STATE OF MICHIGAN

COURT OF APPEALS

GLORIA WILLIAMS, Plaintiff-Appellant,	UNPUBLISHED November 13, 2008
v	No. 283898 Saginaw Circuit Court
FRANKENMUTH BAVARIAN INN, INC., Defendant-Appellee.	LC No. 06-060077-NO

Before: Beckering, P.J., and Borrello and Davis, J.J.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court decision granting defendant's motion for summary disposition. While we disagree that the condition was open and obvious as a matter of law, we nevertheless affirm the trial court's ruling based on lack of notice to defendant of the allegedly dangerous condition. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Pertinent Facts

On the evening of February 20, 2005, plaintiff went to the defendant establishment to drop off her husband, who was employed there, and to pass the time while her husband was working. Plaintiff was accompanied by her daughter, her cousin, and her cousin's daughter. It had been snowing hard that day, and plaintiff described it as the first day of a winter storm. The outdoor walkway leading to the entrance was equipped with a heating system that operates to heat and dry the surface, and there was no snow on the walkway. Immediately inside the lobby was a rubber or rubber-like floor mat, extending inward approximately three to four feet, recessed into the ground and level with the floor, and designed to permit liquids to drain down rather than remain on the surface. The bulk of the lobby floor was covered with approximately one-foot square, dense, short-nap carpet tiles.

Plaintiff entered the lobby and proceeded down a hallway that was covered with reddish-brown tile. Approximately 40 to 50 feet down the hallway from the entrance, plaintiff was walking while looking down at her feet. Ahead of her and out of her view, plaintiff's cousin slipped on the floor but regained her balance and avoided falling. As plaintiff's cousin turned to warn her that the floor was slippery, plaintiff fell, severely injuring her ankle. Plaintiff did not see the water on the floor before she fell, and first felt the water when it soaked her clothes at the

time of the fall. Plaintiff contends that the color of the tile and the lighting conditions in the hallway prevented the water from being visible.

Defendant moved the trial court for summary disposition under MCR 2.116(C)(10), arguing that the condition that caused plaintiff to slip was open and obvious and not unreasonably dangerous, and, alternatively, that plaintiff had not shown that defendant had the requisite notice, either actual or constructive, of any dangerous condition. The trial court agreed and granted the motion.

II. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

III. Analysis

Plaintiff argues that the wet floor was not open and obvious, or if it was open and obvious, a question of fact exists as to whether an unreasonably dangerous condition existed. Plaintiff also argues that a question of fact exists as to whether defendant had constructive knowledge of the wet floor when it knew from past experience that when it snowed, patrons would track water into the establishment.

Defendant contends that the condition was open and obvious, that no special conditions existed giving rise to potential liability, and that plaintiff's claims are barred for lack of the requisite notice to defendant of the allegedly dangerous condition sufficiently in advance to provide defendant with a reasonable opportunity to alleviate it.

A premises possessor owes a duty "to undertake reasonable efforts to make its premises reasonably safe for its invitees." *Lugo v Ameritech Corp*, 464 Mich 512, 526; 629 NW2d 384 (2001). As such, a premises possessor "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Id.* at 516, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

A premises possessor is generally not required to protect an invitee from open and obvious dangers. The open and obvious danger doctrine "attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-96; 485 NW2d 676 (1992). The logic behind the open and obvious doctrine is that "an obvious danger is no danger to a reasonably careful person." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993). Accordingly, when the potentially dangerous condition "is wholly revealed by casual observation, the duty to warn serves no purpose." *Id.* If this purpose is frustrated by the application of the doctrine to a particular set of facts because the condition is for all practical purposes invisible and indiscernible, then the application of the open and obvious doctrine would not be appropriate.

"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, supra* at 517. The special aspects that cause even open and obvious conditions to be actionable are where such a condition is "effectively unavoidable," or where the condition "impose[s] an unreasonably high risk of severe harm." *Id*. at 518.

The standard for determining if a condition is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney, supra* at 475. The test is objective, and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous. *Corey v Davenport College (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

In this case, it must first be determined if there is a genuine, material dispute whether the water in the hallway could have been discovered by an average person of ordinary intelligence upon casual inspection. See *Veenstra, supra* at 164; *Novotney, supra* at 475. Plaintiff asserts that the water could not be discerned upon a reasonable inspection because the tile was dark and the lighting in the hallway poor. To support this assertion, plaintiff testified that her cousin slipped in the same hallway only moments before she herself fell, and that, even though she was looking down at her feet while walking through the hallway, she could not see the water. Given the safety precautions taken by defendant at its entryway with respect to deterring the tracking in of snow, it is reasonable to conclude that an average person would not necessarily expect a significant amount of water accumulation 40 to 50 feet down the hallway. Viewing the parties' descriptions of the premises in a light most favorable to plaintiff, it is not clear that the condition could have been wholly revealed by casual observation. Consequently, we hold that there is a genuine issue of material fact as to whether an average person of ordinary intelligence could discover the danger upon casual inspection. Given our finding in this regard, we need not address plaintiff's alternative argument regarding whether the condition was unreasonably dangerous.

The trial court also granted summary disposition, however, on the ground that plaintiff provided no evidence that defendant had either actual or constructive notice of the presence of a hazard. We agree.

"To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached the duty, (3) the defendant's breach [of duty] caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Kosmalski ex rel Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). As previously stated, a premises possessor has a duty to exercise reasonable care "to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo, supra* at 516. However, the premises possessor is liable for injury resulting from a dangerous condition only if the condition is caused by active negligence by the possessor or its employees, or the condition is of such a character or duration that the possessor should have had knowledge of it. *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968).

In *Serinto*, the plaintiff slipped and fell on a broken mayonnaise jar that was on the floor of the defendant grocery store next to one of the shelves. *Id*. at 641. With regard to the defendant's adequate notice of the condition, the plaintiff testified that she had had been in the

store for about 45 to 50 minutes prior to the accident and during this time she did not hear anything resembling the sound of a jar breaking. *Id*. The Supreme Court held that the plaintiff's failure to hear a jar breaking was not sufficient evidence to justify submitting to the jury the question of the defendant's notice of the existence of the broken mayonnaise jar on the floor of the defendant store. *Id*. at 643-644.

In this case, plaintiff does not allege that defendant was actively negligent with respect to the presence of water on its floor. While arguing that more could have been done to reduce the risk or warn of the danger, plaintiff acknowledges the precautions defendant had taken. Plaintiff confirmed in her deposition that when she approached the lobby entrance from the parking lot, there was no snow on the tiling or sidewalk. Plaintiff further admits that defendant placed a rug over the floor to protect against slippery conditions, even while stating that the rug did not completely cover the tiles. In combination, these steps demonstrate that defendant exercised reasonable care in minimizing the risks its invitees would face from snow or water being tracked into the premises. See *Lugo, supra* at 516.

Additionally, plaintiff did not show that defendant failed to discover a hazardous condition within a reasonable amount of time. See *Serinto, supra* at 640-641. Plaintiff testified that she did not know how long any unusual amount of water had been on the floor in the hallway. Nothing in the record suggests that any of defendant's other invitees had complained about the hallway's condition. Further, there is no evidence that defendant, or defendant's employees, knew that water existed on the hallway floor, or acted negligently in failing to remedy a dangerous condition. Instead, the evidence suggests that defendant was reasonable in believing that the measures taken to protect invitees would adequately guard against the hazard that plaintiff alleges was present.

Plaintiff argues that because it had been snowing all day, and because defendant had been open all day to invitees, defendant had constructive notice that people had been tracking water into the building on their wet shoes. This reasoning is not persuasive, and does not show that defendant breached its duty to plaintiff. In *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999), this Court stated, "[i]nsofar as plaintiff seeks to use general knowledge of local weather conditions to show that defendant should have known that ice lay under the snow on his steps, the same knowledge can be imputed to plaintiff." Similarly, any knowledge plaintiff wishes to charge defendant with regarding water being tracked inside the building can also be reasonably assigned to plaintiff.

Thus, similar to *Serinto, supra*, plaintiff has not provided sufficient evidence from which a reasonable jury could infer that defendant had the requisite notice, either actual or constructive, of a dangerous amount of water on the hallway floor, and negligently allowed the condition to exist for an unreasonable amount of time. As such, plaintiff has failed to show that defendant breached its duty of care to her.

Affirmed.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis