STATE OF MICHIGAN

COURT OF APPEALS

ALPHONSE SCHAAF, Personal Representative of the Estate of ROBERT JOSEPH SCHAAF, Deceased,

Plaintiff-Appellant,

v

PULLMAN INDUSTRIES, INC.,

Defendant-Appellee,

and

WEST BEND MUTUAL INSURANCE COMPANY,

Intervenor.

UNPUBLISHED
August 6, 2009

No. 282234
Van Buren Circuit Court
LC No. 05-053724-NO

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur with the result reached by the majority, but write separately to set forth my reasons for doing so.

Robert Schaaf, plaintiff's decedent, backed up his semi-tractor trailer truck to defendant's loading dock, and waited in the cab while personnel of Pullman Industries, Inc. loaded the trailer. When the loading had been completed, Schaaf exited the cab, walked into defendant's building to sign some paperwork, and reentered the truck. Schaaf pulled the truck forward approximately eight feet so that he could close the trailer's rear doors. After closing the doors, Schaaf walked along the passenger side of the truck and noticed standing water in the loading dock. Schaaf testified at deposition that he had not seen the water until he began his walk back to the truck cab. Schaaf's testimony continued as follows:

Q. Okay. And you saw the puddle and you chose to walk through it?

A. Uh-huh.

Q. Yes? Correct?

A. No. Yeah.

Q. Okay. Could you have walked around the puddle if you had chosen to?

* * *

A: If I'd have walked around the puddle, I would have still walked in the mud.

Q. Okay. But you were able to safely walk through the mud from the driver's side of the truck to the rear; correct?

A. Yeah.

Q. And you could have closed the driver's-side door, passenger-side door, locked it up—

A. And come back around? Yeah, I could have done that, but I didn't want to track the mud back into my truck because the truck was a new truck. I had just got it that day.

Q. Were you walking through the puddle to try and get the mud off your shoes?

A. Yeah. Or to keep from getting any more mud on my shoes is what it . . . .

Q. But were you also thinking this water will help knock some of the mud off?

A. Well, to be honest with you, sir, I wasn't thinking about anything except getting out of there.

* * *

Q. So you could have walked back to the left, but you would have gotten mud on your shoes?

A. Yeah.

Q. Had you chosen to try to walk around this puddle on the right side of the truck, could you have?

A. Probably.

Schaaf slipped on a metal grate concealed under the standing water, and suffered serious injuries.

Defendant brought a motion for summary disposition pursuant to MCR 2.116(C)(10), contending that the puddle qualified as open and obvious. The trial court denied defendant's motion, ruling that a question of fact existed regarding whether the grate was open and obvious. The trial court further opined in its bench ruling,

> So for that reason, I don't really see anything special about this, any special aspect about the condition of this loading dock area, but I do find that there is a real question about whether this was open and obvious given the dispute about the lighting conditions, the location of the grate, the mud, the water, the fact that it was the grate that was concealed by the mud and the water, whether it was in an unusual spot.

The case proceeded to trial. After closing arguments, the trial court read the jury the model civil jury instructions regarding premises liability claims, including M Civ JI 19.03:

> 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.

Neither party objected to the instructions given by the trial court.

Plaintiff proposed that the trial court give the jury the standard verdict form applicable in negligence actions, which appears in M Civ JI 66.03. The trial court instead used a verdict form of its own creation. The first three questions in the special verdict form inquired as follows:

> QUESTION NUMBER ONE:
>
> Did the condition existing in the loading bay of the Defendant on October 28, 2003 create an unreasonable risk of harm?
>
> ANSWER: ___ Yes (go to Question 2)
>
> ___ No (answer no further questions)
>
> QUESTION NUMBER TWO:
>
> Did the Defendant know, or in the exercise of ordinary care should have known, of the condition and should have realized that it involved an unreasonable risk of harm to an invitee?
>
> ANSWER: ___ Yes (go to Question 3)
>
> ___ No (answer no further questions)

QUESTION NUMBER THREE:

Was the condition open and obvious?

ANSWER: ___ Yes (answer no further questions)

___ No (go to Question 4)

The jury determined that the water-covered grate did not give rise to an unreasonable risk of harm, answering "No" to the first question.

I agree with the majority's determination that the trial court's decision to use a special verdict form did not constitute an abuse of discretion. *Ante* at 4-5.[1] The special verdict form's first question inquired of the jury whether the standing water over the concealed grate created an unreasonable danger, a question that properly belongs to the jury. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995), our Supreme Court held that "[i]f the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide."

Plaintiff also contends that the trial court erred by ruling that the water-covered grate did not present a "special aspect about the condition of th[e] loading dock area." But regardless whether the trial court erred when it opined that no special aspect of the premises existed in this case, the jury's decision rendered moot the court's prior special aspects pronouncement.

In *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), the Supreme Court cited 2 Restatement Torts, 2d, § 343, pp 215-216, for the proposition that an invitor's legal duty is "to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land." Subsequently, in *Bertrand, supra* at 609, the Supreme Court invoked Restatement § 343 in its entirety, and added the following emphasis:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an *unreasonable* risk of harm to such invitees . . . .

Accordingly, when confronted with a premises liability case, a fact finder's inquiry includes the determination whether a defect on the premises amounts to an unreasonably dangerous condition.

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[1] Although the trial court did not abuse its discretion by using the special verdict form devised in this case, I believe that the verdict form contained in M Civ JI 66.03 remains preferable.

Here, the jury determined that the muddy water covering the grate did not create an unreasonable danger. Given this finding, the jury lacked any legal basis to further consider the existence of a special aspect at the loading dock. For this reason, I concur that plaintiff's appellate arguments are unavailing.

/s/ Elizabeth L. Gleicher