STATE OF MICHIGAN

COURT OF APPEALS

MILAGROS DASCOLA and JAMES DASCOLA, Plaintiffs-Appellees, v YMCA OF LANSING, Defendant-Appellant,	UNPUBLISHED May 19, 2011 No. 293475 Ingham Circuit Court LC No. 06-000706-NO

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

Servitto, J. (*dissenting).*

Because I believe the circuit court erred in denying defendant's motion for a directed verdict based on the open and obvious doctrine, I respectfully dissent.

A premises possessor has the legal duty "'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1981). However, "a premises possessor is not required to protect an invitee from open and obvious dangers." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). [O]nly 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." *Lugo*, 464 Mich at 519.

This matter presents a rather straight-forward instance of a slip and fall on the floor of a shower stall at a YMCA facility. Mrs. Dascola testified that she went into the shower stall after swimming and removed her bathing suit bottoms, then turned the shower on to rise them off. Mrs. Dascola testified that when she turned to place her bathing suit on a partition in the shower stall, she slipped on soap scum. Notably, she did not testify that the soap scum was invisible or nearly so. Rather, she asserted that the soap scum was hard to see. She described the soap scum as "white stuff" or "a little bit of all white spot around and everything." She described soap scum as "made of . . . the soap after people use the soap, you know, it dries out sometimes." She opined that soap scum is not visible when the water is on, because "[w]hen you turn the shower

[on] even though you have a lot of soap scum on the flooring because of the water, that white spot will—you know, the dry thing will disappear." She testified, however, that she did see some of the soap scum running around the floor of the shower and that she saw it and could feel it after she had fallen. Presumably the water was still on when Mrs. Dascola was on the floor after her fall. Moreover, it was not shown that the soap scum was wet before she entered the shower stall. Further, defense witnesses testified that defendant provided soap dispensers in the shower stalls, which would serve to alert a person using the shower that soap might be present outside of the container. Thus, the danger presented by the shower floor itself was open and obvious.

Moreover, an average person would be well aware that there is an obvious risk that the floor of a wet shower stall would be slippery. An average person would also be well aware of the fact that soaps, shampoos, and perhaps other potentially slippery substances would be used in a shower and the danger posed by the use of slippery substances in a wet area. Finally, although Mrs. Dascola testified that there was "a lot of soap scum on the floor," she did not establish that there was an unreasonable accumulation, so as to "serve to remove that condition from the open and obvious danger doctrine." *Id*.

Because I would find that the danger presented by the shower floor was open and obvious, I would reverse and remand for entry of judgment in favor of defendant.

/s/ Deborah A. Servitto