

STATE OF MICHIGAN
IN THE SUPREME COURT

CHARLOTTE HOFFNER,

Plaintiff/Appellee,

and

Lower Court No. G-08-85-NO

BLUE CROSS AND BLUE SHIELD OF MICHIGAN

Third-Party Plaintiff/Appellee

COA Docket No. 292275

-vs-

SC: _____

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/Appellants.

A. DENNIS COSSI (P23320)
Attorney for Plaintiff-Appellee
225 E. Aurora Street
Ironwood, MI 49938
(906) 932-1221

MICHAEL K. POPE (P48635)
Attorney for Defendants-Appellants
204 N. Harrison Street
Ironwood, MI 49938
(906) 932-4010

STEPHEN E. WOLFE (P42044)
Attorney for Blue Cross-Appellee
P.O. Box 737
Marinette, WI 54143
(715) 735-7797

PLAINTIFF/APPELLEE CHARLOTTE HOFFNER'S OPPOSING BRIEF
TO APPLICATION FOR LEAVE TO APPEAL

APPENDIX

PROOF OF SERVICE

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TABLE OF CONTENTS

INDEX OF AUTHORITIES i

COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT ii

COUNTER-STATEMENT OF APPELLATE JURISDICTION ii

COUNTER-STATEMENT OF QUESTION PRESENTED iv

INTRODUCTION 1

COUNTER-STATEMENT OF FACTS 1

ARGUMENT 3

STANDARD OF REVIEW 3

CONCLUSION 9

INDEX OF AUTHORITY

CASES:

Bragan ex rel Bragan v Symanzik, 263, Mich. App. 324, 331-332,687 NW2d 881 (2004) 7

Corey v Davenport College of Business (On Remand), 251,
Mich. App. 1 649 NW2d 392 (2002) ii, 9

Id at 242-243, 642 NW2d 360 7

Id at 597-598, 614 NW2d 88 7

Joyce v Rubin, 249 Mich App 231, 642 NW2d 360 (2002) ii, 7, 8

Lugo v Ameritech Corp, 464 Mich. 512, Nw2d 384 (2001) iii, 4, 5, 7

Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999) 3

Robertson v Blue Water Oil Company,268 Mich. App. 588, 708 NW2d 749 (2006) iii, 6, 8

Stitt v Holland Abundance Life fellowship, 462 Mich. 591, 596-598, 603-604,
614 NW2d 88 (2000) 7

COURT RULES:

MCR 2.166 (G)(5) 3

MCR 7.215 (C)(1) 9

OTHER:

M Civ JI 19.03 4

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COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

The decision of the Court of Appeals is not contrary to other decisions of the Court of Appeals involving “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. 649 NW2d 392 (2002).

The *Joyce* case, *supra*, involved a plaintiff who was a licensee not an invitee and the plaintiff in that case had an alternate route into the building and could have avoided the ice and snow.

In the *Corey* case, *supra*, the plaintiff also had an alternate route into the building and did not have to confront the danger to enter the premises.

The Court of Appeals ruled that Plaintiff Hoffner was an invitee by virtue of her contract with Fitness Xpress and that there was no alternate route for Plaintiff to take in order to avoid the ice and enter the exercise facility. This is not a personal circumstance or idiosyncrasy but a paid membership contract with the exercise facility and obviously other individuals were contracted with the facility with a similar contract. There has been no proof that Plaintiff Hoffner suffered a severe injury because of an idiosyncrasy such as having a particular susceptibility to injury or engaging in unforeseeable conduct. Having a contractual membership to exercise is not a personal circumstance or idiosyncrasy which makes one more susceptible to injury or engaging in unforeseeable conduct.

COUNTER-STATEMENT OF APPELLATE JURISDICTION

The Court of appeals decision is not clearly erroneous because it follows precedent *Lugo v Ameritech Corp*, 464 Mich. 512, Nw2d 384 (2001) and *Robertson v Blue Water Oil Company*, 268 Mich. App. 588, 708 NW2d 749 (2006). It does not conflict with other decisions of the Court of Appeals and will not cause material injustice because Plaintiff had a contract to exercise and glare ice was in front of the only entrance to the exercise facility.

COUNTER-STATEMENT OF QUESTION PRESENTED

THIS COURT SHOULD DENY LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED BASED ON THE OPEN AND OBVIOUS DANGER DOCTRINE WHEN IT RULED THAT THE ICY SIDEWALK IN FRONT OF THE FITNESS CENTER WAS EFFECTIVELY UNAVOIDABLE AND THUS A SPECIAL ASPECT OF THE CONDITION EXISTS BECAUSE PLAINTIFF/APPELLEE HAD TO TRAVERSE THE ICE TO GET TO THE ONLY ENTRANCE TO THE FITNESS CENTER WHERE SHE HAD PAID FOR A MEMBERSHIP TO EXERCISE.

Defendants-Appellants say "No."

Plaintiff-Appellee says "Yes."

INTRODUCTION

The Open and Obvious Danger Doctrine does not bar Plaintiff/Appellant's Complaint because a "special aspect" exception to the Open and Obvious Danger Doctrine exists because there was no alternative route to Defendant/Appellee's fitness center and crossing the ice was effectively unavoidable.

COUNTER-STATEMENT OF FACTS

In addition to the facts stated in Defendants/Appellants' Brief, Plaintiff/Appellee also adds the following facts. The fitness center rented by Defendants/Appellants Lanctoes appears to be rented to Pamela Mack for the operation of the exercise center. The leased space in the fitness center had one entrance door to the fitness center. (See Exhibit 1 - Deposition of Pamela Mack, pgs 16, 17). The sidewalk in front of the door or entrance way was covered with ice and was the only entrance to the exercise/fitness center. (See Exhibit 2, 3 and 4 - Interrogatories and Deposition of Pamela Mack, pgs. 13, 14; Deposition of Charlotte Hoffner, pgs. 21-28) There was no alternative route. Attached hereto is a copy of the lease. (See Exhibit 5, 5A and 6 - Lease and Deposition of Lori Lanctoe, pages 4-13). The first lease given to Plaintiff/Appellee did have the first page filled out. At the deposition, the filled out page was produced. See Defendants/Appellants' Brief together with Plaintiff/Appellee's Affidavit (See Exhibit 7). Both state there was only one entrance door.

Plaintiff Charlotte Hoffner's Deposition Page 27, Lines 13 -25; Page 28, Lines 1-7

Q Okay. Take me through what happens after you fall. I assume Paula comes to your side –

A Yes.

Q – as does Patty?

A Yes, Patty came over, too, and then the woman from the inside came outside. And I screamed, and I told her: I can't move and that it was really hurting.

And the woman said that she hadn't salted the sidewalk. She didn't have any salt, and that Tiffany, I think was her name, was supposed to bring some on the second shift.

Q Okay. And this is a statement that the woman from Fitness Xpress made to you?

A Yes.

Q And you don't know her name?

A No, they had different people there every time I went so. I didn't work with her. I just went around on the machines with my sister and Patty so.

ARGUMENT

THIS COURT SHOULD DENY LEAVE TO APPEAL TO CONSIDER WHETHER THE COURT OF APPEALS ERRED BASED ON THE OPEN AND OBVIOUS DANGER DOCTRINE WHEN IT RULED THAT THE ICY SIDEWALK IN FRONT OF THE FITNESS CENTER WAS EFFECTIVELY UNAVOIDABLE AND THUS A SPECIAL ASPECT OF THE CONDITION EXISTS BECAUSE PLAINTIFF/APPELLEE HAD TO TRAVERSE THE ICE TO GET TO THE ONLY ENTRANCE TO THE FITNESS CENTER WHERE SHE HAD PAID FOR A MEMBERSHIP TO EXERCISE.

STANDARD OF REVIEW

This Court's review of the trial court's ruling on defendants' motion for summary disposition is de novo. The court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.166 (G)(5), in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

Plaintiff/Appellee's Complaint is not barred by the Open and Obvious Danger Doctrine because a "special aspect" exception exists because the ice in front of the entrance door was effectively unavoidable because one had to traverse the ice to get to the only entrance to the fitness center.

The Defendant/Appellant argues that the Plaintiff/Appellee should have returned to her vehicle and driven back home rather than exercise at the fitness center pursuant to her membership. Defendant/Appellant inaccurately states if the argument that as a paid up member of the fitness center, the Plaintiff/Appellee had a contractual right to work out in the fitness center is followed, it would delete the Open and Obvious Danger Doctrine in all invitee cases. Obviously, paid up members are an insignificant and very small percentage of business invitees. In fact, almost all business invitees are not paid up members with a contractual relationship with the business. The fact is that a paid-up membership makes the Plaintiff/Appellee a member of a very small percentage of business invitees. The present Court of Appeals decision does not involve all invitees in the Open and Obvious Danger

Doctrine.

It is interesting to note that Defendant/Appellant has not used the word effectively in the Question Presented in addressing “unavoidability”. Defendant’s position in this case results in the elimination of any and all “effectively unavoidable” exceptions to the Open and Obvious Danger Doctrine. Any open and obvious condition can be avoided simply by turning around and leaving the area. Where one has a paid membership and the only entrance to the facility is blocked by glare ice, the effectively unavoidable exception to the Open and Obvious Danger Doctrine exists.

To follow Defendants/Appellants’ argument would interfere with a business and its customer’s right to contract. A business owner has the right to contract with its customers and any reasonable business owner would factor in the risk of and the cost of potential liability in the business decision to contract with members and customers.

The example given in *Lugo, supra*, does not exclude invitees coming into a business. Defendants/Appellants’ position is that an invitee Plaintiff cannot confront a known hazard and the Plaintiff in the example given in *Lugo, supra*, should have notified the store owners and waited until the water was removed. This was not required by the Court in *Lugo, supra* and the water blocking the only exit from the business created an effectively unavoidable condition. The same should apply to invitees coming into a business.

The jury instruction in this matter is Michigan Civil Jury Instruction 19.03 which states as follows (a copy is attached hereto - See Exhibit 8):

Duty of Possessor of Land, Premises, or Place of Business
to Invitee; Known Risk or Open and Obvious Condition

A possessor has a duty to use ordinary care to protect an invitee from risks of harm from a condition on the possessor’s [land/premises/place of business] if:

1. the risk of harm is unreasonable, and
2. the possessor knows or in the exercise of ordinary care should know of the condition, and should realize that it involves an unreasonable risk of harm to an invitee.

*(In determining whether the possessor should know of the condition, you should consider the character of the condition and whether the condition and whether the condition existed for a sufficient length of time that a possessor exercising ordinary care would discover the condition.)

** (Here the defendant claims that the condition was [open and obvious/known to the invitee]. If the condition was [open and obvious/known to the invitee], then defendant did not have a duty to protect the invitee from the risks presented, unless there were special features of the condition that made it unreasonably dangerous. This is for you to decide. The following will help you in making these decisions.)

(A condition is open and obvious if the invitee knew of it or if a reasonably careful [person/minor plaintiff's age] under the circumstances that you find existed in this case would have discovered it upon casual inspection.)

(If you decide that the condition was [open and obvious/known to the invitee], then you are to decide whether there were special features of the condition that made it unreasonably dangerous. These would be features that made the condition effectively unavoidable or features that gave rise to an unreasonably high risk of severe harm.)

(If you decide that these existed at least one of those types of special features, it is for you to decide whether defendant took reasonable precautions to avoid the risk that was presented.)

The Jury Instruction states that a decision is to be made whether there were "special features".

Special feature is described as: "These would be features that made the condition effectively unavoidable or features that gave rise to an originally high risk of severe harm." (Emphasis added).

In the case of *Lugo v Ameritech Corp*, 464 Mich. 512, Nw2d 384 (2001), the Supreme Court said:

Consistent with *Bertrand*, we conclude that, with regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e. whether the "special aspect" of the

condition should prevail in imposing liability upon the *518 defendant or the openness and obviousness of the condition should prevail in barring liability.

An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable.

Defendant/Appellants' argument renders the word "effectively" as unnecessary surplusage.

It is Defendants/Appellants' position that as a matter of law, Plaintiff/Appellee Charlotte Hoffner should not have gotten out of her car and was under a duty to go back home. She would have been denied a workout that morning even though she had paid for the same and Defendant/Appellants' were obligated to provide her with a workout venue. The cited cases observe that ice and snow are common conditions during a Michigan winter. This is very common in the western end of the Upper Peninsula which has winter from November through March. The Plaintiff-Appellee would be banned from her workout whenever it snows and Defendant Appellant would owe her no duty. The only way Plaintiff/Appellee would have been able to work out that day would have been to traverse the ice to get to the only entrance of the fitness center. A special aspect exists since there was no alternative route and it is only reasonable for Plaintiff/Appellee to expect to have access to the fitness center for which she had paid for. In addition, Defendants/Appellants had a legal duty to provide her with a safe entrance.

In a published case that is on point with the present case, the court in *Robertson v Blue Water Oil Company*, 268 Mich. App. 588, 708 NW 2d 749 (2006), the court held and stated as follows:

Defendant argues that the condition was effectively avoidable because plaintiff could have gone to a different service station to make his purchases of fuel, coffee, and windshield washer fluid. However, one of the characteristics of the icy condition is that it was brought about by an unusually severe and uniform ice storm covering the entire area. Plaintiff

patronized defendant's station almost every weekday pursuant to his employer's directions to fuel his truck first thing in the morning, and he intended to purchase wiper fluid because he was out of fluid and the weather was bad. The record contains no evidence that there existed any available alternatives. Even if there were, the scope of the inquiry is limited to "the ** 753 objective nature of the condition of the premises at issue." *Lugo, supra* at 523-524, 629 N.W. 2d 384. See also *Bragan ex rel Bragan v Symanzik*, 263 Mich. App. 324, 331-332 687 N.W.2d 881 (2004). Therefore, the only inquiry is whether the condition was effectively unavoidable *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 *594 had been made aware several hours previously. The ice was effectively unavoidable.

Defendant argues that the ice was avoidable because plaintiff was not "effectively trapped." *Joyce v Rubin*, 249 Mich. App. 231, 242, 642 N.W. 2d 360 (2002). However, reliance on *Joyce* is misplaced for a number of reasons. Although we discussed the possibility that the plaintiff in *Joyce* could have gone to the premises on a different day, our holding was based on the plaintiff's own testimony that she was aware and, indeed, had made use, of an available alternative route. *Id.* at 242-243, 642, N.W. 2d 360. In any event, a reasonable trier of fact could rationally find that plaintiff was "effectively trapped" because it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield washer fluid.

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. 591, 596-598, 603-604, 614 N.W. 2d 88 (2000). As our Supreme Court noted, "invitee status necessarily turns on the existence of an 'invitation.'" *Id.* at 597-598, 614 N.W. 2d 88. 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 customers for hazardous conditions as long as the customers even technically had the option of declining the invitation. Although we did not discuss the issue at the time, it is clear in retrospect that the plaintiff in *Joyce*, a former live-in caregiver who was at the time merely removing her personal belongings from *595 defendant's private residence, was a licensee to whom a lessor duty was owed. See *Joyce, supra* at 233, 642 N.W. 2d 360; *Stitt, supra* at 596, 614 N.W. 2d 88.

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 had *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.

The present case is even stronger than the *Robertson* case in that Plaintiff/Appellee was a paid business invitee instead of a paying business invitee. There is no question of fact, and all parties hereto, agree and admit that one had to traverse the glare ice to get to the only entrance.

The case of *Joyce v Rubin*, 249 Mich App 231, 642 NW2d 360 (2002) (See Exhibit 9) was a case that involved a snowy walkway. In that case, the Plaintiff testified that when she arrived at Defendant's house she saw snow on the driveway and snow on the sidewalk. She also stated she walked very carefully. She also said she stepped on the snow that had fallen and it had not yet melted and that she knew the sidewalk was slippery and that she reportedly told the Defendant it was slippery and that she slipped twice while walking on the sidewalk before she finally fell. The Court held that the condition was open and obvious and then went on to determine whether or not there were special aspects.

The Plaintiff (who was a licensee) in the *Joyce* case took the position that the sidewalk was effectively unavoidable. The Plaintiff asked Defendant if she could enter through the garage or use a rug for traction, but the Defendant refused to provide safety measures or an alternative route. The Plaintiff testified that after she slipped on the sidewalk, she walked around the regular pathway to avoid the slippery condition. The Court went on to say that this is a "close case", however, the Plaintiff's own testimony established that she could have used an available alternative route to avoid the snowy sidewalk. Therefore the Court held that there was not a "special aspect". Unlike the present case where the Plaintiff/Appellee is a "business invitee and there is no alternate route, the

Court said it was a close case.”

In the case of *Corey v Davenport College of Business* (On Remand), 251, Mich. App. 649 NW2d 392 (2002) (See Exhibit 10), the Plaintiff slipped on some steps going into a building. Plaintiff testified that there was an alternate route into the building other than taking the slippery stairs. The Court held that special aspects didn't apply because there was an alternate route.

The cases cited by Plaintiff/Appellee that are unpublished do not have precedential value pursuant to MCR 7.215 (c)(1).

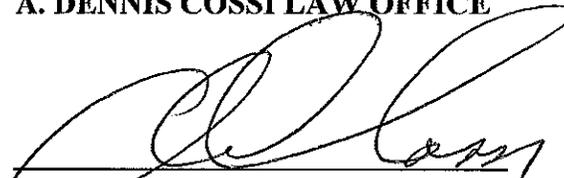
By Defendant/Appellants' own admission in their brief and Plaintiff/Appellee's affidavit it is established there was no alternative route to Defendant/Appellant's fitness center and that the only route to Defendant/Appellant's business was to travel over the icy sidewalk to the only entrance door. There does not appear to be any dispute that this was the only route into the fitness center and, therefore, special aspects rendering this situation effectively unavoidable are present.

CONCLUSION

For all the reasons stated above, Defendants/Appellants' Application for Leave to Appeal should be denied.

Dated 12/30/10

A. DENNIS COSSI LAW OFFICE



A. DENNIS COSSI (P23320)
Attorney for Plaintiff/Appellee
Business Address:
225 East Aurora Street
Ironwood, MI 49938
Telephone: 906/932-1221
Fax: 906/932-4388