STATE OF MICHIGAN

COURT OF APPEALS

PAMELA PETERSON and WES PETERSON, Plaintiffs-Appellants,	UNPUBLISHED October 5, 2001
V	No. 221951 Oakland Circuit Court
DAVID WILKINS and ANN WILKINS, Defendants-Appellees.	LC No. 98-009356-NO

Before: Bandstra, C.J., and White and Collins, JJ.

WHITE, J. (*dissenting).*

I respectfully dissent. The facts viewed in a light most favorable to plaintiffs[1] are that plaintiff Pamela Peterson (plaintiff), a self-employed housekeeper, had been cleaning defendants' residence for about six months when the accident underlying this case occurred. Plaintiff testified at deposition[2] that she normally did routine cleaning of defendants' residence, but on the day in question was performing additional housekeeping duties, pursuant to defendant David Wilkins' (defendant) request that she clean the ceilings of the living room, dining room and kitchen. Plaintiff and defendant had discussed this project several weeks earlier and decided on a price for her services.

Plaintiff testified that on the day she was to clean the ceilings, defendant told her that he wanted her to use drop cloths to cover the floor and furniture while she was cleaning the ceilings, and that she did so. Defendants' house was being remodeled on the day of the accident. Defendant had given plaintiff two ladders, a yellow one and a brown one, at the beginning of the workday to use when cleaning the ceilings, and then defendant left for a while. Plaintiff performed her regular cleaning duties, and at around 11:00 a.m. turned to cleaning the ceiling in

[1] Wes Peterson, plaintiff's husband, claims loss of consortium.

[2] Plaintiffs' response to defendants' motion for summary disposition attached as an exhibit every other page of plaintiff's deposition transcript (in minuscript). Although defendants pointed out in their reply brief that plaintiffs had supplied only every other page of plaintiff's deposition, plaintiffs did not correct this apparent error. Thus, the record before the circuit court consisted of every other page of plaintiff's deposition, and it is on that portion of her deposition that I have reviewed this matter.

the living room. Plaintiff tested the yellow ladder and did not use it because one of the legs was bent, making it wobbly. Plaintiff tested the brown ladder before using it, and found it sturdy. Defendant testified at deposition that both the yellow and brown ladders were traditional A-frame step ladders. Defendant testified that the ceiling of his residence is about twelve feet high at its highest point, and that the ceiling beams are approximately six inches below that. In accordance with defendant's instruction, plaintiff placed drop cloths on the living room floor, which was carpeted, and cleaned the living room ceiling, without incident.

Plaintiff testified that defendant later came back home and asked her how it was going, and that she responded that "it was going good, I was doing just fine." At this point, plaintiff had finished cleaning the living room ceiling. Defendant told her he did not like the ladder she was using and went to the garage to get an extension ladder he said would be safer, even though plaintiff had said to him that the ladder she was using was fine. Defendant testified that the aluminum extension ladder he got from the garage was approximately ten feet long and extended to around twenty feet. Plaintiff testified that defendant then set up the extension ladder for her in the kitchen around where the counter is, placing the ladder over the drop cloth that was on the kitchen floor, which was tile.[3] Plaintiff testified that defendant positioned the ladder so that its top was touching a ceiling cross-beam. Defendant similarly testified at deposition that he put the extension ladder "up to the beam and adjusted the height," by extending the ladder, he believed one rung. Defendant testified that he set up the ladder as he had been taught; at an angle so that "the feet of the ladder were touching my feet and the angle was such that when I extended my arms out, I could touch the ladder." Defendant testified that he left the room before plaintiff climbed the extension ladder the first time. Plaintiff testified that after defendant initially set up the extension ladder, plaintiff climbed it, did some ceiling cleaning, and climbed down, without incident. She then moved the extension ladder over one or two feet, about which she testified:

> Q So in your estimation, there was nothing different about the way the ladder was situated?
>
> A No.
>
> Q Except that it was one to two feet to the right?
>
> A Right.
>
> Q The bottom or – the bottom of the ladder was still on the same thing, which is the tarp which was on the tile?
>
> A Yes, sir.
>
> Q The top of the ladder was still touching the crossbeam?
>
> A Yes, sir.

[3] Defendant testified at deposition that the tiled portion of the kitchen was approximately twelve feet by twelve feet and that the tile was "some type of ceramic or clay."

Plaintiff testified that this second time, she climbed the extension ladder to the same height as the first time, and started to wipe the ceiling beam when she felt the feet of the extension ladder slide out from under her.

Defendants' motion for summary disposition argued, among other things, that the ladder was a simple product and defendants had no duty to warn of or protect against open and obvious dangers presented by simple products. The circuit court granted defendants' motion under MCR 2.116(C)(10), without hearing oral argument, on the basis that the danger associated with the ladder was open and obvious:

> Plaintiff, Pamela Peterson, alleges that, on November 17, 1997, Plaintiff fell off a ladder while performing housecleaning services at Defendants, David Wilkins and Ann Wilkins' residence. Plaintiff alleges that Defendants supplied, provided and/or set up the subject ladder for Plaintiff to use and, further, that Defendants negligently positioned the subject ladder on a canvas sheet and/or drop cloth, which facilitated her fall. Plaintiffs brought the instant cause of action alleging negligence against Defendants in order to recover damages for the alleged injuries of Plaintiff Pamela. . . .
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> * * *
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> This Court finds that an average user of ordinary intelligence would have discovered the danger and risk involved in utilizing the subject ladder and, therefore, the danger associated with the use of the ladder is open and obvious, which is not unreasonable under the circumstances. Under the facts, as alleged, Defendants are under no duty to protect or warn Plaintiff against said open and obvious condition on the premises.

The court denied plaintiffs' motion for reconsideration, which argued, among other things, that the circuit court "[a]fter dispensing with oral argument and without considering the theory advanced by the movants," had granted defendants' motion. Plaintiffs argued that their claim was that "defendants negligently selected the wrong tool for the job and that defendant David Wilkins negligently set up the ladder for Ms. Peterson's use, thus causing her fall." Plaintiffs argued that the facts as presented

> leave open the issue of whether the danger associated with the use of the ladder is, in fact reasonable. Where the proofs create a question of fact with respect to whether the danger was 'open and obvious' and whether the risk of harm was unreasonable, determination must be left to the jury. Hughes v PMG Building, 227 Mich App 1, 11-12 (1997). This is particularly true given the factual dispute as to whether or not the ladder was standing on a drop cloth or the bare tile floor.
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> . . . . Despite open and obvious dangers, expectation of harm to the invitee can arise "where the possessor had reason to expect that the invitee's attention may be distracted," causing forgetfulness or a failure to protect himself. Bertrand [v Alan Ford, Inc, 449 Mich 606, 611-612; 537 NW2d 185 (1995).] Likewise, an expectation of harm may occur where, as in the case at bar, the possessor has

> reason to expect the invitee will proceed to encounter the danger **because the advantages of doing so would outweigh the apparent risks**. Id. at 612. In the case at bar, defendants indeed had reason to expect Ms. Peterson's attention would be distracted and that she may fail to protect herself. Ms. Peterson's injuries occurred while performing her employment duties, which required her to climb the ladder in question, a ladder which defendants insisted she use instead of the step ladder with which she had begun the job.
>
> Perhaps more compelling however, is the fact that, despite the alleged known risk, **defendants could reasonably expect Ms. Peterson to proceed to encounter the danger.** Ms. Peterson was an independent contractor and her need (and desire) to retain her status with defendants could have been jeopardized if she had refused to complete the job due defendants' [sic] choice of equipment. [Emphasis in original.]

The circuit court denied plaintiffs' motion for reconsideration, on the basis that it presented the same issues the court had ruled on previously. This appeal ensued.

A plaintiff must prove four elements in order to establish a prima facie case of negligence: (1) a duty was owed by the defendant to the plaintiff; (2) that duty was breached; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Plaintiffs argued in response to defendants' motion for summary disposition that defendants owed plaintiff a duty of reasonable care and breached that duty when defendant David Wilkins selected the extension ladder, instructed plaintiff to use it, and set it up on a drop cloth resting on a slippery floor, thereby creating an unreasonable risk of harm.[4]

Plaintiff presented evidence that defendant chose, provided and set up the extension ladder for her in the tiled-floor kitchen, leaning the top of the ladder on a ceiling cross beam, with the ladder's feet on top of a drop cloth that was over the tile floor, and that defendant had asked her to cover the floors with drop cloths. Defendant undisputedly assumed the responsibility of selecting and setting up the extension ladder for plaintiff. This created a duty not to expose plaintiff to an unreasonable risk of harm. See *Baker v Arbor Drugs*, 215 Mich App 198, 205-206; 544 NW2d 727 (1996) (noting that "[c]ourts have imposed a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume.").

Further, to the extent that plaintiffs alleged premises liability, the question is whether it is reasonable to expect an average user with ordinary intelligence to discover upon casual inspection the danger, *Weakley v Dearborn Heights*, 240 Mich App 382; 612 NW2d 428 (2000), which in this case was the extension ladder's placement at an angle while on a drop cloth covering a tile floor. Even if the danger is open and obvious, if the risk of harm remains unreasonable, the invitor may be required to undertake reasonable precautions. *Bertrand v Alan*

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[4] Although plaintiffs' complaint included an allegation that the extension ladder was defective, plaintiffs did not pursue that theory or advance it in response to defendants' motion.

Ford, Inc, 449 Mich 606, 611; 537 NW2d 185 (1995). Such unreasonable risks of harm may occur when the invitor expects that there may be distractions preventing discovery of the obvious by the invitee, that the invitee will forget what has been discovered, or that the invitee will fail to protect himself from the danger. *Id.*, quoting 2 Restatement Torts, 2d, § 343A comment f, p 220. Reason to expect harm to the visitor from known or obvious dangers may also arise where the possessor has reason to expect that the invitee will proceed to encounter the danger because to a reasonable person in her position the advantages of doing so would outweigh the apparent risk. *Bertrand*, *supra* at 612. Plaintiff correctly argued that based on the record presented regarding defendant's choice of equipment and instructions to plaintiff, there were genuine issues regarding whether these exceptions applied.

Defendants' motion for summary disposition also argued that plaintiff could not establish causation. The circuit court did not rule on this basis. I conclude that plaintiff presented sufficient evidence on this issue as well.

Plaintiff testified at deposition that after defendant set up the extension ladder for her in the kitchen, on the tarp, she climbed the ladder and cleaned without incident. She then descended the ladder, moved it over one or two feet and positioned it just as defendant had positioned it, leaning against the ceiling beam, its feet on the tarp:

> Q So in your estimation, there was nothing different about the way the ladder was situated?
>
> A No.
>
> Q Except that it was one to two feet to the right?
>
> A Right.
>
> Q The bottom or – the bottom of the ladder was still on the same thing, which is the tarp which was on the tile?
>
> A Yes, sir.
>
> Q The top of the ladder was still touching the crossbeam?
>
> A Yes, sir.

Regarding the ladder then slipping, causing her accident, plaintiff testified:

> A Well, I no sooner got up there and I felt the ladder moving, and all I could say was I just said to myself, oh, no. I tried to grab on to the beam. I tried to come down. I tried to stop myself. And there was just no way, and I could feel my face hitting the ladder several times before I hit the floor.
>
> Q How did the ladder move? In other words, in which direction did it move – not what caused it to move?

A It was sliding down – it was starting to slide out from under me, and that's when I knew I was coming down with the ladder.

Q Which part of the ladder moved?

A The bottom.

Q Which way did it move?

A Back of me.

Q Towards the dining room or toward the kitchen?

A Towards the dining room.

* * *

Q Do you know what caused the bottom of this ladder to slide toward the dining room, as you've described it?

A The only thing I know that could have caused it could have been the tarp.

Q And what was it about the tarp that leads you to believe that that could have caused the bottom of the ladder to slide towards the dining room?

A I guess because the floor, the tile – the tile floor's slippery.

* * *

Q The bottom of the ladder was in the first position, was on the tarp when it was over tile as well, correct?

A When I moved the first time?

Q Yes?

A Yeah. It was sitting on the tarp, too.

Q And the tarp was on the tile when you went up the first time?

A Right.

Although defendant testified at deposition that there were no tarps on the kitchen floor, and that he had instructed plaintiff to use tarps on the furniture and on the carpet, but not on the kitchen floor because it was going to be replaced, plaintiff's deposition testimony raises a genuine issue of fact on this question. Plaintiff's deposition testimony also raises genuine issues regarding the manner of the accident, the ladder slipping out from the base, and defendant's responsibility stemming from his instructing plaintiff which tool to use and how to set it up, and plaintiff's

testimony that she set the ladder up in the same manner as defendant had.[5] For these reasons, summary disposition would not have been proper on the basis of causation.

I would reverse and remand.

/s/ Helene N. White

[5] At oral argument before this Court plaintiffs' counsel stated, and the lower court record confirms, that plaintiffs had named a liability expert on their witness list.