

STATE OF MICHIGAN
IN THE SUPREME COURT

CHARLOTTE HOFFNER,

Plaintiff-Appellee/Cross-Appellant,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Third-Party Plaintiff,

v.

RICHARD LANCTOE and LORI LANCTOE,

Defendants-Appellants/Cross-Appellees,

and

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

Defendants/Cross-Appellees.

SC: 142267
COA: 292275
Gogebic CC: G-08-85-NO

142267

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**DEFENDANTS' BRIEF OPPOSING
APPLICATION FOR LEAVE TO CROSS-APPEAL**

EXHIBIT

PROOF OF SERVICE

FILED

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COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Plaintiff seeks leave to cross-appeal from that portion of the 11/2/10 decision of the Court of Appeals which held that defendant fitness center tenants were not possessors of the sidewalk in front of the fitness center's entry door for purposes of premises liability.

The decision of the Court of Appeals was not erroneous, was based on undisputed material facts, is consistent with settled Michigan law, and does not conflict with any decisions of the Court of Appeals or Supreme Court. The Court should deny plaintiff's application.

COUNTER-STATEMENT OF APPELLATE JURISDICTION

The Court has discretionary jurisdiction of plaintiff's cross-appeal pursuant to MCR 7.301(A)(2). However, the cross-appeal application does not satisfy any of the criteria for granting leave to appeal.

MCR 7.302(B)(1) states that an application for leave must show that "the issue involves a substantial question as to the validity of a legislative act." No act is involved here. Plaintiff's theory is a common law tort claim for premises liability.

MCR 7.302(B)(2) states that the application must show that

the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity.

There is no such governmental involvement here. The element of significant public interest is also lacking since the issue raised in the cross-appeal has been resolved.

MCR 7.302(B)(3) requires that the application for leave show that

"the issue involves legal principles of major significance to the state's jurisprudence."

No such issue is involved in the cross-appeal.

MCR 7.302(B)(5) specifies that the application must show that

in an appeal from a decision from the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals

There was no such error and there is no such conflict. The Court of Appeals followed settled law when it ruled based on the undisputed material facts of this case that defendant fitness center tenants were not possessors of the icy sidewalk for

purposes of premises liability. That portion of the opinion did not make new law or change existing law.

COUNTER-STATEMENT OF QUESTION PRESENTED

SHOULD THE COURT GRANT PLAINTIFF LEAVE TO CROSS-APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED WHEN IT RULED THAT DEFENDANT FITNESS CENTER TENANTS WERE NOT POSSESSORS OF THE SIDEWALK IN FRONT OF THE FITNESS CENTER'S ENTRY DOOR FOR PURPOSES OF PREMISES LIABILITY?

Defendants say "No."

Plaintiff says "Yes."

INTRODUCTION

A. NATURE OF THE ACTION

This is a premises liability case. Plaintiff fell on an icy sidewalk in front of defendant 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. 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]

Plaintiff now seeks leave to cross-appeal from that portion of the 11/2/10 decision of the Court of Appeals in favor of the fitness center defendants. This brief opposes plaintiff's application.

COUNTER-STATEMENT OF FACTS

Plaintiff brought this action for a back injury suffered in a slip and fall on an icy sidewalk in front of defendant 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, pp 5-6; 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, 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 fitness 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]

Defendant Robert Lanctoe testified that he and his wife owned the building the fitness center was in and were the building's landlords. [R. Lanctoe dep, p 4] He said he was responsible for sidewalk maintenance. [Id, p5] He plowed the parking lot, shoveled the sidewalk, and salted it down every morning at 4 a.m. [Id, p 5]

Defendant Lori Lanctoe said she and her husband owned the building, were its landlords, that the building had tenants, and that one of the tenants was defendant Mack's fitness center. [L. Lanctoe dep, pp 5-6, 12-13] Mrs. Lanctoe and her husband shared responsibility for sidewalk maintenance because they owned the building. [Id, p22] She said the sidewalk was not really under control of the tenants, that it was a common sidewalk. [Id, pp 22-23]

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. [Pltf's dep, pp 21-22] She thought she could make it across because she had good boots on and it was only a few steps. [Id]

Unfortunately, plaintiff hit a slippery spot and fell down. [Id, p 26] When asked why she had to exercise that day and whether she could have decided to return to the car and not enter the building, plaintiff said that she thought she could make it. [Id, p 27] She could have decided not to go in the building that day but never thought about it; she "just wanted to get in there and start working out." [Id]

Regarding the nonliability of defendant fitness center tenants, the Court of Appeals held, in pertinent part, as follows [Exhibit A, COA opinion, pp 2-3]:

- Premises liability is based on both possession and control of the land because the person having such possession and control is normally best able to prevent harm to others.
- Paragraph 19 of the lease between the Lanctoes and Fitness Xpress specifically identified the landlord as responsible for the care of the sidewalk and parking lot.
- Evidence was presented that defendants understood that the Lanctoes were responsible for the exterior areas of the premises but that Fitness Xpress had a bucket of salt that it used to help keep the sidewalk clear.

- There was evidence that the Lanctoes cleared snow and ice from the area later during the day of Hoffner's fall.
- The Lanctoes' building also housed several other businesses which had customers entering the building using the sidewalk that fronted the fitness center.
- The lease between the Lanctoes and the fitness center specifically indicated that the center was leasing approximately 2,000 square feet of floor space situated in the rental unit of the building.
- The evidence did not demonstrate that the fitness center assumed care of the sidewalk from the Lanctoes, considered the sidewalk its responsibility, or endangered customers by applying additional salt on occasion.
- The evidence indicated that by contract and the actions and intent of the parties, the fitness center tenants did not exercise dominion and control over the sidewalk, were thus not in the best position to prevent harm to plaintiff, and were not possessors of the sidewalk.

Plaintiff seeks leave to cross-appeal that portion of the decision of the Court of Appeals regarding the nonliability of the fitness center tenants. Contrary to plaintiff's application, that portion of the decision was not erroneous, was based on undisputed material facts, is consistent with settled Michigan law, and does not conflict with any decisions of the Court of Appeals or Supreme Court. The Court should deny plaintiff's application.

ARGUMENT

THE COURT SHOULD DENY PLAINTIFF'S APPLICATION FOR LEAVE TO CROSS-APPEAL BECAUSE DEFENDANT FITNESS CENTER TENANTS WERE NOT POSSESSORS OF THE SIDEWALK IN FRONT OF THE FITNESS CENTER'S ENTRY DOOR FOR PURPOSES OF PREMISES LIABILITY.

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).

The only proper party defendant in a premises liability case is the entity that had both possession and control over the property. *Orel v Uni-Rak Sale Co*, 454 Mich 564; 563 NW2d 241 (1997); *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653; 575 NW2d 745 (1998). M Civ JI 19.02 defines a possessor of land as:

- (a) A person who is in occupation of the land with intent to control it; or
- (b) A person who has been in occupation of land with intent to control it, if no other person has subsequently occupied with intent to control it, or
- (c) A person who is entitled to immediate occupation of the land, if no other person is in possession under clauses (a) and (b).

In *Shackett v Schwartz*, 77 Mich App 518; 258 NW2d 543 (1977), plaintiff fell and injured herself in an office building's parking lot. Her doctor was the only tenant in the building. She sued her doctor and the building's landlord for failure to maintain the premises. The lease devised only a portion of the premises to the tenant, not the entire building. The lease was silent concerning any duty of the landlord to maintain the parking lot. Nonetheless, the Court of Appeals held that the landlord was responsible for maintenance of the parking lot consistent with the general rule that the landlord is responsible for those portions (common areas) of the building to be used in common

with other tenants especially where the lease demised only a portion of the premises to the tenant, the parking control was not in the exclusive control of the tenant, and the lease did not transfer any right of control of the parking lot to the tenant.

In the instant case, it is undisputed that defendants' Lanctoe owned the building, sidewalk, and parking lot. Defendant Fitness Xpress, its parent company (Mousie, Inc.), and company owners Mack and Aho were tenants of only one unit of the building (other units were occupied by other tenants) and were not possessors of the common areas of the building (sidewalk and parking lot) for purposes of premises liability. Indeed, the first page of the lease agreement between the Lanctoes and the fitness center makes clear that defendant tenants only leased "approximately 2000 square feet of floor space situated in the rental unit" of the Lanctoe-owned building.

Moreover, per the lease and the testimony of defendants Lanctoe, it is also undisputed that defendants Lanctoe had responsibility for snow and ice removal from the sidewalk and parking lot. Paragraph 19 of the lease makes the landlord responsible for snow removal in the building's common areas including any sidewalks and parking lots. There is no jury-submissible evidence that defendant tenants possessed those common areas, were responsible for them, and could exclude others from using them. If defendant tenants Mack, Aho, and their company Mousie, Inc., d/b/a Fitness Xpress possessed or controlled anything, it was the interior of their rental unit where they operated their fitness center.

Finally, the fact that defendants Mack and Aho occasionally salted that portion of the landlord-owned sidewalk in front of their rental unit (a common sidewalk shared by

all tenants and their customers) is insufficient evidence of possession and control for premises liability.

In *Devine v Al's Lounge, Inc.*, 181 Mich App 117; 448 NW2d 725 (1989), defendant bar had undertaken the task of plowing and salting a public approach to its property. Plaintiff customer fell on the public approach and sued defendant in premises liability. Plaintiff argued that defendant had taken possession of or control over the public approach. The trial court granted summary disposition to defendant. On appeal, the Court of Appeals affirmed finding that defendant's actions of plowing and salting the public approach amounted were insufficient evidence of possession and control to impose a duty upon defendant.

In *Morrow v Boldt*, 203 Mich App 324; 512 NW2d 83 (1994), plaintiff school bus driver fell on the driveway approach to defendant homeowners' property. The City of Wayne owned the approach. In the past, defendant homeowners had undertaken to remove snow and ice from the approach which included plowing and salting/sanding. Defendants moved for directed verdict, which was denied. On appeal, this Court reversed and dismissed plaintiff's cause of action, holding that evidence that defendant homeowner routinely cleared the city-owned driveway approach was insufficient to establish possession and control for purposes of premises liability.

Per *Ward v Frank's Nursery & Crafts, Inc.*, 186 Mich App 120; 463 NW2d 442 (1990), a defendant's duty ends with the boundaries of the premises and defendant is not responsible for an injury caused outside those boundaries. The only property possessed and controlled by defendant tenants Fitness Xpress, Mousie, Inc., Mack, and Aho was the interior of the rental unit where they operated a fitness center. They were

not possessors of the common area sidewalk for purposes of premises liability and reasonable minds cannot differ in that regard.

RELIEF REQUESTED

WHEREFORE, defendants ask that this Court deny plaintiff's application for leave to cross appeal

Dated: January 19, 2011

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EXHIBIT A

STATE OF MICHIGAN
COURT OF APPEALS

CHARLOTTE HOFFNER and BLUE CROSS
BLUE SHIELD OF MICHIGAN,

Plaintiffs-Appellees,

v

RICHARD LANCTOE, LORI LANCTOE,
PAMELA MACK, TIFFANI AHO, and MOUSIE
INC d/b/a FITNESS XPRESS,

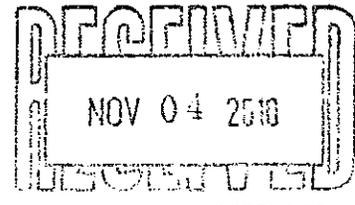
Defendants-Appellants.

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No. 292275
Gogebic Circuit Court
LC No. 08-000085-NO

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.



Defendants appeal an order of the trial court denying their motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) in this premises liability claim. The trial court found there were genuine issues of material fact concerning whether certain defendants could be held responsible as “possessors” of the premises where plaintiff Charlotte Hoffner fell, the scope of a release signed by Hoffner, and the nature of the condition on defendants’ premises that led to Hoffner’s injury. Defendants appeal by leave granted. We affirm in part, reverse in part, and remand.

On January 28, 2006, Hoffner slipped and fell on ice on the sidewalk in front of the entrance to an exercise facility, defendant Fitness Xpress.¹ Hoffner had joined Fitness Xpress approximately two weeks prior to her fall, and was entering the facility at its only customer entrance. Hoffner reported that she saw the sidewalk had “glare ice” on it as she approached from her vehicle but she believed that, because she was wearing good boots and it was a short distance, she could safely walk across it to enter Fitness Xpress.

¹ Fitness Xpress was operated by defendant Mousie, Inc., which was owned by defendants Pamela Mack and Tiffani Aho. Defendants Richard and Lori Lanctoe owned the building and property where Mousie, Inc. leased space for Fitness Xpress.

I. POSSESSION AND CONTROL OF THE PREMISES

Defendants argue that Aho, Mack, and Fitness Xpress could not properly be included as defendants because they did not have possession and control of the sidewalk outside of the exercise facility where Hoffner fell. We agree.

A trial court's determination of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

"The invitee status of a plaintiff, alone, does not create a duty under premises liability law unless the invitor has possession and control of the premises on which the plaintiff was injured." *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 565; 563 NW2d 241 (1997). In the context of premises liability law, possession has been defined as "the right under which one may exercise control over something to the exclusion of all others." *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002), quoting Black's Law Dictionary (7th ed) (emphasis in *Derbabian*). Control has been defined as "exercis[ing] restraint or direction over; dominate, regulate, or command," *Derbabian*, 249 Mich App at 703, quoting *Random House Webster's College Dictionary* (1995), p 297, and as "the power to . . . manage, direct, or oversee." *Derbabian*, 249 Mich App at 703-704, quoting Black's Law Dictionary (7th ed). Whereas possession and control are certainly indicative of title ownership of land, ownership of the land alone is not dispositive because these possessory rights can be "loaned" to another. *Orel*, 454 Mich at 568, quoting *Merrit v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980). Here, the question is whether Aho, Mack, and Fitness Xpress, as leaseholders of an area inside the Lanctoes' building, had possession and control of the sidewalk outside their facility.

In *Merrit*, 407 Mich at 552, quoting 2 Restatement Torts, 2d § 328 E, p 170, the Court defined a possessor of land as:

- (a) a person who is in occupation of the land with intent to control it or
- (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
- (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

See also *Derbabian*, 249 Mich App at 702. Premises liability is based on both possession and control over the land because the person having such possession and control is normally best able to prevent harm to others. *Id.* at 705, quoting *Merrit*, 407 Mich at 552.

Paragraph 19 of the lease between the Lanctoes and Fitness Xpress specifically addressed who was responsible for the care of the sidewalk and parking lot:

Landlord shall be responsible for removal of snow from the leased facility as landlord deems necessary, including from the roof, sidewalks, and parking lots. Landlord shall be responsible, and shall hold tenant harmless for, any and all injuries, accidents, or other liability related to its failure to maintain and remove snow according to its obligations under this lease.

Additionally, evidence was presented that defendants understood that the Lanctoes were responsible for the exterior areas of the premises, but that Fitness Xpress had a bucket of salt that it used to help keep the sidewalk clear. There was evidence that the Lanctoes cleared snow and ice from the area later during the day of Hoffner's fall. The Lanctoes' building also housed several other businesses, including Lori Lanctoe's, which had customers entering the building using the sidewalk that fronted Fitness Xpress.

Plaintiffs argue that paragraph 19 of the lease specifically refers to the sidewalk as part of the "leased facility," thus establishing Fitness Xpress' duty to maintain the area. However, the lease specifically states that Fitness Xpress was leasing "approximately 2000 square feet of floor space situated in the rental unit of a building" Plaintiffs also argue that Fitness Xpress exercised control over the parking lot and sidewalk for the purposes of parking customers' cars and entrance into the building. However, this use of the premises does not necessarily establish control over the area. As noted, there were several other businesses using the same building.

Plaintiffs also argue that Fitness Xpress assumed a duty by applying salt to the sidewalk at times. "A party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform," and once "a duty is voluntarily assumed, it must be performed with some degree of skill and care." *Zychowski v A J Marshall Co, Inc*, 233 Mich App 229, 231; 590 NW2d 301 (1998). However, the evidence did not demonstrate that Fitness Xpress assumed care of the sidewalk from the Lanctoes, considered the sidewalk their responsibility, or endangered customers by intermittently applying additional salt. A defendant can plow or salt a sidewalk without assuming a duty, or taking possession or control over the sidewalk. *Devine v Al's Lounge, Inc*, 181 Mich App 117, 120; 448 NW2d 725 (1989).

Possession for purposes of premises liability depends on the actual exercise of dominion and control over the property. *Derbabian*, 249 Mich App at 704. Here, the evidence indicated that by contract, and the actions and intent of the parties, Fitness Xpress, Mack, and Aho did not exercise dominion and control over the sidewalk. Therefore, they were not in the best position to prevent the kind of harm incurred by Hoffner, and were not the possessors of the sidewalk. See *id.* at 702, 705. We thus find that the trial court erred in finding a genuine issue of material fact regarding whether Fitness Xpress, Aho, and Mack could be accorded liability for Hoffner's fall on the sidewalk, and those defendants were entitled to summary disposition as a matter of law. See *Rose*, 466 Mich at 461.

II. SCOPE OF HOFFNER'S RELEASE

Defendants also argue that a release of liability agreed to by Hoffner and Fitness Xpress precluded liability for all defendants for slip and fall accidents on the sidewalk. We disagree. Summary disposition of a plaintiff's complaint is proper where there exists a valid release of liability between the parties. MCR 2.116(C)(7). In reviewing a motion for summary disposition based on a release barring a claim, MCR 2.116(C)(7), this Court considers the affidavits,

depositions, admissions, and other documentary evidence to determine whether the movant is entitled to summary disposition as a matter of law. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004). The evidence is viewed in the light most favorable to the nonmoving party, and all legitimate inferences in favor of the nonmoving party are drawn. *Jackson v Saginaw Co*, 458 Mich 141, 142; 580 NW2d 870 (1998). A release of liability is valid if it is fairly and knowingly made. *Wyrembelski v City of St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996) (quotations and citation omitted).

“A contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). If contractual language is clear, construction of the contract is a question of law for the court. *Id.* at 594 (quotations and citation omitted). A contract is not ambiguous if it fairly produces only one interpretation, even if it is inartfully worded or clumsily arranged. *Id.*, quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Given our finding that Fitness Xpress, Aho, and Mack were entitled to summary disposition for lack of possession and control of the premises where Hoffner fell, we focus our analysis on the applicability of the release as it pertains to the Lanctoes. Arguably, the Lanctoes could potentially be released from liability by the language of the contract, even though they were not specifically named in the release, in light of the broad language to release and forever discharge “all others” from liability.² However, in light of the fact that we agree with the trial

² As our Supreme Court recently set forth in *Shay v Aldrich*, 487 Mich 648; ___ NW2d ___ (2010):

[T]o determine whether an unnamed party is released from liability by broad or vague release language, the party’s status as a third-party beneficiary must be established by an objective analysis of the release language. However, traditional contract principles continue to apply to the release, and courts may consider the subjective intent of the named and unnamed parties to the release under certain circumstances, such as when there is a latent ambiguity. The third-party-beneficiary statute indicates that the Legislature intended to allow parties who are direct beneficiaries to sue to enforce their rights, but the statute expressly states that third-party beneficiaries have only the “same right” to enforce as they would if the promise had been made directly to them. MCL 600.1405. That is, the statute creates a cause of action, but it is not intended to afford third parties greater rights than they would have if they had been the original promisee. [*Id.*, slip op pp 28-29.]

* * *

[A] latent ambiguity has been described as one that “arises not upon the words of the will, deed or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe.” “And where, from the evidence which is introduced, there arises a doubt as to what

(continued...)

court that the scope of activities released by the contract is ambiguous, and thus agree that summary disposition was not appropriate, we need not now decide this issue.

The indemnification portion of the contract provides, in relevant part:

INDEMNIFICATION: Member . . . hereby agree to indemnify, defend and hold harmless, Fitness Xpress, a division of Mousie, Inc. and its officers, employees, contractors, agents, successors or assigns from any and all claims for liability against [sic] without limitation, including . . . expenses incurred either directly or indirectly by reason of, resulting from, or associated in anyway [sic] without limitation, with the Membership and/or Fitness Xpress. Member also acknowledges that she has reviewed and executed the Waiver of Liability attached hereto as part of this agreement prior to engaging in any physical activities or programs at Fitness Xpress according to the RELEASE below.³

Nothing in the indemnification provision relates to the Lanctoes; however, the release portion of the contract contains a broader disclaimer, which provides, in pertinent part:

RELEASE: I, the member or participant . . . understand and agree that fitness activities including weight loss may be hazardous activities and I . . . should contact a healthcare professional or doctor before beginning any new activities or weight loss program. I am voluntarily participating in these activities and using the Fitness Xpress (Mousie Inc.) facilities and equipment at my sole risk, with full knowledge of the dangers involved. I hereby agree to expressly assume and accept any and all risks of injury or death related hereto.

In consideration of being allowed to participate in the activities and programs of Fitness Xpress (Mousie, Inc.) and use of its facilities and equipment, in the addition of any payment of any fees or charges, I do hereby waive, release and forever discharge Fitness Xpress, Mousie Inc. its officers, agents, employees, representatives, executors, *and all others* from any responsibilities or liabilities for any injuries or damage resulting from my and/or my daughter(s) [sic], or any belongings, including those caused by any negligent act or commission, in connection with participation/membership or use of equipment at Fitness Xpress and Mousie, Inc. (emphasis added).

If the text in the release is unambiguous, we must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release. *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649, 655; 760 NW2d 259 (2008) (quotations and citation omitted).

(...continued)

party or parties are to receive the benefit [of a contract], parol evidence is admissible to determine such fact.” [*Id.*, slip op pp 24-25 (citations omitted).]

³ No Waiver of Liability form has ever been produced.

Here, the Lanctoes argue that the release portion of the contract applies to their liability for Hoffner's slip and fall on the ice prior to entering the exercise facility because the accident is included in the contract's language releasing "all others from any responsibilities or liabilities for any injuries" including those caused by "any negligent act or commission in connection with participation/membership" at Fitness Xpress. The contract's use of broad language releasing "all others" could potentially be interpreted as including any claim that Hoffner could bring against the Lanctoes. See, *Shay*, 487 Mich 648. Further, a release including language such as "any and all claims, demands, damages, rights of action, or causes of action, . . . arising out of the Member's . . . use of the . . . facilities," can express an intention to disclaim liability for all negligence. *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 619; 513 NW2d 428 (1994). However, the contract at issue releases liability for claims "in connection with participation/membership or use of equipment at Fitness Xpress and Mousie, Inc." and states that Hoffner is "using the Fitness Xpress (Mousie Inc.) facilities and equipment, at my sole risk . . ." This language provides an apparent limitation of liability to the actual use of the fitness facility and its equipment, not liability encountered en route to the fitness center. Plaintiffs also maintain that the language "release and forever discharge . . . from any responsibilities or liabilities for any injuries or damage resulting from my and/or my daughter(s) [sic], or any belongings, including those caused by any negligent act or commission, in connection with participation/membership or use of equipment . . .," is ambiguous as to which actions trigger the release.

The trial court found the contract ambiguous by stating that a jury could conclude that the release applied to all activities or only to some activities. The court commented that the release seemed to pertain to the nature of the business, i.e., fitness activities and equipment, rather than falling on a sidewalk outside the exercise facility. The language of the contract could reasonably be interpreted broadly as to include a slip and fall while attempting to enter Fitness Xpress, or narrowly, to include only activities that are related to exercise and weight loss that are specifically discussed in the release portion of the contract. "If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Meagher*, 222 Mich App at 722. Therefore, the trial court did not err in denying summary disposition to defendants on this issue.

III. OPEN AND OBVIOUS DANGER DOCTRINE

Defendants also argue that plaintiffs' claim should be barred by application of the open and obvious danger doctrine. Hoffner was an invitee; one who is invited onto the land for a commercial purpose. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). "The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards." *Id.*

However, this duty does not generally encompass removal of open and obvious dangers "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Here, it is not

disputed that the ice in front of the entrance to the exercise facility posed an open and obvious danger. Hoffner testified that she saw that the sidewalk was covered by “glare ice” as she approached it from the parking lot, but thought that she could cross it safely.

Defendants argue that the trial court erred in finding that the ice could reasonably be found to constitute a special aspect that made the condition unreasonably dangerous because it was effectively unavoidable. If special aspects of a condition make even an open and obvious risk unreasonably dangerous, the land possessor has a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). A special aspect exists when the danger, although open and obvious, is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm. *Id.* at 518-519. In considering what constitutes a special aspect, a court must evaluate the objective nature of the condition of the premises, not the subjective degree of care used by the plaintiff or other idiosyncratic factors related to the particular plaintiff. *Bragan ex rel Bragan v Symanzik*, 263 Mich App 324, 332; 687 NW2d 881 (2004), citing *Lugo*, 464 Mich at 523-524.

Here, defendants argue that the ice was avoidable because Hoffner did not have to attempt to enter the exercise facility and voluntarily confront the ice.⁴ In *Lugo*, 464 Mich at 517, the Court described a hypothetical example of an “effectively unavoidable” obstacle as standing water at the only exit of a commercial building, because no alternative route is available. Defendants note that the *Lugo* example considers a plaintiff who could not exit, rather than a plaintiff who could choose not to enter. Defendants assert that a danger is not unavoidable where the plaintiff is not required to confront the hazard.

However, in *Robertson v Blue Water Oil Co*, 268 Mich App 588, 590-591; 708 NW2d 749 (2005), this Court described testimony concerning an “unusually severe and uniform ice storm that covered the entire area surrounding defendant’s [gas] station,” causing what was described as extremely icy conditions in the parking lot where the plaintiff slipped and fell as he walked from the pump where he had paid for fuel to the station’s convenience store where he wished to purchase windshield washer fluid and coffee. The defendant argued that the condition was avoidable because the plaintiff could have gone to a different service station to make his purchases of fuel, coffee, and windshield washer fluid, but this Court found, emphasizing that the defendant invited the plaintiff to the premises as a business, that the ice was unavoidable. *Id.* at 593-594. The *Robertson* Court reasoned:

Even if there were [available alternatives], the scope of the inquiry is limited to “the objective nature of the condition of the premises at issue.” Therefore, the only inquiry is whether the condition was effectively unavoidable

⁴ As an alternative to entering Fitness Xpress over the glare ice blocking the only entrance, defendants argued at the hearing of this matter that Hoffner could have called Fitness Xpress and demanded that they salt the sidewalk, where after she would presumably wait for the salt to take effect. Such alternative is notably contradictory to defendants’ argument that Xpress Fitness had no possession or control over the sidewalk, and thus, no obligation to salt it.

on the premises. Here, there was clearly no alternative, ice-free path from the gasoline pumps to the service station, a fact of which defendant had been made aware several hours previously. The ice was effectively unavoidable. [*Id.* (quotations omitted, emphasis in original).]

Moreover, the *Robertson* Court dismissed the idea that the defendant could avail itself of the argument that the condition was avoidable simply because the plaintiff could find another business to patronize, holding:

Finally, and more significantly, plaintiff was a paying customer who was on defendant's premises for defendant's commercial purposes, and thus he was an invitee of defendant. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-598, 603-604; 614 NW2d 88 (2000). As our Supreme Court noted, "invitee status necessarily turns on the existence of an 'invitation.'" *Id.*, 597-598. Defendant's contention that plaintiff should have gone elsewhere is simply inconsistent with defendant's purpose in operating its gas station. The logical consequence of defendant's argument would be the irrational conclusion that a business owner who invites customers onto its premises would never have any liability to those for hazardous conditions as long as the customers even technically had the option of declining the invitation.

* * *

Even if the record showed that plaintiff was aware of a realistic, safe alternative location to purchase his fuel, coffee, and windshield washer fluid, where defendant has invited the public, and by extension plaintiff, onto its premises for commercial purposes, we decline to absolve defendant of its duty of care on that basis. To do so would be disingenuous. Therefore, we conclude that the trial court appropriately denied defendant's motions. [*Id.* at 594-595 (emphasis omitted).]

Further, even in the hypothetical example of standing water blocking the only exit to a building as described in *Lugo*, 464 Mich at 517, the Supreme Court apparently would not have absolved the theoretical defendant of responsibility where the theoretical plaintiff chose to leave the building and confront an unavoidable danger, rather than choosing to avoid the danger by waiting until the water was cleared.

Here, in reaching its decision that summary disposition was inappropriate, the trial court noted that Hoffner had contracted to use Fitness Xpress and may have needed to use it for health reasons. Because there was only one customer entrance to the facility that was fronted by the icy sidewalk, "the objective nature of the condition of the premises at issue" reveals that the icy sidewalk was effectively unavoidable as it related to the use of the premises. See *id.* at 523-524; *Robertson*, 268 Mich App at 594-595. There was no alternative route Hoffner could take in

order to enter the exercise facility.⁵ Additionally, Hoffner was an invitee by virtue of her contract with Fitness Xpress, and the *Robertson* Court found that it would be disingenuous to relieve defendants of their duty of care based on similar circumstances. See *Robertson*, 268 Mich App at 595. Therefore, we find that the trial court appropriately denied defendants' motion on this ground.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly

⁵ We find unconvincing defendants' argument at the hearing that if plaintiff had approached the glare ice from a different angle she might have had more success.