S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CATHY JANE SALISBURY,

Plaintiff-Appellant,

v

SUNDANCE, INC., and OLD WEST PROPERTIES, L.L.C.,

Defendant-Appellees.

UNPUBLISHED
December 28, 2006

No. 271328
Shiawassee Circuit Court
LC No. 05-002046-NO

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This case arises out of injuries suffered by plaintiff when she tripped over a collapsed wet floor sign, which was lying partially underneath a table and partially in the travel aisle of defendants' Taco Bell. Plaintiff initially argues that the trial court erroneously ruled that there was no genuine issue of material fact regarding whether a collapsed wet floor sign constituted an unreasonably dangerous condition. We disagree.

On September 14, 2003, plaintiff and her boyfriend, Ronald Larkins, Jr., went to Taco Bell in Owosso, Michigan, for a meal. Plaintiff placed a food order at the counter. Plaintiff waited at the counter until the food was ready, at which time she picked up her tray and walked to the beverage counter to fill the cups she had purchased. Larkins was already seated at a table. After filling the beverage cups, plaintiff picked up the tray, turned around, and walked toward the table where Larkins was sitting. After taking a couple of steps toward the table, plaintiff's foot made contact with a collapsed "caution, wet floor" sign, causing her to trip and fall. The caution sign was bright yellow in color, and was positioned partially in the travel aisle and partially beneath a table and chair, which was next to the beverage counter. The sign plaintiff tripped on was not in the upright position, but rather, was collapsed and lying on the floor. The floor in the area was dry.

When plaintiff was asked whether she would have seen the sign had her hands been free of the tray, she responded, "probably." Plaintiff indicated that she was sure she "probably would have" seen the sign had she turned and looked in its direction at the moment she was approaching the area of the sign. Plaintiff testified that the reason she did not look down before

walking away from the beverage counter was because she was carrying the tray of food and drinks and indicated that it would have been difficult to move the tray around. Although Larkins did not see plaintiff fall, he did see the collapsed caution sign when he walked to his table. When asked how he avoided stepping on the sign, Larkins testified, "I must have, you know, seen it and walked around it."

Defendants filed a motion for summary disposition, arguing that the open and obvious danger doctrine barred plaintiff's claims. The trial court granted defendants' motion, ruling that the collapsed wet floor sign was an open and obvious danger, and that no special aspects existed. On appeal, this Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

In a premises liability action, the plaintiff must prove the elements of negligence: (1) that defendant had a duty to plaintiff, (2) the defendant breached that duty, (3) an injury proximately resulted from that breach, and (4) the plaintiff suffered damages. *Taylor v Laban*, 241 Mich App 449, 452-453; 616 NW2d 229 (2000). Different standards of care are owed to a plaintiff in accordance with the plaintiff's status on the land. A person entering upon the property of another for a reason directly connected to the landowner's commercial business interest is an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000), on rem 243 Mich App 461; 646 NW2d 427 (2000). An invitor has a common law duty 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*, 464 Mich 512, 516; 629 NW2d 384 (2001).

The basic duty to protect an invitee does not generally include removal of open and obvious dangers: "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3; 649 NW2d 392 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person of ordinary intelligence would have discovered the danger upon casual inspection. *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). The test is objective and the court should look to whether a reasonable person in the plaintiff's position would foresee the danger, not whether a particular plaintiff should have known that the condition was hazardous. *Corey, supra* at 5.

In the instant case, the collapsed wet floor sign was an open and obvious danger if it was reasonable to expect that an average person of ordinary intelligence would have discovered it upon casual inspection. *Teufel, supra* at 427. The caution sign was bright yellow in color and lying on the floor, partially in the travel aisle and partially underneath a table and/or chairs. The restaurant had a dark brown tile floor. The contrast between the floor and a bright yellow sign is presumably strong. Larkins testified that he saw the sign while walking toward his table and was able to avoid it by stepping around it. This demonstrates that the sign was visible to those who looked in its general direction. Plaintiff testified that she "probably would have" seen the sign had she looked down upon walking away from the beverage counter. That trial court noted that a

reasonable person in plaintiff's position would have glanced down at the vicinity of her projected path, if only casually and for a brief moment.

Plaintiff also argued that even if the sign is considered an open and obvious danger, there were special aspects, which rendered it unreasonably dangerous. Plaintiff argued that "the sign protruding into the aisle is tantamount to a thirty foot hole because its presence was neither anticipated nor open and obvious. Additionally, the small portion of the sign that protruded into the aisle was unreasonably dangerous because the aisles were narrow, and tables and chairs located on both sides were bolted to the floor, making them immovable." Plaintiff maintained that these factors, combined with her carrying a tray while walking to her table, made the existence of the sign unreasonably dangerous.

If there are "special aspects" of a condition that make even an "open and obvious" condition "unreasonably dangerous," the invitor retains a duty to undertake reasonable precautions to protect invitees from such danger. *Mann v Shusteric Enterprises*, 470 Mich 320, 328-329; 683 NW2d 573 (2004). In determining whether a danger presents an unreasonable risk of harm despite being open and obvious, a court must consider whether special aspects exist, such as a condition which is unavoidable or which poses an unreasonably high risk of severe injury. *Lugo*, *supra* at 516-517. The determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Lugo*, *supra* at 523-524.

Plaintiff cannot demonstrate that the sign was unavoidable. Plaintiff acknowledged that the sign was visible. Notably, her companion saw it and walked around it. Given that the sign was visible to anyone who looked in its general direction, the sign was avoidable. Patrons presumably would have stepped over it, or taken a different path to their tables upon seeing it.

Similarly, plaintiff cannot show that the sign posed an unreasonably high risk of severe injury. Insofar as any object left lying on the floor presents a risk that someone may trip and fall over it, the wet floor sign presented a danger. However, the type of danger contemplated by *Lugo* is of a vastly different nature. The critical inquiry is whether there is something unusual about the sign, which because of its character, location, or surrounding conditions gives rise to an unreasonable risk of harm. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995). The wet floor sign did not give rise to an unreasonably high risk of severe injury. Accordingly, plaintiff's premises liability claim is barred by the open and obvious doctrine.

Further, plaintiff argues, to the extent that her claim sounds in ordinary negligence, the open and obvious danger doctrine does not preclude it. However, plaintiff acknowledged in her brief opposing defendants' motion for summary disposition, "[t]his action is a premises liability action." It is well established that "the gravamen of an action is determined by reading the claim as a whole, and looking beyond the procedural labels to determine the exact nature of the claim." *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (citations omitted). If plaintiff's argument were taken to its natural conclusion, the open and obvious danger doctrine would never be applicable, given that a premises liability cause of action by definition encompasses an ordinary negligence cause of action, to which the open and obvious danger doctrine does not apply. Plaintiff's claim is properly characterized as a premises liability claim, to which the open and obvious danger doctrine applies, precluding plaintiff from prevailing.

Plaintiff's final argument on appeal is that the trial court applied an incorrect test to determine whether special aspects existed. A special aspects determination must be based on the nature of the condition at issue, and not on the degree of care used by the invitee. *Lugo*, *supra* at 523-524. The trial court applied this test. During the hearing, the nature of the collapsed wet floor sign and its potential dangers were thoroughly analyzed to ascertain whether special aspects existed. Some of the factors considered by the trial court included, the location of the sign, whether it was visible to a reasonably prudent person, whether others had tripped over the sign, from what angle and distance the sign was visible, whether alternative routes existed which did not require passing the sign, and other relevant factors. Although the trial court may not have explicitly identified the test it was applying, the trial court considered the appropriate factors and did not err in its analysis.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot