STATE OF MICHIGAN

COURT OF APPEALS

NORMA I. MERRY and GEORGE MERRY, Plaintiffs-Appellants,	UNPUBLISHED June 15, 2006
v	No. 267596 Shiawassee Circuit Court
SWEET ONION, INC, d/b/a PONDEROSA, Defendant-Appellee.	LC No. 05-002491-NO

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

In this case involving a slip and fall accident, plaintiffs appeal by right an order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Norma Merry's (plaintiff)[1] injuries occurred when she slipped and fell on a step up to the sidewalk located at the entrance to defendant's building at approximately 7 p.m. on November 24, 2004. Plaintiff was with her two daughters, her son-in-law, and her two grandsons. Plaintiff was aware that it was snowing hard, and that the roads were bad and had not been cleared. She estimated that two or three inches of snow had fallen, but that wind made the snow deeper in places. Plaintiff stated that the parking lot had not been plowed when she arrived. Some of the snow was six or seven inches deep in drifts. Plaintiff maintained that the snow was level with the sidewalk. She walked towards the door, and slipped as she placed the arch of her foot on the corner of the step up to the sidewalk. Plaintiff tried to grab one of the poles supporting the overhang but fell and injured her left shoulder.

Plaintiff had been to the restaurant a few times prior to this occasion. She acknowledged that she was aware there was a step up into the restaurant, but she did not remember where the step was located. She also stated that she "could see something was there" because of the two poles, but that she could not tell how high or low it was because of the snow. Plaintiff acknowledged that her son-in-law and grandson had preceded her. She maintained that her son-in-law did not travel in the same path that she did, but that he had approached the door from the

[1] Plaintiff George Merry filed a claim for loss of consortium.

side. Plaintiff admitted that she did not pay much attention to where her son-in-law had gone, because she was paying attention to whether her daughters needed help. She acknowledged that the area was well lit, but stated that it was difficult to see with the blowing snow.

Plaintiff filed suit alleging negligence. The trial court granted defendant's motion for summary disposition, finding that the dangerous condition involved was open and obvious, and did not possess special aspects that would render it unreasonably dangerous despite its open and obvious nature.

We review a trial court's decision to grant or deny summary disposition de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The parties and the trial court relied on matters outside the pleadings; thus, review under MCR 2.116(C)(10) is appropriate. *Driver v Hanley* (*After Remand*), 226 Mich App 558, 562; 575 NW2d 31 (1997). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A possessor of land has a duty 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*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609-610; 537 NW2d 185 (1995). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. *Lugo*, *supra* at 517-518.

Both the open and obvious danger doctrine and the principles concerning special aspects are equally applicable to cases involving the accumulation of snow and ice. *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 7-8; 649 NW2d 392 (2002). Whether a 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 upon casual inspection. *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

While all accumulations of snow and ice may not be open and obvious, Michigan courts have generally held that the hazards presented by unobstructed ice and snow were open and obvious when the plaintiff knew or had reason to know of the slippery conditions. See *Perkoviq v Delcor Homes-Lakeshore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002); *Joyce v Rubin*, 249 Mich App 231, 240; 642 NW2d 360 (2002). Here, we find that plaintiff has failed to show that the danger was not open and obvious. Plaintiff testified that she was aware of the heavy snowfall and the snowy conditions in the parking lot and entrance to the building. Photographs reflect this obvious condition and further support defendant's position. We acknowledge that, given the snowy conditions, plaintiff may not have been able to fully see the yellow demarcation line between the raised sidewalk and the parking lot and the elevation change clearly revealed in the photographs. However, the photographs also show that the bottom of the entrance door is not level with the parking lot, which should have suggested an elevation change. In addition, while we do focus exclusively on whether plaintiff herself perceived the danger, we note that she admitted that she was aware of the generally snowy and slippery conditions and the fact that an elevation change existed in the general area where she fell. She also acknowledged that she was

somewhat distracted worrying about her daughters' progress to the door of the restaurant at the time of the fall. However, plaintiff, like all Michigan residents, should be aware of the danger that snow and ice presents. Plaintiff herself testified that she was aware of these dangers. We thus find the trial court correctly ruled that reasonable minds could not differ that the slippery condition of the sidewalk and step was open and obvious to a reasonable person in plaintiff's position. *Novotney, supra*.

We further agree with defendant that the slippery conditions here presented no "special aspects" that created "a uniquely high likelihood of harm or severity of harm. . . ." *Lugo, supra* at 518-519. This Court has previously held that a layer of snow on a sidewalk did not constitute a unique danger creating a "risk of death or severe injury." *Joyce, supra* at 243. This Court has also held that falling down ice-coated stairs does not pose the risk of severe harm such as that contemplated in *Lugo, supra*. *Corey, supra* at 6-7. Plaintiff has presented nothing to substantially differentiate the conditions at the time of her fall from the dangers generally present during snowfalls.

The dangerous condition here was open and obvious. Ice and snow do not present "a uniquely high likelihood of harm or severity of harm." *Lugo, supra* at 518-519. The trial court did not err when it granted defendant's motion for summary disposition.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette