STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MCGILVERY,

Plaintiff-Appellant,

v

BUSCH'S, INC.,

Defendant-Appellee.

UNPUBLISHED
July 23, 2020

No. 348934
Wayne Circuit Court
LC No. 17-005510-NO

Before: METER, P.J., and BECKERING and O'BRIEN, JJ.

PER CURIAM.

In this premises liability action, plaintiff, Michael McGilvery, appeals as of right the trial court's order granting summary disposition to defendant, Busch's, Inc., on the basis of the open and obvious doctrine. Because plaintiff has established that material questions of fact exist for the jury to resolve, we reverse and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

In August 2015, plaintiff was a manager in the service department of General Linen. Because a General Linen delivery driver had quit a few weeks earlier, plaintiff covered the driver's route on August 24, 2015, which included defendant's grocery store at issue. Plaintiff asked one of defendant's employees where the dirty linens in the produce department were stored. Defendant's employee said he was not sure, but suggested that plaintiff check the cooler.[1] Plaintiff had taken two steps into the cooler when the employee called out to plaintiff that he had located the linens. Plaintiff turned on the spot, slipped on water located on the cooler floor, and fell, injuring his left leg. Plaintiff brought this suit and defendant twice moved for summary disposition on the basis of the open and obvious doctrine. The trial court denied the first motion, which was

[1] The photographs submitted by defendant show this to be a large storage room with pallets and shelving located at some distance from the door and containing what appears to be fruit and vegetables.

made before the close of discovery, but granted the second motion after discovery had been completed. Plaintiff now appeals.

II. ANALYSIS

Plaintiff argues that the trial court erred in concluding that the allegedly hazardous condition was open and obvious, and that even if it were open and obvious, special aspects existed precluding summary disposition because the hazard was effectively unavoidable. Upon review of the record evidence, and although it is a close call, we agree with plaintiff's former proposition.

We review de novo a trial court's ruling on a motion for summary disposition. *Petersen Fin LLC v Kentwood*, 326 Mich App 433, 441; 928 NW2d 245 (2018). While defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), defendant relied on deposition testimony and photographs to support its motion. The trial court considered that evidence when it made its ruling. When "the trial court considered facts outside the pleadings in deciding defendant's motion, we treat the dismissal of plaintiff's claim as having been based on MCR 2.116(C)(10)." *Mitchell Corp of Owosso v Dep't of Consumer & Indus Servs*, 263 Mich App 270, 275; 687 NW2d 875 (2004). "A motion under MCR 2.116(C)(10) . . . tests the *factual sufficiency* of a claim." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). "When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. A motion under MCR 2.116(C)(10) should only be granted if "there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted).

Premises liability requires that the plaintiff prove the elements of negligence: "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Mouzon v Achievable Visions*, 308 Mich App 415, 418; 864 NW2d 606 (2014) (quotation marks and citation omitted). "[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." *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 12; 930 NW2d 393 (2018), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (quotation marks omitted). "A premises owner breaches its duty of care when it 'knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect.' " *Lowrey*, 500 Mich at 8, quoting *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). "A possessor of land does not owe a duty to protect or warn an invitee of dangers that are open and obvious." *Wilson v BRK, Inc*, 328 Mich App 505, 513 n 3; 938 NW2d 761 (2019). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*., quoting *Hoffner*, 492 Mich at 461 (quotation marks omitted).

The record evidence here reveals that there are disputed questions of fact regarding whether an average person of ordinary intelligence would, on casual observation, have seen the water upon which plaintiff slipped, given the conditions surrounding the alleged hazardous condition.

Specifically, there remain questions of fact regarding the effect of the lighting conditions inside the cooler area as well as the effect of the conditions of the floor.

Regarding the lighting, both plaintiff and defendant's store manager testified that the lighting inside the cooler area was dimmer than the lighting outside the cooler. Plaintiff testified that the lighting obstructed his view, but defendant's manager testified that he was able to read the expiration-date labels on produce in the cooler.[2] It might be reasonable to assume that if the light was sufficient to allow someone to read the expiration-date labels on produce, it would have been sufficient to allow a person of average intelligence to see a puddle of water on the floor upon casual observation. However, the testimony differs as to its impact on visibility, and it was not simply the light alone that may have affected the observability of the hazard on casual inspection.

As for the floor, plaintiff testified that his view was unobstructed other than the lighting, and he did not see any water before he fell; he only noticed that he was sitting in a puddle after he had already fallen. Defendant's manager testified that the floor was dark-colored. The photographs submitted by defendant show that some areas of the floor are light in color while others appear to be dark due to the floor paint peeling and cracking, giving the floor a splotchy appearance. The photographs also show bright, shiny spots on the floor, which could be wetness. However, it is unclear whether the photographs showed what a reasonable person of average intelligence would have seen on the date of plaintiff's injury. In other words, the appearance of the photographs suggests the use of a flash, which would have compensated for the dimness in the cooler area and been reflected in any water that was on the floor, whether or not it would have been visible upon casual observation. Both of these affects would have differed from what might have been objectively visible.

Thus, in addition to factual questions remaining about the combined effect of the lighting and the condition of the floor, there is also the question of whether the photographs taken by defendant show the cooler area as would have been visible to an average person of ordinary intelligence upon casual observation at the time of the accident. The lighting and condition of the floor paint may have hindered an objectively reasonable person's ability to perceive the water on the floor. To make that assessment, however, a person would have to determine which evidence to believe. Reasonable minds might differ as to the lighting and the condition of the floor, and their effect on an objectively reasonable person's ability to see water on the floor; therefore, there was a dispute of material fact regarding whether the alleged hazard was open and obvious.

Defendant contends on appeal that plaintiff's deposition testimony establishes that plaintiff could have seen the water had he been looking. However, as noted above, plaintiff testified that his view was unobstructed and he did not see the water until he found himself sitting in it. There is no evidence about the size of the puddle that would suggest that the puddle would have been visible to an average person of ordinary intelligence upon casual observation under the circumstances presented. Defendant surmises that plaintiff's linen cart obstructed his view of the

[2] Defendant argued below that the manager could read the "fine print" on the labels. However, the manager did not testify to the size of the print, and defendant appears to have abandoned this element of its argument on appeal.

puddle, which would not render the puddle objectively unobservable. But plaintiff did not testify that his linen cart obstructed his vision, nor that he was not watching where he was going. Finally, defendant contends that a reasonable person of average intelligence would have known that the floor of a room in which ice-packed produce was stored would be wet, or at least would have observed the slanted floor, the floor drain, and the wet produce and surmised that the floor would be wet. However, although defendant's employees might be expected to know that the produce would have been ice-packed and the cooler's floor would be wet, defendant provides no evidence of what it might be reasonable for the average business invitee to know about the conditions of the produce or the storage areas. Further, defendant's argument that the nature of coolers is to present certain hazards that are open and obvious as a matter of law is inconsistent with the open and obvious doctrine, which looks to the actual, objective condition of the premises. Moreover, defendant's contention arguably advances a version of the "assumption of risk doctrine, which was abolished in Michigan in the 1960. See *Watts v Michigan Multi-King, Inc*, 291 Mich App 98, 105; 804 NW2d 569, 573 (2010).

The trial court denied defendant's first motion for summary disposition, finding the issue to be a close call. The court seemed impressed in part by plaintiff's attorney argument that the cooler entrance was covered by a curtain of heavy plastic slats that obstructed plaintiff's view into the cooler and hindered his vision as he pushed through them with his linen cart.[3] In its second motion for summary disposition, defendant presented photographs showing that one entered the cooler through large black rubber swinging double doors with small windows in each that are located at eye level and appear partially obstructed by duct tape. The court found two photographs compelling to its determination of this second motion: a photograph of the inside of defendant's cooler (one of the photographs submitted with defendant's first motion for summary disposition) and a photograph of the inside of the cooler from the perspective of someone entering the cooler through the double doors. On the basis of these photographs, the court concluded that a reasonable person would have recognized the danger of walking into the wet cooler once he or she opened the door. Unlike an entrance with slats that get in a person's way as he or she enters the cooler, the door to defendant's cooler had to be opened before entering, providing an open view of the water on the floor. Reasoning thusly, the court granted defendant's motion.

Assuming for the sake of argument that plaintiff entered the cooler through swinging double doors,[4] it is not clear that the doors would have provided any greater visibility than a curtain of plastic slats. The presence of the doors merely raises the question of how would a reasonable person go through the doors. The photographs showing the inside of the cooler viewed from through the double doors provide a wide view of the storage room. However, the view is

[3] Plaintiff did not testify at his deposition that he entered the cooler though a slatted curtain. Rather, he stated: "I don't recall how it was separated. It might have been one of those plastic curtains. I don't recall."

[4] The photographs showing the swinging double doors were taken in 2018, approximately three years after plaintiff's slip-and-fall injury. Defendant contends that the trial court's consideration of the photographs was proper because there existed a plausible basis for a foundation for admissibility. See *Barnard Mfg Co, Inc v Gates Performance Engineering*, Inc, 285 Mich App 362, 373-374; 775 NW2d 618 (2009).

attributable to the fact that people are holding the doors open. Even in the photograph assumed to have swayed the trial court, the floor is visible because a man is holding open one of the doors to the cooler room. But, there is no evidence in the record that anyone held the door open for plaintiff to view the inside of the cooler before entering. While it might be reasonable to imagine that someone would open the door and survey the room before entering, it is equally reasonable to infer that a person in plaintiff's position would not have done so, but would have gone into the cooler by pushing the swinging rubber doors open with his or her linen cart. In addition, the windows are of such height and size that they serve to let you see if someone is coming out of the door or is on the other side of the door, but they do not clearly appear to be positioned so that you could look through them to the floor, certainly not to that portion of the floor two steps inside the door (which is how many steps plaintiff said he took). In sum, the fact that one entered the cooler through swinging double doors does not establish indisputably that an average person of ordinary intelligence would have seen the danger posed by the water inside defendant's cooler before entering the cooler.

In light of the foregoing, we conclude that there are questions of material fact as to whether an average person of ordinary intelligence in plaintiff's position would have seen the danger posed by the water inside defendant's cooler upon casual inspection. Plaintiff might not ultimately prevail on his claim. But viewing the evidence in the light most favorable to plaintiff, as we are compelled to do, *El-Khalil*, 504 Mich at 160, and mindful that "[c]ourts are liberal in finding a factual dispute sufficient to withstand summary disposition" and that summary disposition is improper if the record evidence is conflicting, summary disposition is improper, *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018), we conclude that the trial court erred in granting defendant's motion for summary disposition. Accordingly, we reverse the order granting defendant summary disposition and remand the matter for further proceedings consistent with this opinion. Because we conclude there were questions of material fact as to whether the water was open and obvious, we need not address plaintiff's second argument that the hazardous condition was effectively unavoidable.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Jane M. Beckering
/s/ Colleen A. O'Brien