STATE OF MICHIGAN

COURT OF APPEALS

JAMES CARPENTER,

Plaintiff-Appellant,

v

COATIS ANDERSON,

Defendant-Appellee.

UNPUBLISHED
July 1, 2010

No. 291155
Saginaw Circuit Court
LC No. 07-065357-NO

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

SHAPRIO, J. (*dissenting*).

I respectfully dissent.

First, although I agree with the majority that if plaintiff is a licensee the trial court properly granted summary disposition, I disagree with their decision to make that conclusion. The majority notes that the trial court would have concluded that plaintiff was a licensee and then makes its own conclusion that plaintiff was, in fact, a licensee. The fact is, this is not a decision for the trial court or this Court, but for a jury. "As a general rule, if there is evidence from which invitee status might be inferred, it is a question for the jury." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 595; 614 NW2d 88 (2000). An invitee is either a public invitee or business visitor, with a business visitor being "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id.* at 602. Under the facts of this case, there is sufficient evidence to indicate that plaintiff may have been an invitee.

Plaintiff went to defendant's residence to participate in a weekly "poker party" held in the basement of defendant's home. The poker games would start on Friday evening and would run until Saturday evening or even Sunday morning. The table only seated seven people, but over the course of the weekend as many as 20 people would participate. Although the players knew one another, this was not a typical, occasional, friendly game. The doorman was paid to make sure no one entered who was not known to the participants. As part of his compensation, the doorman was allowed to sell beer and soda to the participants and retain a profit. According to the doorman and another witness, a percentage of the pots was set aside and split between the host and one of the players. Thus, although the poker game was not a legal business, the host had a significant economic interest in the game. Given that our Supreme Court has held that bingo attendees are invitees, even if the game was illegal, *Manning v Bishop of Marquette*, 345

Mich 130; 76 NW2d 75 (1956), I believe there is more than sufficient evidence for a jury to conclude that plaintiff was an invitee.

Second, although I agree that under *Janson v Sajewski Funeral Home, Inc*, ___ Mich ___; ___ NW2d ___ (SC Docket No. 140071, May 28, 2010), the hazard in this case was open and obvious, I disagree with the trial court's determination that there were no special aspects that made it unreasonably dangerous notwithstanding its open and obvious nature. Again, I believe there is a fact question for the jury as to whether the moisture was unavoidable, creating a special aspect.

Plaintiff alleged that he entered through the side door, which was the designated entrance players were to use because it opened directly to the stairs going down to the basement. To go inside, a player had to step onto the landing inside the door and then proceed to the stairs into the basement. Plaintiff testified that the landing was linoleum floor with no rug or mat to absorb water and that he slipped on something wet which he did not see and does not know what it was. Defendant testified that he did have a rug in place on the landing and the doorman testified that the moisture had built up on the landing that evening, but that a rug was present to make it safe. Several other witnesses testified they remembered a rug, and one witness other than plaintiff testified that there was no rug.

In this case, there was no testimony that the moisture could be avoided. Indeed, the side door was the only entryway available to players and, even if they had used a different entrance, players still had to cross the moisture-covered landing[1] in order to reach the stairs to the basement. Thus, one could not reach the basement without traversing the moisture-covered landing. Such facts are similar to the illustration of special aspects in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001) of "a commercial building with only one exit for the general public where the floor is covered with standing water. In other words, the open and obvious condition is effectively unavoidable." Here, there was only one possible way for players to enter the basement and that was by walking across the landing, making plaintiff's encounter with the liquid potentially unavoidable.[2]

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[1] There may be a fact question as to whether the moisture was of a quality and amount that was avoidable. However, such a factual dispute has to be resolved by the jury.

[2] Although this Court decided a somewhat similar issue to the contrary in *Joyce v Rubin*, 249 Mich App 231, 642 NW2d 360 (2002), I find the facts distinguishable. In *Joyce*, the plaintiff was removing her personal belongings from her former employer's home when she fell on the slippery sidewalk leading to the front door. *Id.* at 233. The plaintiff alleged that the slippery sidewalk was unavoidable. *Id.* at 242. This Court disagreed, concluding that the plaintiff could have "simply removed her personal items another day or advised [the homeowner] that, if [she] did not allow [the plaintiff] to use the garage door, [the plaintiff] would have to move another day." *Id.* The facts here are substantially different. The player could not elect to come a different day, as the poker games only occurred on specific days. Furthermore, the record indicates that plaintiff was specifically contacted and requested to come—he did not simply decide to show up. Finally, as previously noted, even the use of a different entrance would not have permitted plaintiff to avoid the landing, as the landing was the only way to reach the

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Finally, there are factual disputes over whether a rug was present in the landing and whether a rug would have made an invitee safer than no rug. If a rug would not have made invitees safer, then whether a rug was present is irrelevant. However, if a rug would have made an invitee safer, then a jury must resolve the discrepancies between the various witnesses as to whether a rug was present on the landing.

Given that there are factual issues that require jury resolution as to plaintiff's status as an invitee, the unavoidability of the water on the landing, whether a rug would make invitees safer, and whether a rug was present, I believe that the trial court erred in granting summary disposition and that the majority errs by affirming it.

Accordingly, I would reverse the trial court's grant of summary disposition and remand for a jury trial to (1) determine whether plaintiff was a licensee or invitee; and if plaintiff was an invitee, (2) determine whether the moisture was unavoidable, (3) whether a rug was necessary to keep an invitee safe, and (4) whether a rug was provided.

/s/ Douglas B. Shapiro

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staircase to the basement. Accordingly, this Court's determination in *Joyce* is not dispositive of the issue of whether special aspects existed in the present case.