STATE OF MICHIGAN

COURT OF APPEALS

JOSEPHINE ROMERO PEREZ,

Plaintiff-Appellant,

v

UNIVERSITY OF DETROIT JESUIT HIGH SCHOOL AND ACADEMY,

Defendant-Appellee.

UNPUBLISHED
November 27, 2012

No. 306969
Wayne Circuit Court
LC No. 10-014783-NO

Before: SAWYER, P.J., and SAAD and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this premises liability action. We affirm.

Plaintiff contends that the trial court erred in finding there is no genuine issue of material fact regarding whether the wet tile floor on defendant's property was "open and obvious" and whether the wet tile floor constituted a "special aspect." Additionally, plaintiff contends that the trial court erred when it relied on plaintiff's potential knowledge of inclement weather when it reached its determination that the wet tile was an open and obvious condition. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). MCR 2.116(C)(10) provides that a moving party is entitled to judgment as a matter of law if there "is no genuine issue as to any material fact." "In relation to a motion under MCR 2.116(C)(10), we similarly review the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Odom v Wayne Co*, 482 Mich 459, 466-467; 760 NW2d 217 (2008) (internal quotations omitted). Furthermore, "[t]he contents of the complaint are accepted as true unless contradicted by the evidence provided." *Id.* at 466.

"Summary disposition is appropriate only if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 467. A genuine issue of material fact "exists when the record leaves open an issue on which reasonable minds might differ." *Jimkoski v Shupe*, 282 Mich App 1, 4-5; 763 NW2d 1 (2008). "This Court is liberal in finding genuine issues of material fact." *Id.* at 5.

Because plaintiff presents multiple issues, we will first examine whether the trial court erred when it determined that the wet tile floor on which plaintiff slipped was an open and obvious condition. When this Court is confronted with a question of whether a condition on the land is "open and obvious," this Court must ask whether "it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 102; 804 NW2d 569 (2010) (internal quotations omitted). This test is objective, and "the inquiry is whether a reasonable person in the plaintiff's position would have" discovered the danger upon casual inspection. *Id.* (internal quotations omitted). "When deciding a summary disposition motion based on the open and obvious doctrine, 'it is important for the courts . . . to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.'" *Id.* at 102-103, quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001). "If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate." *Watts*, 291 Mich App at 103 (internal quotations omitted).

Water on a floor constitutes an open and obvious condition when it is "visibly wet." *Id.* at 104-105. A maintenance worker inspected the area where plaintiff fell and reported that he could see water on the floor. Thus, the water tracked in from outside made the floor visibly wet, and the condition was open and obvious. Additionally, while this case involves water on a tile floor created by snow being tracked into a building, the condition is analogous to the open and obvious conditions of snow and ice. "[A]bsent special circumstances, Michigan courts have generally held that the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 481; 760 NW2d 287 (2008). In *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010), this Court held that where the slip and fall "occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening[, t]hese wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection." Similarly, water from melted snow, accumulated on flooring inside a building during winter, constitutes an open and obvious danger of which an average person of ordinary intelligence would have discovered. In fact, the risk of falling on a tile floor while wearing shoes that were wet from snow while walking on a tile floor during winter is an open and obvious condition. An average person of ordinary intelligence would be aware that walking into a building entryway on a wintery, January day is a hazard similar to that presented by ice and snow outside a building.

Plaintiff also contends that because "the fall occurred immediately inside the doorway, [there was] no way for [plaintiff] to either see or avoid the wet condition that caused her fall." Additionally, plaintiff contends that the trial court erred when it relied on plaintiff's subjective knowledge of the inclement weather on the day of her fall in determining that the condition was open and obvious. However, the test for determining whether a condition was open and obvious is not whether plaintiff saw the water on the floor. Rather, the question is objective: would an average person of ordinary intelligence have discovered the condition upon casual inspection?

Properly, the trial court did not consider plaintiff's subjective knowledge of the wintery conditions; rather, the trial court examined what an average person of ordinary intelligence would have casually discovered if in plaintiff's position. Thus, the trial court did exactly as it is required to do. When viewed in the light most favorable to plaintiff, the evidence shows it snowed for a "number of hours" on the morning of January 24, 2008, before she arrived at work. Plaintiff testified that the ground was covered by snow, and that the snow fell quickly. Plaintiff walked through the snow-covered parking lot to gain access to the school. Furthermore, plaintiff claimed that she had snow on the bottom of her boots when she entered the building. Also, when viewed in the light most favorable to plaintiff, she witnessed people ahead of her slip and slide as they entered the building. These facts, when viewed in the light most favorable to plaintiff, lead to the conclusion that an average person of ordinary intelligence would have discovered the water in the doorway. The falling snow and snow-covered parking lot would have alerted an average person of the dangers associated with walking, even inside buildings, on winter days. Furthermore, an average person of ordinary intelligence who was aware that she had snow on the bottom of her boots would be especially cautious when stepping into a building for fear of slipping. Water in an entryway on a wintery day is a common occurrence that should have been expected. Therefore, the trial court was correct in concluding that the water tracked into the building from outside constituted an open and obvious danger. Thus, no genuine issue of material fact exists regarding whether the condition was open and obvious, and the trial court properly granted defendant's motion for summary disposition.

Additionally, plaintiff contends that, even if the wet tile was open and obvious, a genuine issue of material fact exists regarding whether the wet tile floor had special aspects that made it unavoidable. We disagree.

The wet tile did not create a special aspect. "In sum, the general rule 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*, 464 Mich at 512 (2001). "[N]either a common condition nor an avoidable condition is uniquely dangerous." *Hoffner v Lanctoe*, ___ Mich ___; ___ NW2d ___ (Docket No 142267, issued July 31, 2012) (slip op at 11).

Special aspects are either unreasonably dangerous because they are effectively unavoidable, and thus, create a high likelihood of harm or they create a "substantial risk of death or severe injury." *Lugo*, 464 Mich at 518. An example of a "special aspect" would be where a commercial building had only one exit for the general public, and the exit was covered with standing water. *Id.* at 518. While this condition is open and obvious, the danger posed by the standing water in front of the only exit is "effectively unavoidable." *Id.* at 518-519. Additionally, "an unguarded thirty foot deep pit in the middle of a parking lot . . . might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition . . . ." *Id.* Thus, "only 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. "Unavoidability is characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome." *Hoffner*, ___ Mich at ___ (slip op at 16) (emphasis in

original). Furthermore, "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id.* at ___ (slip op at 16-17) (emphasis in original).

Plaintiff argues that a genuine issue of material fact exists regarding whether the water on the tile floor presented an unreasonable risk of harm. Even when viewed in the light most favorable to plaintiff, the wet tile was avoidable. When viewed in the light most favorable to plaintiff, the floor was wet from snow tracked onto the tile. Additionally, the area of tile that was wet and exposed was roughly 8 to 10 inches. A mat covered the remaining portion of the floor. Even though the door plaintiff entered appears to be the primary entrance for students and staff, plaintiff was not compelled to step on the wet tile. Instead, plaintiff could easily have stepped cautiously into the building, with full knowledge of the inclement conditions outside. In fact, video footage from the school on the day of the fall showed that five people entered through the exact same doorway before plaintiff entered, and each person avoided slipping and falling. Plaintiff could have stepped over the 8 to 10 inch patch of tile and onto the mat. Alternatively, plaintiff could have taken a different entrance. Thus, there was no special aspect, and the trial court did not err when it granted defendant's motion for summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Patrick M. Meter