STATE OF MICHIGAN

COURT OF APPEALS

PAULETTE M. HAMILTON, Plaintiff-Appellee,	UNPUBLISHED May 3, 2005
v	No. 251842 Wayne Circuit Court
WENDETROIT, LTD., Defendant-Appellant.	LC No. 02-204442-NO

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted the order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises out of plaintiff's slip and fall on a wet floor in the ladies' restroom at a Wendy's restaurant. Plaintiff was eight-months pregnant at the time. She entered the single-person restroom and noticed that the floor "was a little messy with tissue paper and stuff," but she did not notice that the floor was wet. She used the toilet, and as she walked four steps toward the sink she slipped on the wet floor and fell backward, striking her head on the wall. Dawn Turman, another Wendy's patron, had notified the restaurant's manager of the condition of the bathroom approximately one-half hour before plaintiff's fall and suggested that an employee be sent in to clean it before someone slipped and fell. Turman also heard another patron complain to the manager about the condition of the bathroom.

Plaintiff filed this negligence suit and defendant moved for summary disposition, arguing that plaintiff's suit was barred because the condition of the bathroom floor was open and obvious. Plaintiff argued that the condition of the floor had special aspects because the ladies' restroom was the lone restroom available for plaintiff to use, thus placing her in an unavoidable predicament. The trial court agreed with plaintiff and denied defendant's motion for summary disposition.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party

is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A prima facie case of negligence requires a party to establish: (1) a duty; (2) breach of that duty; (3) proximate cause, and (4) damages. *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002). A possessor of land has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not required to protect an invitee from open and obvious danger. *Id.* The question of whether a condition is "open and obvious depends on whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003). The standard is that of a reasonably prudent person and only the condition of the premises may be considered, not the condition of the plaintiff. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004). But if there are "special aspects" to the open and obvious condition that present an "unreasonably high risk of severe harm, or the condition is "effectively unavoidable," the premises possessor may not avoid liability under the doctrine. *Lugo, supra* at 519.

Defendant argues that the trial court erred by denying its motion for summary disposition because no issues of material fact exist regarding whether special aspects were present that would make the condition effectively unavoidable or unreasonably dangerous. If special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517. Special aspects of a condition exist when the open and obvious condition, if not ameliorated or avoided, would create a uniquely high likelihood of harm or severity of harm. *Id.* at 519. A uniquely high likelihood of harm emerges when a person cannot effectively avoid the dangerous condition. *Id.*

Here, plaintiff concedes that the wet floor was open and obvious. She argued, however, that the open and obvious condition was effectively unavoidable because a female customer wishing to use the restroom had to walk on the wet floor. A hypothetical example presented by our Supreme Court as part of its reasoning in *Lugo* is critical to the question of whether there was evidence that the situation at hand involved special aspects that rendered it unreasonably dangerous. The Court stated that a situation in which the only exit for the general public from a commercial building was covered with standing water might be a special aspect because "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." *Lugo, supra* at 518.

A reasonable person could conclude that the situation involved special aspects that rendered the open and obvious danger posed by the wet floor unreasonably dangerous. Turman described the bathroom floor as "muddy," "slippery," and "nasty." She notified the restaurant's manager of the dangerous condition of the restroom one-half hour before plaintiff's fall. Turman also heard another patron complain to the manager about the condition of the restroom. Thus, there was evidence that defendant knew or should have known of the slippery condition of the restroom and failed to respond to it within a reasonable time. Defendant made the restroom available specifically for patron's use, and it should have been apparent to defendant that invitees who visited the restaurant could not safely do so. There was evidence to create a genuine issue

of material fact as to whether a special aspect made the situation unreasonably dangerous because it was effectively unavoidable to female invitees who used the restroom.[1]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

[1] This case is factually distinguishable from *Sidorowicz v Chicken Shack*, unpublished per curiam opinion of the Court of Appeals (Docket No. 239627, issued 01/17/03). In that case, the Court affirmed the trial court's grant of summary disposition to the defendant where the legally blind plaintiff, who suffered from multiple sclerosis, had slipped on a wet bathroom floor. The Court held that the condition was open and obvious. In declining to address the plaintiff's remaining issues, the Court stated:

> We note, however, that plaintiff presented no evidence with regard to how long the unsafe condition existed in the men's restroom and failed to demonstrate that defendant knew or should have known about the unsafe condition. Slip op p 4, n 2.

In the present case, plaintiff presented evidence that the condition existed for at least thirty minutes and that defendant was on notice of the condition.