STATE OF MICHIGAN

COURT OF APPEALS

PAULETTE M. HAMILTON,

Plaintiff-Appellee,

v

WENDETROIT, LTD.,

Defendant-Appellant.

UNPUBLISHED
May 3, 2005

No. 251842
Wayne Circuit Court
LC No. 02-204442-NO

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

WILDER, P.J., *dissenting.*

I respectfully dissent. The general rule in a premises liability case "is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, 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 v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). "[W]ith 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 defendant or the openness and obviousness of the condition should prevail in barring liability." *Id*. at 517-518 (emphasis added). "[O]nly those special aspects that give rise to a *uniquely high likelihood of harm or severity of harm if the risk is not avoided* will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519 (emphasis added and footnote omitted).

I would find that, in the present case, the evidence does not support the conclusion that there were special aspects to the open and obvious danger posed by the wet and dirty floor. The fact that the floor had been safely navigated at least once (and perhaps more) in the half-hour before the plaintiff's fall establishes that a uniquely high likelihood of harm or severity of harm was not present. The fact that there was only one women's restroom available in the restaurant and that the wet and dirty floor could not be avoided is insufficient by itself to establish special

aspects to the risk.[1] Rather, the fact that the risk is unavoidable is pertinent only if the situation presents a *uniquely high likelihood or uniquely high severity* of harm occurring from the inability of the plaintiff to avoid the risk. The evidence in this case fails to establish anything unique about the likelihood or severity of harm that could result from a slip and fall on defendant's wet and dirty bathroom floor, and therefore, I would find that defendant's motion for summary disposition should have been granted.

/s/ Kurtis T. Wilder

[1] See *Lugo, supra* at 518-519, n 2.