'landlord' himself, as clearly, the co-owners could also be deemed "landlords" since they helped pay for and govern the complex."

Neither plaintiff nor the trial court cites any authority to support the proposition that as a member of a contracting nonprofit association and an indirect contributor to the contract consideration through payment of dues, plaintiff is entitled to enforce the contract as a third-party beneficiary under MCL 600.1405. Generally, where a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

The one case plaintiff cites does not support the position he advanced, and the trial court accepted. In *Cenovski, supra* at 726, Michigan Mutual provided comprehensive insurance for a limousine owned by the Cenovski company. But the named insured was another company, Club Monte Carlo, owned by the same people who owned Cenovski. Michigan Mutual refused to pay Cenovski after the limo was stolen and burned because it was not a named insured. This Court held that Cenovski could sue on the contract as a third-party beneficiary because the policy listed the burned limo as an insured vehicle, Cenovski was named as the vehicle's titleholder, and Michigan Mutual had promised to pay comprehensive damage claims for vehicles not owned by Club Monte Carlo without specifying to whom the payments would be made. *Id*. at 727-728. In sum, the contract clearly identified the insured property, the risk that was insured, contained a promise to pay if the risk occurred, and specifically identified Cenovski as the insured vehicle's titleholder. Accordingly, "[v]iewed objectively, a reasonable factfinder could determine that Michigan Mutual's promise to pay had been made for Cenovski's benefit." *Id*. at 729. That is, Michigan Mutual promised "to do or to refrain from doing something *directly* to or for" Cenovski. MCL 600.1405(1)(emphasis added); *Koenig, supra* at 680. Furthermore, the "contracting parties [were] clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract." *Id*. at 677. These facts distinguish *Cenovski* from the case at bar.

In contrast, an objective examination of the "form and meaning" of the contract at issue reveals T&J promised "to do or to refrain from doing something directly to or for" Lakeview, not plaintiff or condominium unit owners. The contract contained no promises by T&J "to do or to refrain from doing something directly to or for" plaintiff, or, except as noted *supra*, "to do or to refrain from doing something directly to or for" a class of which plaintiff is a member, condominium unit owners. Thus, although condominium unit owners are obviously benefited

when T&J performs the contract, they are not third-party beneficiaries within the meaning of MCL 600.1405. *Schmalfeldt, supra* at 428-429.

In *Schmalfeldt,* a tavern patron was injured on the bar's premises but the Court held that the injured patron was not a third-party beneficiary of the bar's insurance policy providing for payment of medical expenses for bodily injury caused by an accident on the premises. The injury occurred when the plaintiff tried to walk away from a game of pool, but the other player struck the plaintiff in the face. *Schmalfeldt, supra* at 423-424. From an objective examination of the contract itself, the Court concluded "[n]othing in the insurance policy specifically designates [the plaintiff], or the class of business patrons of the insured of which he was one, as an intended third-party beneficiary of the medical benefits provision." *Id*. at 428-429. The Court opined that at best, "the policy recognizes the possibility of some incidental benefit to members of the public at large, but such a class is too broad to qualify for third-party status under the statute." *Id*. at 429, citing *Brunsell*, *supra* at 297. So, too, here, the contract does not specifically designate plaintiff, or condominium unit owners as intended beneficiaries, and the snowplowing contract merely provides incidental benefits to condominium residents, as well as other members of the public using the common elements of the condominium premises. In sum, plaintiff is not an intended third-party beneficiary entitled to sue defendant T&J under § 1405.

Last, plaintiff's direct contract claim against Lakeview is no more than a restatement of plaintiff's premises liability claim; therefore, it is subject to the same tort defense that the defendant must have actual or constructive knowledge of a dangerous condition before liability attaches. Plaintiff alleges that pursuant to the master deed and condominium bylaws, Lakeview "had the contractual obligation to maintain and repair the common elements . . . the driveways, parking lots, sidewalks, and carports." Plaintiff also alleges the condominium association bylaws "contractually obligated the association to reasonably maintain the common elements." In reality, plaintiff's contract claim alleges no more than breach of a landlord's common-law duty to maintain in a reasonably safe condition the common elements of the premises to which control is retained, a tort claim. See *Lipsitz v Schechter*, 377 Mich 685, 687-688; 142 NW2d 1 (1966).

This Court recently decided the case of *McDowell v Detroit*, ___ Mich App ___; ___ NW2d ___ (#246294, dec'd November 9, 2004). In that case, the plaintiffs' decedents died in a house fire and sued the City of Detroit and its housing commission under numerous theories, including nuisance per se, nuisance, trespass-nuisance, breach of contract, breach of express and implied warranty of habitability and quiet enjoyment, and violation of the housing code. The fatal fire occurred in the plaintiffs' home, an apartment leased from the defendant. The issues presented on appeal included whether the plaintiffs had stated claims that survived governmental immunity as it existed before *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). Of course, both before and after *Pohutski*, statutory immunity extended only to tort liability; it does not grant immunity from contract claims. MCL 691.1407; *Ross v Consumers Power Co,* 93 Mich App 687, 691; 287 NW2d 319 (1979), affirmed 415 Mich 1; 327 NW2d 293 (1982), reh granted 417 Mich 1113; 331 NW2d 729 (1983), modified on other grounds 420 Mich 567; 363 NW2d 641 (1984), remanded 422 Mich 890; 367 NW2d 326 (1985).

This Court reported the trial court's resolution of the plaintiffs' contract claims:

> . . . the trial court found that under *Mobil Oil v Thorn*, 401 Mich 306; 258 NW2d 30 (1977), [the] plaintiffs could "maintain a tort action predicated upon a breach of contract to keep the premises in reasonable repair." The trial court stated that both the parties to the lease as well as the third party plaintiffs could sustain causes of action against defendant for a breach of contract claim and a breach of warranty claim under the lease for personal injury damages under *Mobil Oil, supra*. The trial court also stated that the lease at issue contained additional obligations of both the landlord and the tenant that went above and beyond the requirements of the public housing laws, and therefore, the preexisting duty doctrine did not preclude plaintiffs' contract claim. Finally, regarding the third party plaintiffs specifically, the trial court found that they could "maintain a breach of contract action as they were on the premises by consent and would have been subject to the landlord's duty of reasonable care to perform the contract provisions." [*McDowell, supra,* slip op at 9.]

The *McDowell* Court held that the plaintiffs' contract claims were, in reality, tort claims for which no exception to governmental immunity applied. *Id*., slip op at 9-10. The Court reasoned that the trial court had misapplied *Mobil Oil,* which had overruled the common-law rule that a lessor could not be held liable for injuries arising from a breach of a covenant to do repairs. *Id*. at 310-312. In doing so, our Supreme Court in *Mobil Oil* adopted the rule stated in 2 Restatement Torts, 2d, § 357, *Mobil Oil, supra* at 311-312:

> "A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> "(a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> "(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and
>
> "(c) the lessor fails to exercise reasonable care to perform his contract."

The *McDowell* Court opined:

> After carefully reviewing the substance of plaintiffs' contract claims, we conclude that the claims are in fact merely recapitulations of the tort claims. Plaintiffs relied upon, and the trial court applied *Mobil Oil, supra*. In *Mobil Oil*, our Supreme Court stated that an action in tort can be brought by a tenant predicated upon a lessor's breach of an agreement to make repairs. *Mobil Oil, supra,* 401 Mich 310-313. In other words, *Mobil Oil*, stands for the proposition that lessees can recover *in tort* for personal injuries in actions sounding in contract. *Id*. In applying *Mobil Oil* to the instant case, we are again left with the conclusion that although plaintiffs' cause of action "sounds in contract" the issues are plainly tort issues. Accordingly, the trial court should have analyzed the

issues under MCR 2.116(C)(7) and tested whether the claims were barred by governmental immunity. [*McDowell, supra,* slip op at 9-10.]

The same reasoning applies with equal force to the case at bar. Although plaintiff claims Lakeview is liable for breach of contract, his action is in reality a tort claim to which tort defenses apply. And, as the *McDowell* Court correctly recognized from *Mobil Oil*, allegations of a breach of a covenant to maintain or repair a premises where the breach results in personal injury, have long been considered tort claims. Accordingly, unless the agreement specifies otherwise, to be liable for breach of a covenant to maintain and repair, the defendant must have actual or constructive notice of the alleged defective condition. The commentary in the restatement to § 357, adopted in *Mobil Oil,* is pertinent to the nature of the claim, and the notice required for liability to attach:

> *c*. The lessor's duty under the rule stated in this Section is not merely contractual, *although it is founded upon a contract. It is a tort duty*. It extends to persons on the land with the consent of the lessee, with whom the lessor has made no contract. The lessor is not an insurer of the safety of the premises, and is not liable for harm caused even to his lessee by a failure to make the land absolutely safe. He is liable only if his failure to do so is due to a failure to exercise reasonable care to that end.
>
> * * *
>
> *d*. Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. Unless it provides that the lessor shall inspect the land to ascertain the need of repairs, *a contract to keep the premises in safe condition subjects the lessor to liability only if he does not exercise reasonable care after he has had notice of the need of repairs*. In any case his obligation is only one of reasonable care. [Comment 4, 2 Restatement Torts, 2d, § 357; emphasis added.]

Although the relationship in the instant case is not exactly one of lessor-lessee or landlord-tenant, the analogy is close enough that the legal principles should apply. Because the contract provision on which plaintiff relies merely vests the management and maintenance of the common elements in the condominium association (Lakeview), actual or constructive knowledge of the alleged unreasonably dangerous condition is necessary to give rise to liability for breach of contract. Thus, we need not decide whether the open and obvious doctrine would afford a defense to plaintiff's contract claim against Lakeview. As with plaintiff's premises liability claims, lack of evidence that Lakeview possessed actual or constructive knowledge of the alleged dangerous condition is dispositive. Because this Court will affirm the trial court when it reaches the correct result for the wrong reason and because the trial court correctly granted Lakeview summary disposition on this claim, we affirm the trial court's decision.

C. Conclusion

The trial court correctly granted summary disposition to Lakeview and Metro on plaintiff's premises liability claim because plaintiff failed to produce sufficient evidence to

create a material issue of fact as to whether defendants knew, or should have known in the exercise of reasonable care, of the ice on which plaintiff fell, and that it presented an unreasonable risk of harm to invitees. Thus, whether the ice on which plaintiff fell was open and obvious was not dispositive of plaintiff's premises liability claims.

The trial court properly granted T&J summary disposition as to plaintiff's premises liability claim because T&J did not possess or control the property or owe a duty to plaintiff independent of its snow removal contract.

Contrary to the trial court's conclusion, plaintiff was not a third-party beneficiary of either Lakeview's contract with Metro or Lakeview's contract with T&J within the meaning of MCL 600.1405. Plaintiff lacked standing to enforce an alleged breach of either contract. Finally, because plaintiff's direct contract claim against Lakeview is in reality a tort claim, it fails for the same reason as plaintiff's premises liability claim.

We affirm.

/s/ Jane E. Markey
/s/ Donald S. Owens

I concur in result only.

/s/ E. Thomas Fitzgerald