# STATE OF MICHIGAN

# COURT OF APPEALS

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CYLVIA CHEYENNE HERNANDEZ,

Plaintiff-Appellant,

v

STUDIO PLUS PROPERTIES, INC, and D&R PROPERTY MAINTENANCE, LLC,

Defendants-Appellees.

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UNPUBLISHED
April 19, 2007

No. 272658
Macomb Circuit Court
LC No. 2004-004414-NO

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

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting summary disposition to defendants in this premises liability action involving a slip and fall. Because plaintiff fails to show error by the trial court in concluding that the condition was open and obvious, and that the property maintenance company did not owe her a separate and distinct duty under a snow removal contract, we affirm.

On February 23, 2003, the 62-year-old plaintiff fell while traversing the parking lot after exiting out the front door of the Studio Plus Hotel in Warren, Michigan owned by defendant Studio Plus Properties, Inc., and maintained by defendant D&R Property Maintenance, LLC. Plaintiff is a Texas resident who traveled to Michigan regularly for business. Every time plaintiff traveled to Michigan, she stayed in the Studio Plus Hotel and typically stayed in the same room adjacent to the side door of the hotel. On this occasion, plaintiff had stayed at the hotel approximately ten days to four weeks. Plaintiff testified that it had snowed thirteen inches overnight, but that it stopped snowing before she went to leave the hotel. When she first tried to leave the hotel, she attempted to exit through the side exit near her hotel room, but it was blocked by snow. Plaintiff then exited out the main entrance of the hotel. She testified that the concrete slab located immediately outside the entrance was cleared of snow, but that the parking lot was still snow-covered. However, there was a trail approximately two to three feet wide that had been shoveled from the center of the front entrance to the right in the direction of her parked vehicle. Plaintiff testified that the shoveled path was cleared to the pavement but there did not appear to be any salt on the trail. Plaintiff stated that she walked across the concrete slab, took a step onto the pavement where the trail was shoveled and slipped and fell backwards. Plaintiff testified that she was walking carefully because of the snow. Plaintiff claimed that she did not see any ice before she fell or after she fell because it was clear, but she felt it afterward with her hand when she tried to get up.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect an 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). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id*. at 517.

Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Because the test is objective, this Court "look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Further, as a general rule, and absent special circumstances, the hazards presented by snow and ice are open and obvious, and do not impose a duty on the property owner to warn of or remove the hazard. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5-6, 8; 649 NW2d 392 (2002). This Court has previously held that, in general, where there is snow in winter in Michigan, there is likely to be ice and the presence of snow puts a person on notice that there may be slippery conditions. *Teufel v Watkins*, 267 Mich App 425, 427-429; 705 NW2d 164 (2005); *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 115-122; 989 NW2d 737 (2004) (Griffin, J., dissenting), rev'd 472 Mich 969 (2005). Judge Griffin's dissenting opinion in *Kenny*, that the Supreme Court adopted, concluded, "ice and snow do not present 'a uniquely high likelihood of harm or severity of harm.'" *Kenny, supra* at 121, quoting *Joyce v Rubin*, 249 Mich App 231, 241-243; 642 NW2d 360 (2002).

Although plaintiff is a Texas resident, plaintiff was a regular patron of the extended stay hotel and even stayed in the same room on her visits to Michigan. She was familiar with the hotel exits and parking lot. Plaintiff testified that she was familiar with Michigan winters and had to shovel her car out of the same hotel parking lot on an earlier occasion. Plaintiff testified that on the date of the incident it had been snowing all night resulting in a snowfall of thirteen inches blanketing the parking lot. When plaintiff attempted to leave via the side exit, she discovered the heavy snow obstructing the exit. Plaintiff then exited through the main entrance that was not obstructed by the snowfall because it had been cleared. Plaintiff testified that once she stepped out of the hotel she walked carefully indicating that she was aware of the snowy condition and reasonable risks associated with a Michigan snowstorm. Even when viewing the evidence in the light most favorable to plaintiff, the evidence demonstrates that a reasonably prudent person with ordinary intelligence would have anticipated that an icy condition could be present on pavement after a snowstorm resulting in thirteen inches of freshly fallen snow. Under the facts present, an average person with ordinary intelligence would have been able to foresee the danger of a slippery condition on the pavement trail and would have discovered the danger and risk presented upon casual inspection. *Teufel, supra*; *Kenny, supra*. Because plaintiff failed to present evidence to create a genuine issue of material fact, the trial court did not err in granting defendant Studio Plus Properties, Inc.'s motion for summary disposition.

Plaintiff also argues that genuine issues of material fact exist concerning the reasonableness of care defendant D&R Property Maintenance, LLC used in salting and plowing the parking lot where she fell. "The threshold question for negligence claims brought against a contractor on the basis of a maintenance contract between a premises owner and that contractor is whether the contractor breached a duty separate and distinct from those assumed under the contract." *Fultz v Union-Commerce Associates*, 470 Mich 460, 461-462, 683 N.W.2d 587 (2004) "'It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.'" *Id*. at 463, quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). If no independent duty exists, no tort action based on a contract will lie. *Fultz, supra* at 463. Therefore, the appropriate inquiry is whether defendant D&R Property Maintenance, LLC owed plaintiff a duty that was "separate and distinct" from the preexisting contractual obligation it owed defendant Studio Plus Properties, Inc. to remove snow from the hotel parking lot. If a defendant creates a new hazard, even in the course of performing a contract, a duty that is separate and distinct from the defendant's contractual obligations is established. *Id*. at 468-469. Plaintiff only alleges that defendant D&R Property Maintenance, LLC performed its snow removal services under the contract unreasonably and does not argue that defendant D&R Property Maintenance, LLC created a new hazard in performing the contract. Because plaintiff has not alleged a duty that was "separate and distinct" from the preexisting contractual obligation defendant D&R Property Maintenance, LLC owed to defendant Studio Plus Properties, Inc., no independent duty exists, and no tort action based on the contract exists. *Id.* at 463.

Affirmed.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey