STATE OF MICHIGAN

COURT OF APPEALS

JILL ANN BURCH and OLEN J. BURCH,

Plaintiffs-Appellants,

v

BOB EVANS FARMS, INC.,

Defendant-Appellee.

UNPUBLISHED
November 16, 2006

No. 269907
Lenawee Circuit Court
LC No. 05-001919-NO

Before: Whitbeck, C.J., Saad and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

When plaintiff[1] was going into defendant's restaurant, wet, slushy snow was present in the parking lot. As plaintiff walked in the restaurant, she stepped on a grate that was on the floor in the vestibule between the first and second set of doors. She took "maybe two" steps on the grate and her feet went out from under her, causing her to fall. Plaintiff testified that the grate and the whole floor appeared wet. Snow was visible on the grate; "a little bit . . . not like it was snow-covered." Plaintiff testified that she was watching where she was walking, but "had no knowledge that [the grate] was going to be as slippery or whatever, icy as it was."

A former employee of defendant, Candis Hardy, submitted an affidavit in which she averred that two weeks before plaintiff's fall, she too slipped on the grate. She informed defendant's general manager, manager, and assistant manager that she slipped and advised them that she believed the grate presented an unreasonable risk of harm.

[1] The singular term "plaintiff" shall refer to Jill Burch. Plaintiff Olen Burch has raised only a loss of consortium claim, which is derivative in nature.

The trial court concluded that the hazard was open and obvious and granted defendant's motion for summary disposition.

II. STANDARD OF REVIEW

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

III. ANALYSIS

Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citation omitted). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id*., p 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). As explained in *Novotney*, the logic underlying the open and obvious doctrine, as first developed in products liability cases, is that "where the very condition that may cause injury is wholly revealed by casual inspection, the duty to warn serves no purpose." (Citation omitted.) The determination whether a hazardous condition is open and obvious depends on the characteristics of a reasonably prudent person, not on the characteristics of a particular plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

We agree with the trial court that the hazardous condition was open and obvious. Plaintiffs attempt to avoid application of the open and obvious doctrine to this slip and fall on a wet floor by focusing on the grate, claiming that its slipperiness was unusual and unexpected. But plaintiff indicated that the wetness of the surface was apparent, and an average person of ordinary intelligence would be aware of the "danger and risk" of falling on a wet floor. Plaintiffs have not cited, nor are we aware of, any authority that supports plaintiffs' position that the degree of slipperiness must be apparent upon casual inspection for the open and obvious doctrine to apply.

Plaintiffs contend in the alternative that the danger presented by the wet metal grate constituted a "special aspect" as described in *Lugo, supra*. The *Lugo* Court provided two examples to illustrate when an open and obvious condition could be considered unavoidable or unreasonably dangerous: (1) when the floor of a commercial building with a single exit is covered with water, the open and obvious doctrine would not apply because the condition would be essentially unavoidable; (2) when an unguarded thirty-foot hole exists in the middle of a parking lot, the open and obvious doctrine would not bar liability because the 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, at least absent reasonable warnings or other

remedial measures being taken." *Id*., pp 518-519. Here, plaintiffs suggest that the slippery metal grate was effectively unavoidable because there was only one entrance to the restaurant. However, it is apparent from the diagram and photographs of the area that a person could enter the restaurant without stepping on the grate. Therefore, plaintiffs have not shown that the hazard posed by the wet metal grate was unreasonably dangerous because it was effectively unavoidable.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette