

STATE OF MICHIGAN
IN THE SUPREME COURT

CHARLOTTE HOFFNER,

Plaintiff-Appellee,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Third-Party Plaintiff-Appellee,

v.

RICHARD LANCTOE and LORI LANCTOE,

Defendants-Appellants.

and

PAMELA MACK and TIFFANI K. AHO,
~~a/k/a TIFFANI K. FONTECCHIO~~, and MOUSIE, INC., d/b/a
FITNESS XPRESS,

Defendants-Appellees.

SC.: 6pm 11-2-10
COA: 292275
Gogebic CC: ~~0~~-08-85-NO

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NOTICE OF HEARING

DEFENDANTS-APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL

APPENDIX

PROOF OF SERVICE

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-appellants, Richard Lanctoe and Lori Lanctoe, seek leave to appeal only from that portion of the 11/2/10 decision of the Court of Appeals which held that the icy sidewalk in front of appellants' tenant's fitness center's only entry door was unavoidable and thus a special aspect of the condition where plaintiff admitted the condition was open and obvious, she could have avoided it, but opted to confront the condition because she wanted to exercise and then slipped on the sidewalk and fell.

The decision of the Court of Appeals that the icy sidewalk was effectively unavoidable even though plaintiff was not required to confront the hazard is contrary to other decisions of the Court of Appeals in "building entry" cases including *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 260 (2002) and *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 390 (2002). Those cases held that a known dangerous condition is not effectively unavoidable if plaintiff has a choice whether to confront or avoid the danger (alternate route, decline to enter, delay entry) yet chooses to confront the danger anyway.

The Court of Appeals also improperly considered plaintiff's personal circumstances or idiosyncrasies when it ruled that the icy sidewalk was effectively unavoidable in light of her need to access the building to satisfy her desire to exercise, contrary to *Lugo v Ameritech Corp Inc*, 464 Mich 512, 519 n 2; 629 NW2d 384 (2001).

Based on the foregoing and the arguments set forth in their application for leave to appeal, defendants-appellants ask that this Court grant them peremptory relief, reverse the lower court decisions on the open and obvious danger doctrine, and hold

that judgment should be entered in their favor, or failing that, grant leave to appeal on these important issues.

STATEMENT OF APPELLATE JURISDICTION

The Court has discretionary jurisdiction of this appeal pursuant to MCR 7.301(A)(2). This appeal satisfies the criteria set forth in MCR 7.302 and warrants an order granting leave to appeal or peremptory relief.

This appeal involves legal principles of major significance to the state's jurisprudence because it squarely raises the issue of plaintiff's personal responsibility to protect herself from an open and obvious danger. *Wiater v Great Lakes Recovery Centers, Inc.*, 477 Mich 896; 722 NW2d 664 (2006) (Markman, J. dissenting):

The crux of the "open and obvious hazard" doctrine is that an invitee has the personal responsibility to protect himself or herself from open and obvious dangers. I would grant leave to appeal to clarify whether the "avoidability" or "unavoidability" of a hazard posing an alleged "special aspect" is relevant to the exercise of such personal responsibility.

The decision of the Court of Appeals regarding the open and obvious danger rule is clearly erroneous, will cause material injustice, and conflicts with other decisions of the Court of Appeals because (a) a known danger is not unavoidable where plaintiff has a choice other than to confront the condition and (b) plaintiff's decision to attempt to enter the fitness center despite the icy sidewalk fronting the only customer entrance was an idiosyncratic or personal one (her desire to exercise) that is immaterial to the application of the open and obvious doctrine.

STATEMENT OF QUESTION PRESENTED

SHOULD THIS COURT GRANT LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED WHEN IT RULED THAT THE ICY SIDEWALK IN FRONT OF A FITNESS CENTER'S ONLY ENTRY DOOR WAS UNAVOIDABLE AND THUS A SPECIAL ASPECT OF THE CONDITION WHERE PLAINTIFF ADMITTED THE CONDITION WAS OPEN AND OBVIOUS, SHE COULD HAVE AVOIDED IT, BUT OPTED TO CONFRONT IT BECAUSE SHE WANTED TO EXERCISE AND THEN SLIPPED ON THE SIDEWALK AND FELL?

Defendants-Appellants say "Yes."

Plaintiff-Appellee says "No."

Third-Party Plaintiff-Appellee says "No."

INTRODUCTION

A. NATURE OF THE ACTION

This is a premises liability case. Plaintiff fell on an icy sidewalk in front of a fitness center's only entry door and hurt her back. She admitted the icy condition was open and obvious but wanted to work out so she opted to confront the condition to gain access to the center. The accident happened on 1/28/06 around 11:00 a.m.

The fitness center, known as Fitness Xpress, was operated by Mousie, Inc. The latter company was owned by Pamela Mack and Tiffany Aho. Defendants-appellants, Richard and Lori Lanctoe, owned the building and property where Mousie, Inc. leased space for Fitness Xpress.

B. THE CHARACTER OF THE PLEADINGS AND PROCEEDINGS

On 3/14/08, plaintiff sued the Lanctoes, Mack, Aho, and Mousie, Inc., d/b/a Fitness Xpress for premises liability. After some discovery, defendants moved for summary disposition on three grounds: (1) that plaintiff's complaint was barred by the open and obvious danger doctrine [MCR 2.116(C)(10)], (2) that her complaint was barred by indemnity and release language in the fitness center's membership agreement [MCR 2.116 (C)(7)], and (3) that her complaint against the fitness center defendants was barred because they were not possessors of the sidewalk for purposes of premises liability [MCR 2.116 (C)(10)].

Defendants' motion was argued to the trial court on 5/5/09 and was denied. The court ruled that whether the icy sidewalk was effectively unavoidable, whether the release and indemnity agreement applied to plaintiff's slip and fall and released all

defendants, and whether the fitness center defendants were in possession and control of the sidewalk were all material fact questions for jury resolution. [Tr, pp 41-43]

An order denying the motion was entered on 5/15/09. Defendants applied for leave to appeal that order on 5/29/09. The Court of Appeals granted defendants' application by order dated 10/6/09.

In an 11/2/10 decision, the Court of Appeals affirmed in part, reversed in part, and remanded the case for further proceedings. The Court held that the fitness center defendants were not possessors of the sidewalk for purposes of premises liability and thus were entitled to summary disposition as a matter of law. However, the Court agreed with the trial court that the scope of activities released by the language in the membership agreement was ambiguous and thus summary disposition was inappropriate. Finally, the Court ruled that the icy sidewalk was effectively unavoidable and thus a special aspect as it related to the use of the premises by plaintiff in light of her desire to exercise because there was only one customer entrance to the fitness center. [Appendix, Exhibit A]

Defendants-appellants, Richard and Lori Lanctoe, now seek leave to appeal only from that portion of the 11/2/10 decision of the Court of Appeals on the open and obvious danger doctrine

STATEMENT OF FACTS

Plaintiff brought this action for a back injury suffered in a slip and fall on an icy sidewalk in front of a fitness center's door. [Complaint, ¶¶ 4-8] Plaintiff was a member of the fitness center (and thus an invitee) and was attempting to reach the door to access the center so she could exercise. Plaintiff named as defendants the fitness

center and its landlord and charged them with failure to make the premises safe.

[Complaint, ¶ 6] Defendants moved for summary disposition on 5/5/09. The trial court denied the motion. [Order Denying Motion for Summary Disposition, 5/15/09]

Defendants applied for leave to appeal the trial court's order. [Defendants' Application for Leave to Appeal, 5/29/09] The Court of Appeals granted defendants' application.

[Order, 10/6/09] In an 11/2/10 decision, the Court affirmed in part, reversed in part, and remanded the case for further proceedings.

Plaintiff's accident happened on Saturday, January 28, 2006 around 11:00 a.m. in Ironwood, MI. The fitness center was operated by defendants Mack and Aho and owned by their company, defendant Mousie, Inc. d/b/a Fitness Xpress. [Mack dep, pp5-6; Aho dep, p 4] The fitness center was located in a rental unit of a building owned by defendants Richard and Lori Lanctoe. [L. Lanctoe dep, pp 6, 12-13] There was only one entry door for fitness center members. [Mack dep, pp 16-17]

The fitness center leased approximately 2,000 square feet of floor space in the building. [Exhibit 7 to Defendants' 4/29/09 Reply to Plaintiff's Brief Opposing Motion for Summary Disposition] There were other tenants in the building, too. [L. Lanctoe dep pp 5-6] The sidewalk that plaintiff fell on ran the length of the building and was owned by the Lanctoes. [Exhibit 6 to Defendants' 4/29/09 Reply to Plaintiff's Brief Opposing Motion for Summary Disposition] The latter also owned the building's parking lot. Each tenant of the building including the fitness center (and tenant customers) had use of the sidewalk and the parking lot. [L. Lanctoe dep, pp 22-23]

Per paragraph 19 of the lease between the Lanctoes and the fitness center (and deposition testimony), the Lanctoes were responsible for snow removal from the

building's sidewalk and parking lot although Mr. Lanctoe supplied the fitness center with a bucket of salt and center personnel would occasionally salt that portion of the common sidewalk in front of the fitness center. [L. Lanctoe dep, p 22, R. Lanctoe dep, p 5; Mack dep, p 19; Exhibit (unnumbered) to Defendants' 4/14/09 Motion for Summary Disposition]

Plaintiff and her sister Paula were both members of the fitness center. On the morning of the accident, plaintiff's sister picked her up and the two then drove to the center in Ironwood. [Pltf's dep, p 11] They parked in the parking lot owned by the defendant Lanctoes between the door and the window of the fitness center with the front of the vehicle facing the building. [Pltf's dep, pp 19-20] Plaintiff got out of the vehicle and walked around the front of the vehicle about halfway, and then tried to cross the sidewalk to the fitness center's only customer entrance door. [Pltf's dep, pp 21-23]

In her interrogatory answers, plaintiff acknowledged the icy condition of the sidewalk was open and obvious. [Exhibit 1 to Defendants' 4/29/09 Reply to Plaintiff's Brief Opposing Motion for Summary Disposition] She also testified that the condition was obvious. Plaintiff didn't look at the condition of the parking lot once she got out of the vehicle, but she did notice ice on the sidewalk:

“Q: Okay. Did you look at sidewalk?

A: I looked at the sidewalk.

Q: When did you first look at the sidewalk that day?

A: When I got out the vehicle and I was walking in front of the vehicle, I could see the ice and the roof was dripping, and it didn't look like it would be that bad, you know. I figured, how wide is the sidewalk? I figured I should be able to make it across. I had good boots on and it was only just a few steps.

Q: Okay. So you were able to take a few more steps before you actually fell?

A: Yes, uh—hum.”

[Pltf's dep, pp 21-22]

* * *

“Q: Okay. So when did you first look down on this area in front of the car to see what it was like?

A: As soon as I got to the corner of my vehicle.

Q: Okay.

A: Or Paula's vehicle.

Q: And then you were able to walk from there to the halfway point of the vehicle—

A: Yeah.

Q: —and then turn to go towards the door?

A: uh—hum.

Q: Yes.

A: Yes.

Q: And then you started to walk toward the door?

A: Yes.”

[Pltf's dep, pp 23-24]

* * *

Q: Okay. Then describe for me what you saw on the sidewalk parking lot area.

A: Ice, glare ice.

Q: Okay. And you had seen that right when you first rounded the corner of the vehicle?

A: Yes."

[Pltf's dep, p 25]

Plaintiff then described how she fell:

"Q: How did you fall? Can you describe for me how you went down?

A: I hit that slippery spot and all of a sudden, I just like went up in the air and just came back down and landed right on my back."

[Pltf's dep, p 26]

Plaintiff was asked why she had to exercise that day, and whether she could have decided to return to the car and not enter the building:

"Q: Okay. When you saw the condition of the sidewalk, could you have said: "I am not going to try to go walk through this; I am just going to sit in the car?"

A: No. I thought that I could make it.

Q: Okay. So even despite what you saw, you thought that you could make it safely?

A: Yes.

Q: Okay. Could you have decided not to go in the building that day?

A: I could have, but I never thought about it. I just wanted to get in there and start working out."

[Pltf's dep, p 27]

ARGUMENT

THIS COURT SHOULD GRANT LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED WHEN IT RULED THE ICY SIDEWALK IN FRONT OF A FITNESS CENTER'S ONLY ENTRY DOOR WAS UNAVOIDABLE AND THUS A SPECIAL ASPECT OF THE CONDITION WHERE PLAINTIFF ADMITTED THE CONDITION WAS OPEN AND OBVIOUS, SHE COULD HAVE AVOIDED IT, BUT OPTED TO CONFRONT THE CONDITION BECAUSE SHE WANTED TO EXERCISE AND THEN SLIPPED ON THE SIDEWALK AND FELL.

STANDARD OF REVIEW

An appellate court reviews a trial court's grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

In *Lugo v Ameritech Corp, Inc.*, 464 Mich 512; 629 NW2d 384 (2001), the Court held that a premises possessor has no duty to protect an invitee from an open and obvious danger unless special aspects of the condition make even an open and obvious risk unreasonably dangerous. "To prevent the application of the open and obvious doctrine 'to a typical and obvious condition, the condition must be 'effectively unavoidable' or 'unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm.'" (Citations omitted.) *Belhabib v J & B of Michigan, Inc.*, 2008 WL 2476713 (Docket No. 278380; 6/17/08) [Appendix, Exhibit B]. The *Lugo* Court provided two examples of special aspects of an otherwise open and obvious condition that make the condition unreasonably dangerous.

First, a danger that is unavoidable, creating a uniquely high likelihood of harm, such as where the only way to exit a building is through standing water, and second, a danger that possesses a uniquely high severity of harm if the risk is not avoided, such as an unguarded 30-foot deep pit in the middle of a parking lot. (Citation omitted.)

Eckhout v Kroger Corp, 2006 WL 839922 (Docket No. 267102; 3/20/07)

[Appendix, Exhibit C].

“However, an unreasonably high risk of harm caused by an effectively unavoidable condition ‘must be more than merely imaginable or premised on a plaintiff’s own idiosyncrasies.’ ” (Citation omitted.) *Becker v Glaister*, 2009 WL 153289 (Docket No. 281481; 1/22/09) [Appendix, Exhibit D]. In other words, the focus should be “on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.” *Lugo, supra*.

Finally, per Judge Griffin’s dissenting opinion in *Kenny v Kaatz Funeral Home, Inc.*, 264 Mich App 99; 689 NW2d 737 (2004) (*Kenny I*), rev’d 472 Mich 929 (2005) (*Kenny II*) :

Snow and ice in a Michigan parking lot on December 27 are a common, not unique, occurrence. Under the *Lugo* definition of ‘special aspects’, ice and snow do not present ‘a *uniquely high* likelihood of harm or severity of harm.’ (Citation omitted.)

Instant plaintiff claimed (and the Court of Appeals agreed) that she had no choice but to confront the icy sidewalk in front of the fitness center’s only door in order to exercise and thus the condition was unavoidable, the first type of special aspect referred to in *Lugo*. Plaintiff and the Court of Appeals cited the case of *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005) as authority to support the “unavoidability” argument. However, reliance on *Robertson* is misplaced because the instant case is factually distinguishable from *Robertson*.

In that case, plaintiff slipped and fell on ice in the parking lot of defendant’s gas station as he walked from the pump to the station to buy windshield washer fluid. The ice “covered the entire area surrounding defendant’s station”. *Id.* The parking lot was described as “extremely icy”, “a disaster”, “a mess”, and “a sheet of ice”. *Id.* The icy

condition was caused by “an unusually severe and uniform ice storm covering the entire area.” *Id.* Plaintiff was “effectively trapped” since he was out of windshield washer fluid and “it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield washer fluid.” *Id.*

Here, plaintiff described the day as nice and sunny [Pltf’s dep, p 17] She said it was “unusually warm for a January day. [/*d*, p 18] There were other vehicles in the parking lot further down from the fitness center. [/*d*, p 20] Plaintiff and her sister parked close to the fitness center’s door. [/*d*, p 20] Plaintiff didn’t look at the parking lot but saw there was ice on the sidewalk. [/*d*, p 21] She was able to get out of the passenger side of her sister’s car and walk in front of the vehicle. [/*d*, p 21] She didn’t think the icy condition looked that bad and thought she could make the few steps to the fitness center door. [/*d*, p 22] After plaintiff got out of her sister’s car, she walked toward the building, turned to cross the sidewalk to enter the fitness center, and then fell on a slippery spot on the sidewalk. [/*d*, pp 22-23; 26] Her sister Paula had already exited the driver’s side of her car and was approaching the sidewalk on her side of the vehicle. [/*d*, p 25] Plaintiff’s sister Patty arrived in her own vehicle and plaintiff remembered her running toward where plaintiff fell. [/*d*, p 25] Plaintiff said Paula and Patty came to her side as did a woman from inside the fitness center. [/*d*, p 23] Defendant Lori Lanctoe, one of the building’s owners, also came over from her unit in the building. [/*d*, p 28]

Unlike the situation in *Robertson*, the sidewalk and parking lot in the instant case were not covered by a sheet of ice that posed an unusually high likelihood of harm. Instead, plaintiff and her sisters were all able to exit their vehicles and approach the sidewalk in front of the fitness center. Plaintiff was injured when she slipped on an icy

spot on the sidewalk in front of the fitness center's door. This is not the type of special aspect which will serve to remove the condition of the sidewalk from the open and obvious danger doctrine.

In addition, the icy spot in front of the fitness center's door was not effectively unavoidable because plaintiff didn't have to confront the condition. She could have avoided the risk presented by the sidewalk by retracing her steps to her sister's vehicle once she knew the condition of the sidewalk. A known dangerous condition is not effectively unavoidable if plaintiff has a choice whether to confront or avoid the danger (alternate route, decline to enter, delay entry) but chooses to confront the condition anyway. The fact that plaintiff saw the icy sidewalk but decided to confront it because she thought she could make it and "just wanted to get in there and start working out" [*Id.*, p 27] is insufficient to render her effectively trapped by the condition. Plaintiff's decision to attempt entry when she did was an idiosyncratic or personal one "the plaintiff brought to the situation that is immaterial to the application of the open and obvious doctrine."

Stanton v Fitness Mgt Corp, 2006 WL 2382434 (Docket No. 267623; 8/17/06)

[Appendix, Exhibit E].

Further, unlike the fictitious store customer in *Lugo* confronting standing water at the store's only exit, instant plaintiff was aware of the icy sidewalk before she attempted to enter the fitness center's only door and thus had a choice to enter or not. If she had first faced the icy sidewalk while attempting to leave the fitness center, the condition may have been unavoidable and plaintiff may have been effectively trapped but that is not the case here. (Even in that scenario, it is questionable whether plaintiff would have

been trapped. She may have been able to get a fitness center employee to call for salt or a rug of some sort to put down over the icy spot on the sidewalk.)

Unlike the store customer in *Lugo* and the plaintiff in *Robertson* (who was trapped because bad weather made it unsafe for him to leave the gas station without windshield washer fluid), instant plaintiff had a choice whether to protect herself from a known danger. Instead, she chose to confront it. The open and obvious danger doctrine bars her claim and reasonable minds cannot differ in that regard.

Finally, to the extent plaintiff argues that she was effectively trapped because she had a right to work out as a paid-up member of the fitness center and that right left her no choice but to confront the icy sidewalk to gain access to the center, that argument, if followed, would do away with the open and obvious danger doctrine in all invitee cases. This is not the current state of the law. Again, the focus is on the condition of the premises, not on plaintiff's personal circumstances or idiosyncrasies. *Lugo*, fn 2. If an otherwise open and obvious condition features no special aspects, plaintiff's claim is barred. The icy sidewalk in the instant case was both common, apparent, and avoidable and did not present a special aspect as would impose a duty upon defendants to protect plaintiff.

The *Lugo* Court's example of an unavoidable risk is where the only way to exit a building is through standing water. The condition is open and obvious but the invitee has no alternative but to confront the danger because he or she is effectively trapped.

However, a danger is not unavoidable nor is the invitee trapped when the invitee is not required to confront the known danger. *Teufel v Watkins*, 267 Mich App 425; 705 NW2d 164 (2005) [Appendix, Exhibit F] (snow and ice in parking lot of apartment

complex not unavoidable where plaintiff could have parked somewhere else); *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002) (slippery walkway to front door of house not unavoidable where plaintiff could have removed personal items another day).

Here, plaintiff could have avoided the risk of harm presented by the icy sidewalk by declining to enter the fitness center and retracing her steps to her sister's vehicle once she knew the condition of the sidewalk. The danger was not unavoidable nor was she trapped by the icy sidewalk when she was not required to confront the known danger. Plaintiff could have chosen to avoid it. Instead, she made the choice to confront it. The open and obvious danger claim bars plaintiff's claim and reasonable minds cannot differ in that regard.

Plaintiff's argument that the icy sidewalk was effectively unavoidable because she *had* to confront the known condition to enter the building has been repeatedly rejected by various panels of the Court of Appeals.

In *Becker, supra* [Appendix, Exhibit D], plaintiff slipped and fell on a one foot wide ramp while leaving defendant's house after dropping off carpet samples. The house was under construction and the ramp was the only means of ingress and egress. The trial court dismissed the action. The Court of Appeals affirmed, rejecting plaintiff's argument that the use of the ramp was effectively unavoidable because it was her only way in and out of the building:

Here, nothing in the record suggests plaintiff, upon observing the ramp, could not have delayed her delivery of carpet samples until another time or simply dropped off the carpet samples in the garage without going up the ramp.... Moreover, this case differs markedly from Lugo's example of a store customer facing a pool of standing water at the only exit. The difference is that, here, plaintiff was aware of the danger before entering the house in the first

place, and as a consequence had a choice whether to enter or not.
(Emphasis added.)

In *Stanton v Fitness Mgt Corp*, supra [Appendix, Exhibit E], plaintiff made a delivery to and picked up packages from defendant fitness center. Only one entryway was available to her. She slipped and caught herself going into the building with a delivery. However, she slipped and fell on an icy cement pad when she left the building while returning to her van. She admitted the icy condition was open and obvious but argued that a “special aspect” existed because she had no choice but to enter and leave the building by the only doorway available to her. The trial court dismissed the action. The Court of Appeals affirmed, rejecting plaintiff’s argument that the slippery condition was unavoidable because it was her only way in and out of the building:

Plaintiff argues that the slippery area represented a special aspect because she was obligated to face it in order to enter and exit the building and perform her contractual obligation. We disagree. *Plaintiff was in control of her own actions and was aware of the conditions before encountering them.* There may have been negative consequences for her had she chosen to avoid the danger by not entering the building, but that does not change the fact that she had a choice.... *The point being that the underlying principle of the open and obvious doctrine is that once a visitor is aware of a danger, it is their responsibility to determine whether to face it or avoid it. Plaintiff could have chosen to avoid it.* (Emphasis added.)

In *Drobot v Way*, 2006 WL 3373083 (Docket No. 270132; 11/21/06) [Appendix, Exhibit G], plaintiff was watching her neighbors’ house in their absence and was injured when she slipped on an icy walkway after leaving the house. The trial court dismissed the action. The Court of Appeals affirmed, rejecting plaintiff’s argument that the icy condition was effectively unavoidable where plaintiff had a choice whether to confront or avoid the condition:

We also reject plaintiff's argument that the condition was effectively unavoidable. First, there was an alternate route out of the house. While it may be true that had plaintiff chosen to take that route, a side door instead of the front door, she would have been unable to lock the door on her departure, the route was available rather than facing the danger. *Second, and more importantly, plaintiff was aware that there was some ice on the sidewalk before even entering the house. Thus, she was on notice that ice was present and that there was some danger in using the sidewalk. Yet she chose to enter the house anyway. She could have avoided the harm merely by declining to enter the house in the first place once she was on notice that there were icy conditions on the sidewalk.* (Emphasis added.)

Accord, McKiddie v Super Bowl of Canton, Inc., 2007 WL 3037335 (Docket No. 272597; 10/18/07) [Appendix, Exhibit H] (slippery bowling lane approach not unavoidable where plaintiff had choice not to bowl or tell bowling alley about condition); *Parsons v HMTC Inc*, 2006 WL 399761 (Docket No. 265863; 2/21/06) [Appendix, Exhibit I] (ice not unavoidable where plaintiff avoided the ice when dropping his keys off, could have taken the same path back to his girlfriend's car, could have chosen to drop his car off at another time); *Kelly v Clay, Inc*, 2006 WL 287407 (Docket No. 255314; 2/7/06) [Appendix, Exhibit J] (beverage delivery man's slip and fall on ice and snow in liquor store parking lot not unavoidable where he could have delayed delivery).

In *Joyce v Rubin*, 249 Mich App 231; 642 NW 2d 260 (2002), plaintiff slipped and fell on a snowy sidewalk and was injured while retrieving her belongings from the home. She argued that the sidewalk was unavoidable because she had no choice but to use the sidewalk to the front door after the homeowner refused to provide a rug for traction or allow her to enter through the garage. The Court of Appeals ruled that the condition was not unavoidable because plaintiff had a choice other than to confront the condition; she could have come back another day:

First, *Joyce* [plaintiff] could have simply removed her personal items another day or advised Debra Rubin [defendant] that, if Rubin did not allow her to use the garage door, she would have to move another day.

In *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 390 (2002), plaintiff slipped and fell on icy steps outside of a college dormitory. The trial court dismissed the action. The Court of Appeals affirmed on remand from this Court, ruling that the icy steps were not unavoidable because plaintiff had a choice whether to confront or avoid the condition:

Plaintiff here testified that although he saw the steps and their condition and knew that there was an alternate route into the building that was close by, he nonetheless attempted to use them.

The point of the above cases including *Joyce* and *Corey* is not that defendant must provide and plaintiff must reject an alternate safer route into a building before plaintiff's slip and fall claim is barred by the open and obvious danger doctrine. The point is that a known dangerous condition is not effectively unavoidable if plaintiff has a choice whether to confront or avoid the danger (alternate route, decline to enter, delay entry) yet chooses to confront the condition anyway.

In summary, plaintiff was not forced to confront the known danger. She had choices to avoid it. She was not effectively trapped by the condition. Her decision to attempt entry when she did was an idiosyncratic or personal one "that plaintiff brought to the situation that is immaterial to the application of the open and obvious doctrine."

Stanton, supra citing *Lugo, supra* at 518 n 2.

Instant plaintiff had a choice whether to protect herself from a known danger. Instead, she chose to confront it. The open and obvious danger doctrine bars her claim and reasonable minds cannot differ in that regard.

RELIEF REQUESTED

WHEREFORE, defendants-appellants, Richard Lanctoe and Lori Lanctoe, ask that this Court grant them peremptory relief, reverse the lower court decisions on the open and obvious danger doctrine, and hold that judgment should be entered in their favor, or failing that, grant leave to appeal on these important issues.

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